IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
WASHINGTON MUTUAL, INC., et al.,[1]	Case No. 08-12229 (MFW)
Debtors.	(Jointly Administered)
	Hearing Date: May 19, 2010 at 11:30 a.m. **Objection Deadline: May 13, 2010 at 4:00 p.m.** **Related Docket No. 3568**

OBJECTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS TO APPROVAL OF THE MOTION OF DEBTORS FOR AN ORDER, PURSUANT TO SECTIONS 105, 502, 1125, 1126, AND 1128 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 3003, 3017, 3018 AND 3020, (I) APPROVING THE PROPOSED DISCLOSURE STATEMENT AND THE FORM AND MANNER OF THE NOTICE OF THE DISCLOSURE STATEMENT HEARING, (II) ESTABLISHING SOLICITATION AND VOTING PROCEDURES, (III) SCHEDULING A CONFIRMATION HEARING, AND (IV) ESTABLISHING NOTICE AND OBJECTION PROCEDURES FOR CONFIRMATION OF THE DEBTORS' JOINT PLAN

The Official Committee of Equity Security Holders (the "Equity Committee")[2] of Washington Mutual, Inc. ("WMI" and, together with its chapter 11 debtor-affiliate, WMI Investment Corp., the "Debtors"), by and through its undersigned counsel, submits this objection (the "Objection") to the *Motion of Debtors for an Order, Pursuant to Sections 105, 502, 1125, 1126, and 1128 of the Bankruptcy Code and Bankruptcy Rules 2002, 3003, 3017, 3018 and 3020, (I) Approving the Proposed Disclosure Statement and the Form and Manner of the Notice of the Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling a Confirmation Hearing, and (IV) Establishing Notice and Objection Procedures for*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Washington Mutual, Inc. (3725) and WMI Investment Corp. (5396). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

[2] All capitalized terms not otherwise defined herein shall have the meaning given to them in the Plan.

Confirmation of the Debtors' Joint Plan (Dkt. No. 3568) (the "Motion"). In support of this Objection, the Equity Committee respectfully states as follows:

PRELIMINARY STATEMENT

The Debtors ask this Court to allow them to solicit votes to accept a Plan the cornerstone of which is a "global settlement" (the "Proposed Settlement"). Yet the Proposed Settlement, and thus the Plan which is conditioned upon the effectiveness of the Proposed Settlement, is illusory: (i) it continues to lack the agreement of the FDIC, which is a condition to the effectiveness of the Proposed Settlement; and (ii) it is conditioned upon an event which might never come to pass, and appears certain not to come to pass in the near term, namely the disallowance in full of the $12.1 billion face amount of the Bank Bondholder Claims. (DS 35)[3] For weeks the Debtors have attempted to reassure parties in interest that a deal really does exist and all that remains to be done is to iron out the final details. At every turn, the FDIC – a primary participant to the Proposed Settlement – has protested stating that "significant open issues" remain to be negotiated and that any agreement in principle remains subject to FDIC Board approval. Truly, the devil must be in the details.

The Debtors recently lost their legal challenges to the Bank Bondholder Claims and are only now segueing into discovery in what is likely to be fierce and protracted litigation. The Court should decline to permit the Debtors to expend estate resources to solicit votes to accept a Plan which is dependent upon the Proposed Settlement which is non-binding, and thus not a "settlement" at all, and which may never become effective. Indeed, in analogous circumstances Courts have found plans that are conditioned upon a litigation outcome unconfirmable. (*See infra* Section I.A.)

[3] Except as otherwise noted, parenthetical citations in this Objection with the "DS" prefix refer to the Debtor's proposed Disclosure Statement for the Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (Dkt. No. 2623), filed in this case on March 26, 2010.

Even were these fundamental infirmities not present, the proposed Disclosure Statement, Proposed Settlement and Plan lack information critical to an understanding of the Proposed Settlement and thus the Plan. These deficiencies include, but are not limited to, the value (or range of potential values) the Debtors ascribe to their potential claims against: (a) JPMorgan Chase ("JPMC"); (b) the Debtors' directors and officers (who were in office at the time of the WMB seizure, and who presumably approved the Proposed Settlement and Plan under which they will receive broad and non-consensual releases): (c) the "Settling Note Holders"; and (d) the FDIC,[4] which they propose to compromise in the Proposed Settlement. Likewise, the value (or range of values) the Debtors ascribe to the consideration the Debtors are receiving in return is vague or worse, noticeably absent. The Plan is also expressly conditioned upon approval and effectiveness of the sale of the Debtors' interests in the Plan Contribution Assets, which have yet to be identified. (DS 8; Plan § 1.113; Proposed Settlement Ex. G) The Liquidation Analysis, which should include a detailed analysis of anticipated recoveries under the Plan versus potential recoveries in chapter 7, has not, perhaps for strategic reasons, been filed with the Court as of the date of this Objection.

In short, nearly every essential piece of information regarding what the Proposed Settlement and the Plan are, and are not, has yet to be identified, provided, valued or otherwise disclosed by the Debtors. The Plan is not ready to be solicited.

BACKGROUND

1. Prior to commencing these chapter 11 cases, WMI was a savings and loan holding company that owned WMB and indirectly WMB's subsidiaries, including Washington Mutual Bank fsb ("FSB"). (DS 1) It was the largest savings and loan holding company in the country,

[4] In this Objection, the FDIC Receiver and FDIC Corporate are referred to collectively as "FDIC."

and WMB and its subsidiaries collectively constituted the seventh largest U.S.-based bank. (DS 22)

2. On September 25, 2008, the Office of Thrift Supervision (the "OTS") ordered the closure of WMB and appointed the FDIC as receiver for WMB. (DS 2) Immediately after its appointment as receiver, the FDIC took possession of WMB's assets and sold substantially all of them to JPMC for $1.88 billion and the assumption of WMB's deposit liabilities. (DS 2) That precipitated this bankruptcy. (DS 29) The failure of WMB is the largest bank failure in the Nation's history.

3. Before those dramatic actions by the OTS and FDIC, WMI's financial condition had been adversely affected by significant disruptions during 2007 and 2008 in the U.S. residential mortgage market. (DS 28) And yet, WMI had weathered the storm, due in part to completion in April 2008 of a significant recapitalization that resulted in a $7.2 billion capital infusion by institutional investors. (DS 28) Moreover, although the OTS lowered WMB's supervisory rating in a way that made it ineligible to receive primary credit from the Federal Reserve Board's Discount Window, WMB was able to receive secondary credit from the Discount Window of the Federal Reserve Bank of San Francisco, and was able to maintain borrowings up to the time of its seizure. (DS 29) Nevertheless, speculation began to circulate in the market that WMI's and WMB's operations and capital positions were unstable, and in the ten days prior to the FDIC receivership, WMB experienced significant deposit withdrawals of more than $16.7 billion. (DS 29)

4. During this ongoing process, WMI pursued a merger or sale transaction with another financial institution and investigated other strategic alternatives intended to increase

WMI's capital and liquidity levels. (DS 29) WMI was continuing to pursue those alternatives when the OTS stepped in and appointed the FDIC as receiver for WMB.

5. On September 26, 2008, (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). Since the Petition Date, the Debtors have continued to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors' cases are being jointly administered for procedural purposes only, pursuant to an Order of this Court entered on October 3, 2008.

6. On October 15, 2008, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Creditors Committee"). On January 11, 2010, the U.S. Trustee appointed the Equity Committee.

Summary of Significant Litigation Involving the Estates

7. The Court is well aware that the failure of WMB and its sale to JPMC lead to the commencement of significant amounts of litigation and the assertion of billions of dollars of claims in this and other courts. The status of these litigations and the claims asserted in them are summarized briefly below.

A. The D.C. Action

8. On December 30, 2008, the Debtors filed a proof of claim against the FDIC Receiver seeking compensation for the Debtors' equity interest in WMB, recognition of WMI's interest in WMI assets claimed by the FDIC, allowance of a protective claim for payment of the Debtors' deposits, payment of amounts owed to WMI by WMB, and the avoidance of certain transfers made by WMI to WMB as a preference or fraudulent transfer. (DS 3) (From December 2007 to September 2008, WMI made capital contributions to WMB amounting to

$6.5 billion.) The FDIC summarily rejected those claims, and in March 2009, the Debtors filed a complaint against the FDIC in the U.S. District Court for the District of Columbia.

9. Significantly, the Debtors alleged "that the FDIC sold WMB's assets for less than they were worth, and as a result, the FDIC breached its statutory duty under the Federal Deposit Insurance Act to maximize the net present value of WMB's assets." (DS 3) The Debtors also alleged that the FDIC's actions constituted a taking of the Debtors' property without just compensation in violation of the Fifth Amendment to the U.S. Constitution and a conversion of the Debtors' property in violation of the Federal Tort Claims Act. (DS 3) JPMC was allowed to intervene in that suit.

10. On January 7, 2010, the D.C. District Court stayed the D.C. Action at the Debtors' request, in favor of pending adversary proceedings in this Court – but at the same time denied the FDIC's motion to dismiss the suit. (DS 3-4) The D.C. Action would be dismissed with prejudice under the terms of the Proposed Settlement. It is not apparent that any discovery occurred in the D.C. Action before the court stayed it.

B. The JPMC Adversary Litigation

11. In March 2009, JPMC filed an adversary complaint in this Court against the Debtors and FDIC, seeking a declaratory judgment with respect to the ownership of disputed assets and interests that JPMC contends it acquired in the FDIC's auction sale of WMB. (DS 4) In May 2009, the Debtors filed counterclaims against JPMC, claiming ownership of disputed assets and seeking avoidance of prepetition transfers of assets to WMB, and subsequently to JPMC.

12. This Court denied JPMC's subsequent motion to dismiss the Debtors' counterclaims, and JPMC appealed that decision to the District Court (DS 4), where it is now

pending but recently has been stayed as a result of the pending Proposed Settlement. If approved, the Proposed Settlement would result in the dismissal of the Debtors' counterclaims with prejudice.

13. In its counterclaims, the Debtors asserted a right to anticipated federal and state tax refunds in the approximate amount of $5.4 to $5.8 billion. (DS 9) Under the Proposed Settlement, 70% of initial tax refunds, estimated at $2.7 to $3.0 billion, would be paid to JPMC, and almost 60% of additional tax refunds, estimated at $2.7 to $2.8 billion, would be allocated to the FDIC Receiver. (DS 9)

14. Also at issue in the JPMC Adversary Litigation is a dispute over ownership of certain trust preferred securities with a liquidation preference of approximately $4 billion (backed by a $4 billion mortgage collateral pool). (DS 5) On September 25, 2008, at the direction of the OTS employees of WMI and WMB executed an agreement purporting to assign ownership of those securities to WMB. (DS 27) In its counterclaims in the adversary suit, the Debtors assert that the transfer was ineffective or constituted a fraudulent transfer or voidable preference. (DS 6) The Debtors alleged that JPMC, as the subsequent recipient of those securities via the FDIC sale of WMB assets, was liable to WMI's estate because it knew or should have known of the financial condition of both WMI and WMB at the time of the transfer – and thus was not a good faith purchaser. (DS 6) Under the Proposed Settlement, JPMC will become the undisputed owner of those securities. (DS 10)

C. The Turnover Action

15. In April 2009, the Debtors filed a complaint against JPMC in this Court seeking turnover of approximately $4 billion of the Debtors' funds in disputed accounts at WMB. JPMC spuriously asserted in response that the funds on deposit in those accounts might be capital

contributions rather than deposit liabilities. (DS 6) This Court denied JPMC's motion to dismiss the turnover action. (DS 7) The Debtors' motion for summary judgment in the turnover action was argued in October 2009, and the matter is *sub judice*. (DS 7) Under the Proposed Settlement, nearly all of the funds in the disputed accounts (except approximately $175 million to be retained by JPMC) would be paid over to the Debtors. (DS 9; Proposed Settlement §2.1)

D. The American National Action

16. In February 2009, various insurance companies that hold bonds issued by WMB and WMI filed suit against JPMC in state district court in Galveston County, Texas. "Specifically, the plaintiffs asserted that there was a premeditated plan by JPMC designed to damage WMB and FSB, and thereby enable JPMC to acquire WMI's banking operations at a 'fire sale' price." (DS 34) The allegations in the complaint raised disturbing questions about the extent to which JPMC had been working with the FDIC behind the scenes for weeks before the seizure of WMB, and had withdrawn from negotiations for the purchase of WMB after concluding that government seizure of WMB would happen and that it could then acquire the assets more cheaply.

17. The FDIC intervened in the suit as a defendant and removed it to the U.S. District Court for the Southern District of Texas, which then transferred it to the District Court for the District of Columbia. (DS 34) On April 13, 2010, that court granted motions by JPMC and the FDIC to dismiss the suit for lack of subject matter jurisdiction and entered a final order dismissing the suit and closing the case. The court did not reach the merits, but rather held that the FDIC was a necessary party to the plaintiffs' claims and that plaintiffs were required to pursue their claims against the FDIC exclusively through an administrative claims process established by Congress in the Financial Institutions Reform, Recovery and Enforcement Act of

1989, Pub. L. No. 101-73, 103 Stat. 83 (1989).[5] Prior to that dismissal, the Debtors had proposed that the action would be dismissed on its merits, with prejudice, under the Debtors' proposed Plan.[6]

E. The Debtors' Rule 2004 Examination Requests

18. As a result of the American National Action, the Debtors filed a motion for Rule 2004 examination on May 1, 2009, seeking an order directing the examination of JPMC.[7] In that motion, the Debtors summarized the allegations in the American National Action and sought the authority to investigate the underlying merit of those claims, as well as other potential estate claims suggested by the American National allegations. The Debtors argued to the Court that the discovery they sought through Rule 2004 was broader than the issues raised in the JPMC Adversary Litigation and the Turnover Action. (May Rule 2004 Motion at 2)

19. This Court granted the Debtors' motion on June 24, 2009, over JPMC's opposition. (DS 34) In August and September 2009, JPMC began producing documents to the Debtors for their review.[8] There is no indication that the Debtors took any depositions.

20. As described in the proposed Disclosure Statement, "As a result of the review of certain of the documents produced by JPMC, the Debtors determined that additional fact investigation was necessary." (DS 34) Accordingly, on December 14, 2009, the Debtors moved

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[5] *See Am. Nat'l Ins. Co. v. JPMorgan Chase & Co.*, 2010 WL 1444533, at *3 (D.D.C. April 13, 2010).

[6] *See* Chapter 11 Plan of Reorganization (Dkt. No. 2622), filed on March 26, 2010, §§ 1.182 (naming this action the "Texas Litigation"), 1.146 (including "Texas Litigation" in "Related Actions"), 2.1 (releasing "Related Actions").

[7] *See* Motion for 2004 Examination of JPMorgan Chase Bank, N.A. (Dkt. No. 974) ("May Rule 2004 Motion").

[8] *See* Debtors' Motion for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of Witnesses and Production of Documents from Knowledgeable Parties (Dkt. No. 1997), filed on December 14, 2009 ("Dec. Rule 2004 Motion"), at 5.

for authority to conduct a further Rule 2004 examination of witnesses and to request production of documents from various third parties – including the FDIC, the OTS, the U.S. Department of the Treasury, and former U.S. Treasury Secretary Henry M. Paulson, Jr. (DS 34) The Debtors also sought to obtain testimony and documents from rating agencies, banks (including Goldman Sachs, the investment bank that WMI retained in September 2008 to assist it in finding a suitor), and third-party professionals that WMI had at one time used. (Dec. Rule 2004 Motion at 1, n. 2)

21. In that motion, the Debtors described the contents of certain documents they had obtained pursuant to the first Rule 2004 examination – documents that the Debtors themselves fairly characterized as warranting the need for further investigation from third parties who "are likely to have information currently unobtainable by Debtors relevant to potential estate claims sounding in business tort and tortious interference against JPMC, including information relevant to allegations made in [the American National Case]." (Dec. Rule 2004 Motion at 3)

22. The Debtors represented to the Court:

> As with the Rule 2004 Examination of JPMC, the Rule 2004 Examination of the Knowledgeable Parties will enable the Debtors – as estate fiduciaries – to determine the validity and ownership of these potentially significant claims. To the extent the Requested Examination demonstrates that the Debtors have viable claims against JPMC, such claims are assets of the Debtors' chapter 11 bankruptcy estates and, thus, any recovery resulting from the assertion of these claims will inure to the benefit of the Debtors and their creditors.

(Dec. Rule 2004 Motion at 4)

23. Suffice it to say that what the Debtors had discovered by December 2009 was disturbing. The Debtors explained in their reply brief:

> As detailed in Debtors' Motion, the discovery sought through the Requested Examination concerns possible misconduct by JPMC preceding the seizure and sale of WMB, including gaining access to WMI's confidential information in connection with JPMC's supposed interest in bidding for the company, improperly disclosing such information to third parties to cause market panic and

foment a government seizure of the bank, destroying a 119-year-old institution that once had more than $50 billion in market capital.[9]

24. It was also apparent from the December Rule 2004 motion that the Debtors had not obtained the requested information through discovery in any of the lawsuits referred to above. Indeed, in their reply brief, the Debtors explained that discovery was no longer even available in the D.C. Action because it had been stayed. (Reply Br. Dec. Rule 2004 Motion at 3)

25. By order dated February 16, 2010, this Court denied the Debtors' motion on the grounds that the discovery the Debtors sought was not appropriate under the limited scope of the Rule 2004 examination that the Court had previously authorized and that permitting further examination under Rule 2004 would have allowed the Debtors to circumvent the Federal Rules of Civil Procedure applicable in the litigation the Debtors had already commenced against JPMC.[10]

26. Less than one month later, on March 12, 2010, the Debtors announced on the record the general terms of the Proposed Settlement and proposed release of the substantial claims they had told the Court as late as the January 28 hearing on their motion that they vitally needed to investigate further through Rule 2004. *And this, despite apparently not having taken a single deposition, obtained any formal discovery of the OTS, the FDIC or other third parties with knowledge of the significant potential claims against JPMC, the OTS, the FDIC and others.* Indeed, it appears that the Debtors' review of third-party documents has been, in large part, limited to those documents third-parties, including JPMC, have been willing to provide to the Debtors. In the case of JPMC, the Debtors were provided with as little as 30,000 pages. The

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[9] *See* Reply of the Debtors to the Objections to Dec. 2004 Motion (Dkt. No. 2212), filed on January 25, 2010 ("Reply Br. Dec. Rule 2004 Motion").

[10] Transcript of Hearing, Jan. 28, 2010 (Dkt. No. 2312), at 88-90 (attached hereto as Exhibit 5.a.). Excerpts of each of the transcripts cited in this Objection are attached hereto as **Exhibit 5**.

overall lack of formal discovery preceding the Debtors' announcement of a multi-billion dollar settlement is shocking.

F. Other Suits and Investigations

27. As described in the Debtors' proposed Disclosure Statement, consolidated class action suits brought under ERISA and the federal securities laws are proceeding in the U.S. District Court for the Western District of Washington as a result of transfer and consolidation orders entered by the Judicial Panel on Multi-District Litigation. (DS 39-40) Former officers and directors of WMI are named as defendants in those suits, and discovery has begun. (DS 39-41)

28. Under the Proposed Settlement, WMI's present and former officers and directors and employees will be entitled to a priority recovery for all claims made against a blended insurance program obtained by WMI before bankruptcy, providing (among other things) directors and officers, bankers professional liability, and fiduciary liability insurance. (DS 56)

29. In addition, in October 2008, the U.S. Attorney for the Western District of Washington, together with other federal authorities including the FBI, the FDIC, the IRS, and the Department of Labor commenced a coordinated investigation into the failure of WMB. (DS 45) The Debtors have reported that WMI "has received several grand jury subpoenas and is producing documents responsive to those subpoenas." (DS 45) The Debtors further report that "[t]he government's investigation is pending and WMI does not know how much longer the investigation will continue or whether any charges will result against WMI or any individuals." (DS 45)

30. Further, the Debtors have disclosed that the sale of substantially all of the assets of WMB to JPMC has been "a point of interest" to the Financial Fraud Enforcement Task Force

established by President Obama on November 17, 2009, by Executive Order No. 13519. (DS 45)

31. Last but not least, the U.S. Senate's Homeland Security and Government Affairs Permanent Subcommittee on Investigations, has recently conducted hearings (on April 13 and April 16, 2010) about the collapse of WMB and has issued two investigative reports.[11] Among other things, the hearings revealed the existence of disputes between the OTS and the FDIC over the financial condition of WMB and whether regulatory action was necessary. Former OTS director John M. Reich testified that WMB's seizure was not caused by the poor quality of its loans or by deficient capitalization, but by an asserted liquidity crisis prompted by a "run on deposits" at the bank by depositors in the 10-day period preceding OTS intervention.[12] Reich's testimony, confirming that WMB's seizure and sale were not the result of inadequate regulatory capital, underscores the importance of allegations in the American National Action that JPMC helped orchestrate a run on the bank, which became the ostensible precipitating cause of the FDIC receivership, by engineering "a campaign involving adverse media 'leaks,' stock sales, and

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[11] The first report, contained in an April 13, 2009 Memorandum to the Permanent Subcommittee on Investigations, is available at http://levin.senate.gov/newsroom/supporting/2010/PSI.LevinCoburnmemo.041310.pdf, and attached hereto as **Exhibit 1**.

The second report ("April 16 Subcommittee Report"), contained in an April 16, 2009 Memorandum to the Permanent Subcommittee on Investigations, is available at http://levin.senate.gov/newsroom/supporting/2010/PSI.LevinCoburnmemo.041610.pdf, and attached here to as **Exhibit 2**.

[12] *See* April 16, 2010 Statement of John M. Reich, Former Director, Office of Thrift Supervision, regarding Washington Mutual Bank, Before the U.S. Senate Permanent Subcommittee on Investigations United States Senate, available at http://tiny.cc/f0zly and attached hereto as **Exhibit 3**.

deposit withdrawals designed to distort the market and regulatory perception of Washington Mutual's financial health."[13]

The WMI Annual Shareholder Meeting Litigation

32. On March 3, 2010, the Equity Committee filed its Complaint against WMI commencing Adv. Pro. No. 10-50731 (MFW) in which the Equity Committee seeks an order from this Court compelling WMI to hold a long overdue annual shareholders meeting (Adv. Dkt. No. 1).

33. On April 21, 2010, the Bankruptcy Court granted, in part, the Equity Committee's Motion for Summary Judgment, or In the Alternative, for Relief from the Automatic Stay (Adv. Dkt. No. 3) (the "Summary Judgment Motion") concluding that the automatic stay does not preclude the filing or prosecution of an action by shareholders of WMI in Washington state court to compel WMI to convene an annual shareholders meeting.[14] The Court entered an Order on April 26, 2010 (Adv. Dkt. No. 20) memorializing the Court's April 21st ruling.

34. On April 26, 2010, two WMI shareholders filed a Complaint to Compel Shareholders' Meeting (the "Shareholders' Complaint") in the Superior Court for the State of Washington for the County of Thurston commencing Case No. 10-2-00854-1. A true and correct copy of the Shareholders' Complaint is attached hereto as **Exhibit 4**. On May 5, 2010, the plaintiffs filed a motion to compel shareholders' meeting that is currently scheduled to be considered by the Washington state court on June 11, 2010.

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[13] *Am. Nat' Ins. Co. v. FDIC*, No. 09-1743, Complaint ¶ 46 (attached as Exhibits 1-3 of Dkt. No. 1) (D.D.C. March 25, 2009). As noted previously, this case was recently dismissed on non-merits grounds because Plaintiffs failed to exhaust their administrative remedies against a necessary party, the FDIC. *See Am. Nat'l Ins. Co. v. JPMorgan Chase & Co.*, 2010 WL 1444533, at *3. In reaching this decision, the court did not gainsay any of the factual allegations in the complaint.

[14] Transcript of Hearing, Apr. 21, 2010 (Dkt. No. 3593), at 64-65 (attached hereto as Exhibit 5.c.)

The Proposed Settlement

35. On March 12, 2010, the Debtors announced on the record the broad strokes of the Proposed Settlement, under which the Debtors intend to compromise the most valuable assets of the estate, namely those claims and causes of action against JPMC, the FDIC and others relating to the downfall, seizure and sale of WMB. In addition to the grant of broad general releases of estate and third-party claims, the Proposed Settlement would result in the following allocation of assets (*see generally* DS at 7-12):

Assets going to JPMC

- $3.37 to $3.77 billion of expected Tax Refunds;
- the Trust Preferred Securities with a liquidation preference of approximately $4 billion;
- title to numerous other assets of the Debtors;
- the WMI Medical Plan;
- the JPMC Rabbi Trusts;
- the JPMC Policies and related proceeds;
- the WaMu Pension Plan;
- the Lakeview Pension Plan;
- the proceeds of the Anchor Litigation;
- the 3.147 million shares of Visa Inc. (in exchange for $50 million) and the VISA Strategic Agreement;
- certain Transferred Intellectual Property;
- the JPMC Wind Investment Portfolio

Assets going to Estate

- $1.8 to $2.0 billion of expected Tax Refunds;
- turnover of $4 billion held in the Disputed Accounts;
- release of an administrative account held at JPMC holding $52.6 million;
- $50 million as consideration for the sale of WMI's 3.147 million Class B shares of Visa Inc.;
- that certain HF Ahmanson Rabbi Trust;
- certain Boli-Coli policies and proceeds thereof;
- the remaining 1.33% of stock of H.S. Loan Corporation; and
- the WMI Intellectual Property.

LLC; and

- certain bonds issued on behalf of WMB and FSB.

36. On March 26, 2010, the Debtors filed the Plan and the proposed Disclosure Statement, together with a draft of the Proposed Settlement. The Plan is completely dependent upon the effectiveness of the Proposed Settlement. (DS 1). However, the FDIC has not agreed to the Proposed Settlement,[15] it is unclear whether the FDIC will ever agree to the Proposed Settlement and, in the event it does, the Debtors concede that the Proposed Settlement will likely require modification to accommodate the FDIC.[16] (DS 1) Whether the FDIC and the other parties to the Proposed Settlement reach agreement on the Proposed Settlement in its current iteration, some other iteration, or not at all, is unknown. It is clear, however, that the FDIC is an

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[15] In fact, the form of Proposed Settlement filed with the Plan does not reflect the agreement that continues to be negotiated. On April 6, 2010, the FDIC stated :

> The FDIC is working with all parties involved to reach agreement with respect to all terms of the proposed settlement. The plan disclosure statement and settlement agreement that were filed today do not reflect the continuing discussions among the parties. Once finalized, the agreement is subject to approval by the FDIC's board of directors.

Transcript of Hearing, Apr. 6, 2010 (Dkt. No. 3106), at 113 (attached hereto as Exhibit 5.b.)

[16] Indeed, as late as May 5, 2010, the FDIC continued to refute the Debtors' assertions that the Proposed Settlement is substantially complete stating:

> We said that there were still significant open issues with the parties to the proposed settlement; that we continue to have discussions with those parties; that we had not yet resolved those issues; and there are other conditions to the settlement that still haven't been satisfied, but we're working with the goal of trying to achieve all that and get the proposed settlement agreed to and presented to this Court.

(Transcript of Hearing, May 5, 2010 (Dkt. No. 3699) at 96) (repeating statement made during April 6, 2010 hearing) (attached hereto as Exhibit 5.d.)

essential party to the Proposed Agreement. (Proposed Settlement at § 7.2) (providing execution by the FDIC is a condition to the effectiveness of the Proposed Settlement)

37. In addition, the disallowance of the Bank Bondholder Claims "in their entirety" is an express condition precedent to the Proposed Settlement becoming effective. (DS 35; Proposed Settlement §7.2(f)) Yet the Court overruled the Debtors' objections to these claims on legal grounds at the April 6, 2010 hearing, and it appears that discovery in respect of the Bank Bondholder Claims has only just begun.[17]

38. The Plan is also expressly contingent upon obtaining Court approval and the effective sale of the Debtors' interest in the Plan Contribution Assets. (DS 8) The Plan Contribution Assets are supposed to be identified on Exhibit G to the Proposed Settlement. However, that exhibit is completely blank which raises the question whether the Debtors, JPMC and the other parties to the Proposed Settlement have not yet agreed upon the assets that will be contributed to support the Plan. Thus, even if the parties to the Proposed Settlement were able to reach agreement on mutually acceptable modifications that address the significant issues of concern to the FDIC, whether the Proposed Settlement (and by extension, the Plan) will become effective is anyone's guess.

Denial of the Equity Committee's Request for Appointment of an Examiner

39. By their announcement of the Proposed Settlement, the Debtors made express their intention to sweep under the rug those asserted and additional potential claims against JPMC that the Debtors themselves thought worthy of further investigation as late as January 25, 2010 regarding the destruction of an institution that once had in excess of $50 billion of market

[17] Transcript of Hearing, April 6, 2010 (Dkt. No. 3106) at 143 (suggesting the parties discuss a discovery schedule) (attached hereto as Exhibit 5.b.)

capital.[18] (DS 34) On April 26, 2010, the Equity Committee filed its Motion for Appointment of an Examiner Pursuant to Section 1104(c) of the Bankruptcy Code (Dkt. No. 3579) (the "Examiner Motion"). On May 5, 2010, the Bankruptcy Court entered an Order (Dkt. No. 3663) denying the Examiner Motion finding, in part, that the Equity Committee can appropriately conduct the investigation for which an examiner was requested.

40. On May 7, 2010, the Equity Committee's professionals prepared and served the Debtors with initial due diligence requests seeking those documents, information and analyses that support their decision to enter into the Proposed Settlement.[19] To date, the Equity Committee has received little by way of information and documents. The Equity Committee, however, will continue to try to work constructively with the parties to the Proposed Settlement to obtain the requested information.

I. THE COURT SHOULD NOT AUTHORIZE THE SOLICITATION OF VOTES WITH RESPECT TO THE PLAN.

41. Even if the Debtors revise the Disclosure Statement to include the substantial amount of information currently lacking (*see infra* Section II), the Equity Committee respectfully submits the Court should not permit the Debtors to solicit votes with respect to the Plan for two reasons. First, the Proposed Settlement upon which the Plan rests has not been agreed to, is unenforceable, and contains significant contingencies that should first be satisfied. Second, a decision from the Washington state court is expected in the near future on the shareholders' request to compel WMI to hold a shareholders' meeting. Thus, a new WMI board of directors

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[18] *See* Reply Br. Dec. Rule 2004 Motion.

[19] The Equity Committee has been granted access to an electronic data room containing some of the information requested, however, by no means does it contain all (or even a substantial majority) of the information requested by the Equity Committee. In an effort to avoid duplication of effort and minimize expense to the estates, the Equity Committee also requested that the Debtors share their analyses supporting the Proposed Settlement and the Plan. The Debtors have not yet complied with the request nor agreed they would comply with such a request.

will likely be seated prior to the confirmation hearing and a new Board might, in the exercise of its fiduciary duties, determine to withdraw the Debtors' support for the Proposed Settlement. Importantly, the proposed Plan is a plan of liquidation, which contemplates the creation of a Liquidating Trust and the distribution of cash and interests in the Liquidating Trust.[20] The Debtors do not appear to be under a "time crunch" to exit chapter 11, which deferral of solicitation otherwise might put in jeopardy.

A. Consideration of the Disclosure Statement Now is Premature in that the Cornerstone of the Plan – the Proposed Settlement – is Not, and May Never Become Enforceable, Final or Effective.

42. The Plan and, by extension the Disclosure Statement, rests entirely on the Proposed Settlement. The consideration to be received by the non-Debtor parties to the Proposed Settlement provide the lion's share of Cash to be distributed to claimants under the proposed Plan. Yet, the FDIC, a primary party to the Proposed Settlement, has stated that the Proposed Settlement does not accurately reflect the parties' discussions and, despite the Debtors' efforts to convince the FDIC otherwise, the FDIC has staunchly withheld its consent ever since the Debtors announced this supposed landmark achievement some 60 days ago. Indeed, the putative parties to the Proposed Settlement cannot even agree among themselves on the

[20] The Disclosure Statement asserts that the "Plan contemplates the reorganization of the Debtors" based upon the Reorganized Debtors' retention of the equity interests in WMI Investment and WM Mortgage Reinsurance Company ("WMMRC"), and the cash received on account of the Rights Offering. (DS 13) WMI Investment does not have any operations but merely holds a variety of securities and investments (*see* DS 22) the aggregate value of which is approximately $319 million. (*See* Schedule A (Dkt. No. 475) With respect to WMMRC, all of the Trusts held by WMMRC are in "run-off" (*i.e.*, liquidation) and WMMRC has ceased to reinsure any new loans. (DS 51) The Reorganized Debtors will not have any significant operations, but will merely consist of various investments and cash. Thus, the Debtors are not reorganizing. *See In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d 100, 107 (1st Cir. 2005) (noting that, in a reorganization plan as opposed to a liquidating plan, the debtor is "attempting to make a go of its business"). Even if the Debtors dispute this characterization, none of the assets around which the Debtors will purportedly "reorganize" will waste if the Court were to decline authorization to solicit votes regarding the Plan because they are either already currently in the process of liquidation or are static investments (equity and cash) the value of which is not tied to emergence of the Debtors from chapter 11.

significance of the remaining open issues.[21] The risk that the Proposed Settlement will collapse or require significant amendment is real. In its current iteration the Proposed Settlement is illusory, and the Plan which is built upon it is unconfirmable. The Equity Committee respectfully submits that solicitation of a Plan at this time would be a waste of estate resources.

43. Additionally, even if the FDIC were to sign on to the Proposed Settlement in its current iteration, a condition precedent to the effectiveness of the Proposed Settlement is the disallowance of the Bank Bondholder Claims "in their entirety." (DS 35) On April 6, 2010, the Court overruled the Debtors' legal objections to those claims. (*See* Dkt. No. 3549) Discovery in that litigation has only begun and the outcome is anything but certain.

44. In circumstances analogous to these, Courts have concluded that a plan is not feasible.[22] *In re DCNC N. Carolina I, LLC*, 407 B.R. 651, 668 (Bankr. E.D. Pa. 2009) (stating that a plan based on the debtor's hoped-for success in litigation as the foundation of the reorganization strategy is not feasible), *see also In re Premiere Network Srvs., Inc.*, 2005 WL 6443624, at *6 (Bankr. N.D. Tex. July 1, 2005) (denying confirmation of plan as not feasible where "[t]he Debtor's ability to satisfy its financial obligations under the Plan, and the payment requirements of § 1129 is not just speculative, but is so contingent on factors beyond its control (such as resolution of appeal of the confirmation order, implementation of the effective date, litigious claims by and against SBC, the assumption of allegedly expired contracts that will most likely spur further litigation, and collection of enough funds to pay administrative expenses) that

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[21] *Compare* statement of Debtors' counsel: "... there is no dispute that we have an agreement; it's just the final words are still being worked on with the FDIC" *with* the statement of FDIC's counsel: "... still significant open issues ... we continue to have discussions with those parties; we have not yet resolved those issues; and there are other conditions to the settlement that still haven't been satisfied...." Transcript of Hearing May 5, 2010 (Dkt. No. 3699) at 94, 96 (attached hereto as Exhibit 5.d.)

[22] This Objection is not intended to set forth all of the Equity Committee's objections to confirmation of the Plan, and the Equity Committee reserves the right to object to confirmation of the Plan on any appropriate grounds at the appropriate time.

completion of the Plan is unlikely."); *In re Made in Detroit, Inc.*, 299 B.R. 170, 176-77 (Bankr. E.D. Mich. 2003) (denying confirmation based on lack of feasibility where financing was contingent and speculative); *In re SIS Corp.*, 120 B.R. 93, 95 (Bankr.N.D.Ohio 1990) ("A plan submitted on a conditional basis thwarts this legislative intent and therefore renders a plan infeasible."); 7 *Colliers on Bankruptcy* § 1129.02[11] at 1129-54 (16th ed. 2010) ("[t]he debtor must offer more than speculation about the source of funding for the plan.").

45. The parallel between the finding that a plan is not feasible based upon a litigation outcome or other events beyond a debtor's control and the need to have the claims of the Bank Bondholders denied in their entirety is compelling. Whether or not those claims are ultimately disallowed in whole or part or not at all is simply not within the Debtors' control.

46. Both obtaining the FDIC's agreement to the Proposed Settlement and the disallowance of the Bank Bondholder Claims in their entirety are each so speculative as to preclude any showing of feasibility of the Plan under section 1129(11) of the Bankruptcy Code. Accordingly, consideration of the Disclosure Statement should be deferred until the terms of the Proposed Settlement and the Plan have been finalized.

B. Consideration of the Disclosure Statement Should Await Outcome of the Annual Shareholders' Meeting.

47. WMI has endeavored to silence its shareholders throughout these chapter 11 cases. Prevailing law, however, is to the contrary. S*ee In re Marvel Entmt't Group, Inc.*, 209 B.R. 832, 838 (D.Del. 1997) ("[s]hareholders . . . 'should have the right to be adequately represented in the conduct of a debtor's affairs, particularly in such an important matter as the reorganization of the debtor.'" (quoting *In re Johns-Manville Corp.*, 801 F.2d 60, 65 (2d Cir. 1986))); *State ex rel. Johnson v. Heap*, 95 P.2d 1039, 1042 (Wash. 1939) ("'The right to participate in the election of the governing board of a corporation is one of the most important

rights incident to stock ownership.'" (citation omitted)). "[T]he ability of shareholders to exercise their rights to corporate governance cannot be enjoined simply on the basis that a group of shareholders may be successful in their bid to elect directors whose views concerning a plan of reorganization may differ from those of existing management." *In re Allegheny Int'l, Inc.*, 1988 WL 212509 at *5 (W.D. Pa. May 31, 1988).

48. As this Court has recognized, the WMI shareholders are entitled to participate in the process and seek to compel the Debtors to convene a share holders meeting to elect a Board that will protect the rights and interests of all interested parties. (*See* Order (Adv. No. 10-50731; Dkt. No. 20)) On April 26, 2010, shareholders filed suit in Washington state court seeking to compel WMI to hold its long overdue annual shareholders meeting as required under applicable state law and WMI's Bylaws. That litigation is proceeding and a decision from the Washington state court is expected on or about June 11, 2010. The Debtors' entrenched directors should not be allowed to charge ahead to confirm a Plan that proposes to extinguish current shareholders' corporate governance rights, compromise tremendously valuable claims (claims that may be sufficient to provide a greater distribution to equity) and, at the same time, effectuate broad releases of those very same entrenched directors by non-debtor third-parties without those third-parties' consent.

49. The Equity Committee fully expects any new slate of directors will exercise their business judgment according to the very same fiduciary duties and obligations that bind the current directors. *See, e.g., In re Advanced Ribbons and Office Prods., Inc.*, 125 B.R. 259, 266 (B.A.P. 9th Cir. 1991) (noting that "whoever controls the debtor will be held to fiduciary standards in its dealing with the debtor's assets"). Thus, a new Board, in the exercise of its fiduciary duties, might very well determine to withdraw the Debtors' support for the Proposed

Settlement. If the Disclosure Statement is approved and the Debtors proceed with solicitation of the Plan, the estate will incur significant expense that may prove to have been wasted in the event the Debtors withdraw from the Proposed Settlement. Under these circumstances, prudence dictates a brief deferral of the hearing to consider approval of the Disclosure Statement to await the outcome of the WMI annual shareholders meeting.

C. Deferral of Consideration of the Disclosure Statement Will Not Harm These Estates

50. The thrust of the Proposed Settlement and Plan is the liquidation of the Debtors' assets, not the reorganization of a viable business. *See In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d at 107 (noting that, in a reorganization plan, as opposed to a liquidating plan, the debtor is "attempting to make a go of its business"). The Debtors do not have any employees and the Plan is not dependent upon exit financing from a lender whose investment depends upon the expeditious emergence of a financially sound enterprise. On the contrary, the Debtors' estate is comprised mostly of legal claims that ultimately will be monetized and the proceeds distributed to claimants. The Proposed Settlement has not been finalized and the contingencies to its effectiveness are nowhere near being satisfied. In short, no exigency to emerge from chapter 11 exists. Thus, deferral of consideration of the Disclosure Statement until the Proposed Settlement and Plan have been finalized so all parties in interest (and the Court) actually know what it is the Debtors are asking the Court to approve is in the best interests of the estate.

II. THE DISCLOSURE STATEMENT LACKS INFORMATION CRITICAL TO AN UNDERSTANDING OF THE PROPOSED SETTLEMENT AND PLAN.

51. For a document, the purpose of which is to describe the compromise of claims that aggregate in the multiples of billions of dollars, the Disclosure Statement lacks an alarming amount of information, including such basic information as (i) an analysis of the possible value

of the assets being liquidated for distribution to claimants, (ii) the total amount of claims in each Class, (iii) the estimated percentage recovery for each Class of Claims, and (iv) a liquidation analysis demonstrating that recoveries will be greater under the Plan than under a straight liquidation conducted by a Chapter 7 Trustee and the factors which upon which the Debtors relied in reaching the conclusions expressed in any such liquidation analysis. Until the Debtors revise the Disclosure Statement to include all necessary information for claimants to make an informed judgment about the Plan, it cannot be approved.

52. A chapter 11 debtor may only solicit votes on a plan of reorganization once the Court has approved its written disclosure statement as containing "adequate information." 11 U.S.C. § 1125(b). A disclosure statement contains adequate information and may be approved only if it provides:

> information of a kind, and in sufficient detail, as far as is reasonably practical in light of the nature and history of the debtor and the condition of the debtor's books and records . . ., that would enable a hypothetical investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan.

11 U.S.C. § 1125(a)

53. The Third Circuit has emphasized the importance of adequate information, stating that:

> [T]he importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of "adequate information."

In re Oneida Motor Freight, Inc., 848 F.2d 414, 417 (3d Cir. 1988); *see also Gen. Elec. Credit Corp. v. Nardulli & Sons, Inc.*, 836 F.2d 184, 188 (3d Cir. 1988) (Bankruptcy Code section 1125(a)(1) "requires a debtor . . . to submit a written disclosure statement containing adequate information to allow a reasonable holder to make an informed judgment about the plan."); *In re*

Scioto Valley Mortgage Co., 88 B.R. 168, 170 (Bankr. S.D. Ohio 1988) ("The disclosure statement was intended by Congress to be the primary source of information upon which creditors and shareholders could rely in making an informed judgment about a plan of reorganization.").

54. The principal of adequate disclosure requires, among other things, "information relevant to the risks posed to creditors under the plan." *In re Phoenix Petroleum Co.*, 278 B.R. 385, 393 n.6 (Bankr. E.D. Pa. 2001); *see also In re Radco Props., Inc.*, 2009 WL 612149, *12 (Bankr. E.D.N.C. Mar. 9, 2009) ("Creditors not only rely on the disclosure statement to form their ideas about what sort of distribution or other assets they will receive but also what risks they will face.").

55. A disclosure statement must contain, at a minimum, adequate information concerning "all those factors presently known to the plan proponent that bear upon the success or failure of the proposals contained in the plan." *In re Beltrami Enters., Inc.*, 191 B.R. 303, 304 (Bankr. M.D. Pa. 1995). These material factors include, among other things: (i) a complete description of the available assets and their value; (ii) the anticipated future of the debtor with accompanying financial projections; (iii) information regarding claims against the estate, including those allowed, disputed and estimated; (iv) information regarding the future management of the debtor, including the amount of compensation to be paid to any insiders, directors, and/or officers of the debtor; and (v) any financial information, valuations, or pro forma projections that would be relevant to creditors' determinations of whether to accept or reject the plan. *In re Scioto Valley Mortgage Co.*, 88 B.R. at 170-71; *In re United Brass Corp.*, 194 B.R. 420, 424 (Bankr. E.D. Tex. 1996); *see also* 7 *Collier on Bankruptcy* §1125.02[2] (16th ed. 2010).

56. "A plan is necessarily predicated on knowledge of the assets and liabilities being dealt with and on factually supported expectations as to the future course of the business." Senate Report No. 95-989, 95th Cong. 2d Sess. (1978). "Knowledge of the debtor's financial condition is [therefore] essential before any informed decision concerning the merits of a plan can be made." *Beltrami*, 191 B.R. at 304.

57. A disclosure statement should not be approved where the debtor's disclosure is incomplete or inaccurate. *See Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) ("[D]isclosure requirements are crucial to the effective functioning of the federal bankruptcy system. Because creditors and the bankruptcy court rely heavily on the debtor's disclosure statement in determining whether to approve a proposed restructuring plan, the importance of full and honest disclosure cannot be overstated.").

58. The Disclosure Statement fails to include information concerning a host of issues material to understanding the Proposed Settlement and the Plan, many of which are discussed below.

A. The Disclosure Statement Fails to Provide Adequate Information Regarding JPMC's Recovery under the Proposed Settlement and Plan.

59. On top of the $3.37 to $3.77 billion of Tax Refunds JPMC and the FDIC are slated to receive under the Proposed Settlement, WMI intends to transfer numerous additional assets of the estate to JPMC. Attached hereto as **Exhibit 6** is a list of those assets that the Equity Committee has been able to ascertain will be transferred free and clear of liens, claims and encumbrances to JPMC under the Plan.[23] The Disclosure Statement fails to disclose the factors

[23] In addition to the Transferred Intellectual Property that is to be transferred by WMI to JPMC, the Proposed Settlement also provides that WMI will transfer certain Unidentified Intellectual Property to JPMC as well. (Proposed Settlement at §2.17) Suffice to say that the Proposed Settlement and Plan can not be fairly evaluated if the Debtors are allowed to keep the identity of certain assets to be transferred to

considered and analysis undertaken by the Debtors in determining to transfer these assets to JPMC, the Debtors' estimation of the value (or range of values) of such assets, or the consideration to be paid by JPMC attributable to such assets. The Disclosure Statement does state that JPMC will pay $50 million in exchange for WMI's 3.147 million Class B Shares of Visa Inc., but fails to disclose how that amount was derived or the total amount of dividends WMI expects to receive and retain in respect of the Class B Shares prior to the effective date of the Proposed Settlement. The Disclosure Statement also fails to provide an estimation of the amount of liabilities to be assumed by JPMC (defined as "JPMC Assumed Liabilities" in the Plan) pursuant to the Proposed Settlement including, without limitation, liabilities associated with the Interchange Litigation and the BKK Litigation. This is basic information that should be readily available to the Debtors and is necessary to understand the economics of the Proposed Settlement.

60. A significant facet of the Proposed Settlement is the compromise of the dispute over the Tax Refunds, which according to the Disclosure Statement total $5.4 to $5.8 Billion. (DS 9) Under the Proposed Settlement, the first portion of the Tax Refunds is to be split: 70% of such refunds to JPMC ($1.89 to $2.1 billion) and 30% to the estates ($810 to $900 million); and the second portion of the Tax Refunds is to be split: 59.6% to the FDIC ($1.6 to $1.67 billion) and 40.4% to WMI ($1.09 to $1.13 billion). (DS 9) Under the Plan, that portion of the Tax Refunds received by the Debtors is a primary source of the cash to be distributed under the Plan. Yet the Disclosure Statement does not address or, at best, is unclear regarding the overall value of the Tax Refunds and the factors considered and analysis undertaken by the Debtors that supports the allocation of the Tax Refunds as between the estates, JPMC and the FDIC.

JPMC secret; all transferred assets should be identified and their value (or a range of value) should be disclosed.

61. Similarly, the Disclosure Statement fails to disclose or discuss what proportion of the NOLs are attributable to each member of the Tax Group under the Tax Sharing Agreement, and fails to disclose whether the value of the NOLs is included in the Debtors' $5.4 to $5.8 billion estimate of the value of the Tax Refunds. (*See* DS 9, 54; Proposed Settlement §2.4). The Debtors also fail to disclose whether the FDIC holds a claim against WMI relating to the Tax Refunds and, if so, the amount of such claim. Under the Proposed Settlement, the FDIC stands to recover approximately $1.6 billion of the Tax Refunds, however, it is unclear from the Disclosure Statement the basis on which the FDIC is entitled to such recovery. In addition, the Debtors fail to disclose the anticipated date(s) of receipt of the Tax Refunds. An understanding of the basis of the allocation of the Tax Refunds, the timing of their receipt and the risks associated with their recovery are critical to an understanding of the Proposed Settlement and the Plan, and should be disclosed to claimants.[24]

62. Exhibit U to the Proposed Agreement lists a host of contracts that will be deemed to be property of WMB and sold to JPMC. (Proposed Settlement at §2.14) In connection with JPMC's receipt of those contracts, JPMC will provide $50 million to be deposited into the Vendor Escrow to be used to satisfy the claims of vendors associated with those contracts. (*Id.* at 2.14(b)) The Disclosure Statement does not contain any analysis establishing that the $50 million will be sufficient to satisfy all of those vendors' claims.

[24] Under the Plan, the JPMC Entities will sell to WMI free and clear of all liens, claims, interests and encumbrances (i) the HF Ahmanson Rabbi Trust and certain BOLI-COLI policies and proceeds thereof listed on Exhibit R to the Proposed Settlement, and (ii) the 1.33% stock in H.S. Loan Corporation owned by WMB, and (iii) the WMI Intellectual Property. (DS 11) The Disclosure Statement fails to identify the factors considered by the Debtors regarding their "purchase" of these assets or the amount to be paid by the Debtors for these assets. Moreover, the Disclosure Statement fails to describe the reason for WMI's purchase of these assets, or the basis upon which JPMC, which has not filed a bankruptcy petition and thus is not entitled to the benefit of section 363 of the Bankruptcy Code, can transfer assets free and clear of liabilities.

63. In addition, under Section 2.4(j) of the Proposed Settlement, all amounts transferred to WMB or JPMC are to be treated as "capital contributions" for tax purposes. The Disclosure Statement fails to set forth what impact, if any, the proposed tax treatment may have on the estate.

B. The Disclosure Statement Fails to Provide Required Information Regarding Claims and Distributions.

64. The Disclosure Statement reiterates the Debtors' classification scheme, however, it is particularly deficient in that it fails to disclose the total amount of claims that fall within each Class and the percentage recovery expected for each Class. In addition, the Disclosure Statement informs that the Liquidation Analysis – essential to an understanding of any disclosure statement and plan– "will be filed at a later date." (DS 127)

65. The Disclosure Statement is also deficient with respect to the treatment of the PIERS Claims (Class 16). The PIERS Claims are comprised of Preferred Securities and Common Securities. (DS 26) The Disclosure Statement discloses that WMI owns all of the PIERS Common Securities (DS 26; f.n. 7), but does not disclose the identity of the holders of Preferred Securities. The Plan appears to treat the PIERS Claims as general unsecured claims (despite the fact that they are comprised of preferred and common equity securities), affords them priority over Subordinated Claims (Class 17) and pays them accrued interest. The Debtors fail to disclose any basis upon which holders of PIERS Claims are entitled to higher priority than other preferred and common equity, or the rational for treating what are denominated "Common Securities" as Claims (as defined in the Bankruptcy Code).

66. In addition, the Disclosure Statement also fails to provide the basis for the Debtors' conclusion that the holders of claims relating to the CCB Securities (in the approximate aggregate principal amount of $68 million) will receive little to no distribution on account of

their claims against the WMB Receivership and therefore are treated as allowed in full under the Plan. (DS 25)

C. The Disclosure Statement Fails to Provide Adequate Information Regarding Implementation of the Plan.

67. Disallowance of the Bank Bondholders Claims in full is a condition to effectiveness of the Proposed Settlement and Plan. (DS 35, 90; Proposed Settlement §7.2(j)) As stated above, the parties to that dispute are only now working toward establishing a discovery schedule. The Disclosure Statement should disclose the potential impact upon the Plan if the Bank Bondholders prevail in whole or in part in that litigation, and the consequences to the Proposed Settlement and the Plan if that litigation is not concluded in the near term.

68. The Disclosure Statement also fails to provide the Debtors' estimation of the value of the assets to be retained by the reorganized Debtors following emergence, including, without limitation, the anticipated value of the equity interests in WMI Investment, WM Reinsurance Company, Marion Insurance Company, WaMu 1031 Exchange and the HFA Trust Estates. (DS 13, 47) There is also no disclosure of why the Debtors have determined to retain these assets rather than distributing them to stake holders as they propose with the bulk of their other assets. The Disclosure Statement fails to provide any basis for the retention of assets, the value of which is not disclosed, for the benefit of a subset of claimants (the holders of Allowed PIERS Claims) following the release of claims and cancellation of equity interests. (DS 84). Under the Plan, the Rights Offering is limited to holders of Allowed PIERS Claims, which include WMI, who are to be given the opportunity to purchase Additional Common Stock in the Reorganized Debtors the number and value of which is to be disclosed 3 business days prior to the hearing on the Disclosure Statement. (Plan §1.3) The Disclosure Statement fails to inform whether the Debtors are obligated to pay any fees to the Backstop Purchasers in connection with the Rights Offering –

if so, how much and on what basis? Thus, the value of the assets to be retained by the Reorganized Debtors, the par value of the stock in the Reorganized Debtors, the basis for limiting the Rights Offering to holders of Allowed PIERS Claims, and the costs associated with the Rights Offering remain undisclosed.

69. The definition of Liquidating Trust Assets sets forth those assets that will be contributed to the Liquidating Trust for eventual distribution. Among those assets to be contributed to the Liquidating Trust are the Plan Contribution Assets, which include assets contributed by the WMI Entities, the JPMC entities, and the FDIC that are supposed to be set forth on Exhibit G to the Proposed Settlement. (DS 15) Exhibit G to the Proposed Settlement, however, is completely blank. Thus, the nature, amount and value of the Plan Contribution Assets remain a mystery.

70. The Plan also provides that the Debtors will pay the professional fees of "certain creditors." (Plan § 42.18) However, the Disclosure Statement fails to disclose the identity of those creditors and their professionals, the amounts the Debtors propose to pay, and the basis on which the Debtors are obligated to pay such fees.

71. The Disclosure Statement also fails to provide any explanation for the Settlement Note Holders' participation in the Proposed Settlement or the consideration they are contributing in return for the proposed (non-consensual) release. (Proposed Settlement 1) The claims and equity interests held by the Settlement Note Holders are supposed to be disclosed on Exhibit C to the Proposed Settlement. However, Exhibit C is blank. Thus, the nature and amount of claims and equity interests compromised by the Settlement Note Holders remains unknown.

D. The Disclosure Statement Fails to Provide Adequate Information Regarding Certain Litigations and Investigations.

72. The Disclosure Statement provides insufficient information concerning the claims and causes of action held by the estates. With respect to the D.C. Action and the JPMC Adversary, the Disclosure Statement should include the Debtors' estimation of the (i) value (or range of values) of the claims asserted by the Debtors, and (ii) likelihood of recovery on those claims.

73. The Proposed Settlement and Plan would resolve all claims and causes of action assertable among those parties to the Proposed Settlement. It appears that through the course of the Debtors' investigations in these cases, they formed the belief based upon information obtained that the Debtors may be able to assert additional claims against third parties. (DS 34) Before the Debtors may compromise any claims and causes of action, they should disclose the nature of those claims and causes of action regardless of whether they have been formally asserted, and the factors they considered before deciding to release such claims.

74. There have been numerous investigations of the Debtors and others regarding lending practices prior to the seizure and sale of WMB to JPMC, including investigations commenced by (i) the U.S. Senate Permanent Subcommittee on Investigations; (ii) the U.S. Attorney for the Western District of Washington; (iii) the New York Attorney General; (iv) the Securities and Exchange Commission; and (v) the Financial Fraud Enforcement Task Force (although it does not appear that any third-party investigation of the Debtors' potential claims against JPMC, the FDIC, and other third parties has been undertaken, other than perhaps by the Debtors' Board and professionals who seek to be released of any and all claims under the Plan).[25]

[25] *See In re Spansion, Inc*, 2010 WL 1292837 *23 (Bankr.D.Del. April 1, 2010) (rejecting proposed non-consensual release of debtor's management where plan provided no recovery to objecting parties).

The Disclosure Statement should be revised to include a summary of the published results, if any, of any of the foregoing investigations.

E. The Disclosure Statement Fails to Provide Adequate Information to Demonstrate that the Releases Included in the Proposed Settlement and Plan are Appropriate Under Applicable Law.

75. The value of the claims and causes of action against various third parties are quite likely the most substantial assets comprising the Debtors' estate. The Plan proposes to compromise those valuable assets by granting extremely broad releases to numerous parties. (DS 98) Even more egregious, the Plan proposes to force upon non-debtors an expansive non-consensual release of potential claims against other non-debtor third parties *regardless of whether the "releasors" affirmatively opt out of the proposed Plan releases, vote to approve the Plan, or receive no consideration under the Plan at all.* (DS 99). *See, e.g., In re Coram Healthcare Corp.* 315 B.R. 321, 335-337 (Bankr. D. Del. 2004) (neither the debtor nor the Court has authority to grant third-party releases).

76. The Disclosure Statement does not contain adequate information to demonstrate that the proposed Plan releases are necessary, fair and in the best interests of the Debtors' estate and, accordingly, should not be approved.

(i) Debtors' Releases of Non-Debtor Third-Parties.

77. The Plan seeks to compromise the Debtors' most valuable assets – those claims and causes of action they hold against third parties, which are conservatively valued in the multiples of billions of dollars. (Plan 71) The Plan, if confirmed, would release all Claims[26] and Causes of Action[27] that the Debtors, Reorganized Debtors (and their respective Related

[26] The definition of "Claim" appears in Section 1.60 on page 7 of the Plan.

[27] The definition of "Causes of Action" appears in Section 1.49 on page 6 of the Plan.

Persons)[28], the Liquidating Trust, the Liquidating Trustee, the Liquidating Trust Beneficiaries and the Disbursing Agent (and each of their respective Related Persons) have against any of the Released Parties[29] (or their respective Related Persons). (DS 98)

78. When a proposed plan of reorganization includes releases of claims by a debtor against non-debtor third parties, a court must review the specific facts and equities to determine whether the proposed release is a valid exercise of the debtor's business judgment, is fair, reasonable and in the best interests of the estate. *In re Zenith Elec. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999). Factors that inform whether a debtor's release of third parties is appropriate include:

(1) the identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;

(2) substantial contribution by the non-debtor of assets to the reorganization;

(3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;

(4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes "overwhelmingly" votes to accept the plan; and

(5) provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

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[28] "Related Persons" include: "With respect to any Entity, such predecessors, successors and assigns (whether by operation of law or otherwise) and their respective present and former Affiliates and each of their respective current and former members, partners, equity holders, officers, directors, employees, managers, shareholders, partners, financial advisors, attorneys, accountants, investment bankers, consultant, agents and professionals. or other representatives, nominees or investment managers, each acting in such capacity, and any Entity claiming by or through any of the them (including their respective officers, directors, managers, shareholders, partners, employees, members and professionals)." (Plan 17)

[29] Released Parties" include: "Collectively, each of the Debtors, the Reorganized Debtors, the Creditors' Committee and each of its members in their capacity as members of the Creditors' Committee and in their individual capacity as Trustees, the Liquidating Trust, the Liquidating Trustee, the JPMC Entities, the FDIC Receiver and FDIC Corporate, and the Settlement Note Holders, and each of their respective Related Persons. (Plan 18)

Zenith, 241 B.R. at 110 (citing *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994)).

79. While the Disclosure Statement names a few putative beneficiaries of the proposed releases, there appear to be numerous additional unidentified parties that will be swept under the proposed release as well. (*See* f.n. 28 and 29 *supra*.) The Disclosure Statement fails to adequately disclose all parties the Debtors intend to release, whether the Debtors are aware of any claims assertable against such parties, and the consideration such parties will provide to the estate in exchange for the Debtors' release.

80. In particular, the Disclosure Statement fails to provide any analysis of the factors considered by the Debtors regarding the merit of the JPMC Claims, all of which are unliquidated. (*see* Proposed Settlement, Ex. A.) Under the Proposed Settlement, the JPMC Claims will be deemed allowed claims and are referred to collectively as the JPMC Allowed Unsecured Claim. (Proposed Settlement at §2.22) The distribution on account of the JPMC Allowed Unsecured Claim will be deemed contributed by JPMC to the Debtors in exchange for certain of the releases identified in the Plan. (Proposed Settlement at §2.22)[30] Unless the Debtors disclose the analysis they presumably undertook of the JPMC Claims, and the factors they considered in deciding to grant the releases to JPMC, no one can know whether the supposed consideration provided by JPMC is real or illusory.

81. In addition, the Debtors provide no basis to explain the Settlement Note Holders' participation in the Proposed Settlement or the Debtors' release of those parties under the Plan. The Settlement Note Holders are identified on Exhibit C to the Proposed Settlement, however, the claims held by such parties (which presumably provide the basis for their inclusion in the

[30] The Disclosure Statement does not identify which releases in the Plan the Debtors are exchanging for the distribution on account of the JPMC Allowed Unsecured Claim.

Plan releases) are not identified and, therefore, whether the Settlement Note Holders are contributing any consideration to the estate in exchange for being released is unknown.

82. Until those basic disclosures are made, parties in interest do not have adequate information to determine whether the proposed releases are in the best interests of the Debtors' estate. Moreover, the Debtors have failed to demonstrate that the proposed release of each Released Party satisfies the *Master Mortgage* factors. Thus, the Disclosure Statement should not be approved and the Plan cannot be confirmed.

(ii) Non-Consensual Releases by Holders of Claims and Equity Interests.

83. The Disclosure Statement fails to provide adequate information about the propriety or specific details of any third-party release. "[N]on-consensual releases by a non-debtor of other non-debtor third parties are to be granted only in 'extraordinary cases.'" *In re Exide Techs.*, 303 B.R. 48, 72 (Bankr. D. Del. 2003) (quoting *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001)); *see also Deutsche Bank AG London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141-42 (2d Cir. 2005) (holding that non-debtor releases are proper only in rare cases and may be "tolerated if the affected creditors consent"). The "hallmarks of permissible non-consensual releases [are] fairness, necessity to the reorganization, and specific factual findings to support these conclusions." *In re Continental Airlines*, 203 F.3d 203, 213-14 (3d Cir. 2000) (holding that a debtor must establish through specific factual findings that non-debtor third-party releases are fair and necessary).

84. The Court in *Genesis Health* further enunciated factors considered to be indicative of these hallmarks, including: (i) the necessity of the non-consensual release to the success of the reorganization; (ii) the releasees having provided a critical financial contribution

to the debtor's plan; (iii) the releasees' financial contribution being necessary to make the plan feasible; and (iv) the release being fair to the non-consenting creditors, *i.e.*, whether the non-consenting creditors received reasonable compensation in exchange for the release. *Genesis Health*, 266 B.R. at 607-08; *see also In re Exide Techs.*, 303 B.R. at 75.

85. The Disclosure Statement provides none of the information of the type described in *Genesis Health* with which parties in interest or this Court can assess the terms of any third-party release, or balance the propriety and benefit to the estate of such third party release. The Disclosure Statement, therefore, should not be approved and the Plan cannot be confirmed

F. The Disclosure Statement Fails to Include Sufficient Information to Demonstrate that the Plan does Not Improperly Classify Similarly Situated Creditors.

86. Despite being similarly situated and holding similar legal rights against the Debtors, the Disclosure Statement provides no justification for the separate classification and disparate treatment of PIERS Claims, REIT Series, Preferred Equity Interests and Common Equity Interests. Without providing such information, the Disclosure Statement does not provide adequate information and should not be approved.

87. As discussed above (*infra*, para. 65) the PIERS Common Securities issued by Washington Mutual Capital Trust 2001 to WMI are included among the PIERS Claims (Class 16) that are separately classified from all other Common Equity Interests in WMI (Class 21). The PIERS Common Securities were originally issued with a face value of approximately $0.4 billion. (DS 26) WMI owns 100% of the PIERS Common Securities. (DS 26) Under the Plan, holders of claims in Class 16 – including WMI on account of the PIERS Common Securities – will receive a distribution while holders of Interests in Class 21 will not. (DS 18-19) In addition, the Plan separately classifies the PIERS Claims, which are comprised of the Preferred

Securities and Common Securities, from all other preferred equity that otherwise fall within Classes 18 and 19. (DS 18-19, 26) It also appears that the Plan affords those equity interests that comprise the PIERS Claims priority over Subordinated Claims in Class 17. The Disclosure Statement does not provide any basis to support such separate classification and facially discriminatory treatment among substantially similar claimants.[31]

RESERVATION OF RIGHTS

88. To the extent any objection, in whole or in part, contained herein is deemed to be an objection to confirmation of the Plan rather than, or in addition to, an objection to the adequacy of the Disclosure Statement, the Equity Committee reserves its right to assert such objection, as well as any other objections, to confirmation of the Plan. Furthermore, to the extent the Equity Committee, any Equity Committee member, or the Debtors' shareholders generally are impacted in any way by the contents of any supplements or amendments to the Disclosure

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[31] While Bankruptcy Code Section 1122(a) only explicitly requires that claims placed in the same class be substantially similar, the Court of Appeals for the Third Circuit has held that it is "clear that the Code was not meant to allow a debtor complete freedom to place substantially similar claims in separate classes," and requires that the classification scheme be "reasonable." *John Hancock Mut. Life Ins. Co. v. Route 37 Business Park Assocs.*, 987 F.2d 154, 158 (3d Cir. 1993); *see also re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987). The determination of reasonableness "must be informed by the two purposes that classification serves under the Code: voting to determine whether a plan can be confirmed (*see* 11 U.S.C. §§ 1129(a)(8), (10) (1988)); and treatment of claims under the plan (*see* 11 U.S.C. § 1123(4) (1988))." *John Hancock*, 987 F.2d at 159; *see also In re LaBlanc*, 622 F.2d 872, 879 (5th Cir. 1980) ("As a general rule, the classification in a plan should not do substantial violence to any claimant's interest. The plan should not arbitrarily classify or discriminate against creditors."). The Third Circuit has emphasized the importance of plan classification:

> The Bankruptcy Code furthers the policy of "equality of distribution among creditors" by requiring that a plan of reorganization provide similar treatment to similarly situated claims. Several sections of the Code are designed to ensure equality of distribution from the time the bankruptcy petition is filed. Section 1122(a) provides that only "substantially similar" claims may be classified together under a plan of reorganization. Section 1123(a)(4) requires that a plan of reorganization "provide the same treatment for each claim or interest of a particular class."

In re Combustion Eng'g, Inc., 391 F.3d 190, 239 (3d Cir. 2004).

Statement or the Plan that may be filed after any Disclosure Statement or Plan confirmation objection deadline, the Equity Committee reserves its right to object thereto. The Equity Committee reserves the right to raise further and other objections to the Disclosure Statement or any amendment thereto prior to or at the hearing thereon in the event the Equity Committee's objections raised herein are not resolved prior to such hearing.

CONCLUSION

WHEREFORE, based on the foregoing, the Equity Committee respectfully requests that an order be entered (i) denying approval of the Disclosure Statement and (ii) granting such other and further relief as the Court deems just and proper.

Dated: May 13, 2010

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EXHIBIT 1

MEMORANDUM

To: Members of the Permanent Subcommittee on Investigations

From: Senator Carl Levin, Subcommittee Chairman
Senator Tom Coburn, Ranking Member

Date: April 13, 2010

Re: **Wall Street and the Financial Crisis: The Role of High Risk Loans**

On Tuesday, April 13, 2010, beginning at 9:30 a.m., the Permanent Subcommittee on Investigations will hold its first in a series of hearings examining some of the causes and consequences of the recent financial crisis. This hearing will focus on the role of high risk loans, using a case study involving Washington Mutual Bank.

The Financial Crisis. In July 2007, two Bear Stearns offshore hedge funds specializing in mortgage related securities collapsed; the credit rating agencies suddenly downgraded hundreds of subprime residential mortgage backed securities; and the formerly active market for buying and selling subprime residential mortgage backed securities went cold. Banks, mortgage brokers, securities firms, hedge funds, and others were left holding suddenly unmarketable mortgage backed securities whose value began plummeting.

Banks and mortgage brokers began closing their doors. In January 2008, Countrywide Financial Corporation, a $100 billion thrift specializing in home loans, was sold to Bank of America. That same month, one of the credit rating agencies downgraded nearly 7,000 mortgage backed securities, an unprecedented mass downgrade. In March 2008, as the financial crisis worsened, the Federal Reserve facilitated the sale of Bear Stearns to JPMorgan Chase. In September 2008, in rapid succession, Lehman Brothers declared bankruptcy; AIG required a $85 billion taxpayer bailout; and Goldman Sachs and Morgan Stanley converted to bank holding companies to gain access to Federal Reserve lending programs.

In this context, Washington Mutual Bank, the sixth largest depository institution in the country with $307 billion in assets, $188 billion in deposits, and 43,000 employees, found itself losing billions of dollars in deposits as customers left the bank, its stock price tumbled, and its liquidity worsened. On September 25, 2008, after a century in the lending business, Washington Mutual Bank was closed by its primary regulator, the Office of Thrift Supervision ("OTS"). On the same day, the Federal Deposit Insurance Corporation ("FDIC"), having been appointed receiver, facilitated sale of the bank to JPMorgan Chase. It was the largest bank failure in the history of the United States.

The sudden financial losses and forced sales of multiple financial institutions put the U.S. economy into a tailspin. The stock market fell; business loans dried up; and unemployment exploded. Hidden liabilities associated with financial firms' proprietary positions in mortgage backed securities, credit default swaps, collateralized debt obligations ("CDOs"), structured investment vehicles, and other complex financial instruments created concerns about the stability of major financial institutions. The contagion spread worldwide as financial institutions holding similar financial instruments lost value and curtailed transactions with other firms. In October

2008, Congress enacted the $700 billion Troubled Asset Relief Plan ("TARP") to stop the U.S. economy from falling off a cliff and taking the rest of the world economy with it. The United States and other countries are still recovering today.

Subcommittee Investigation. In November 2008, the Permanent Subcommittee on Investigations initiated a bipartisan investigation into some of the causes and consequences of the financial crisis. Since then, the Subcommittee has engaged in a wide-ranging inquiry, issuing subpoenas, conducting over 100 interviews and depositions, and consulting with dozens of government, academic, and private sector experts. The Subcommittee has also accumulated and initiated review of over -50 million pages of documents, including court pleadings, filings with the Securities and Exchange Commission, trustee reports, prospectuses for securities and private offerings, corporate board and committee minutes, mortgage transactions and analyses, memoranda, marketing materials, correspondence, and email. The Subcommittee has also reviewed documents prepared by or sent to or from banking and securities regulators, including bank examination reports, reviews of securities firms, enforcement actions, analyses, memoranda, correspondence, and email.

To provide the public with the results of its investigation, the Subcommittee plans to hold a series of hearings addressing aspects of the financial crisis, including the role of high risk home loans, regulators, credit rating agencies, and Wall Street. These hearings will examine issues related to mortgage backed securities, CDOs, credit default swaps, and other complex financial instruments. After the hearings, a report summarizing the investigation will be released.

Washington Mutual Case History. This initial hearing in the series examines Washington Mutual Bank as a case study in the role of high risk loans in the U.S. financial crisis. Headquartered in Seattle, with offices across the country and over 100 years of experience in the home loan business, Washington Mutual Bank had grown to become the nation's largest thrift. Each year, it originated or acquired billions of dollars of home loans through multiple channels, including loans originated by its own loan officers, loans brought to the bank by third party mortgage brokers, and loans purchased in bulk from other lenders or firms. In addition, its affiliate, Long Beach Mortgage Company ("Long Beach"), originated billions of dollars in home loans brought to it by third party mortgage brokers specializing in subprime lending.

Washington Mutual kept a portion of these home loans for its own investment portfolio, and sold the rest either to Wall Street investors, usually after securitizing them, or to the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac).

At first, Washington Mutual worked with Wall Street firms to securitize its home loans, but later built up its own securitization arm, Washington Mutual Capital Corporation, which gradually took over the securitization of Washington Mutual and Long Beach loans. In addition, from 2001 to 2007, Washington Mutual sold about $430 billion in loans to Fannie Mae and Freddie Mac, representing nearly a quarter of its loan production during those years.

High Risk Home Loans. Over a five-year period from 2003 to 2008, Washington Mutual Bank made a strategic decision to shift its focus from traditional 30-year fixed and government-backed loans to higher risk home loans. This shift included originating more home loans for higher risk borrowers, with increased loan activity at Long Beach, which was exclusively a subprime lender. Washington Mutual also financed subprime loans brought to the

bank by third party mortgage brokers through its "Specialty Mortgage Finance" and "Wholesale" channels, purchased subprime loans through its "Correspondent" channel, and purchased subprime loans in bulk through its "Conduit" channel.

Washington Mutual decided to shift to higher risk loans, because it had calculated those loans were more profitable. Higher risk loans typically charged borrowers a higher rate of interest and higher fees. Once securitized, a large percentage of the mortgage backed securities received AAA ratings, yet offered investors a higher rate of return than other AAA investments, due to the higher risk involved. As a result, mortgaged backed securities relying on higher risk loans typically fetched a better price on Wall Street than those relying on lower risk loans.

Washington Mutual's most common subprime loans were hybrid adjustable rate mortgages, known as "2/28," "3/27," or "5/25" loans. These 30-year mortgages typically had a low fixed "teaser" rate, which then reset to a higher floating rate after two years for the 2/28, three years for the 3/27, or five years for the 5/25. The initial payment was typically calculated to pay down the principal and interest at the initial low, fixed interest rate. In some cases, the payments covered only the interest due on the loan and not any principal. After the fixed period expired, the monthly payment was typically recalculated to cover both principal and interest at the higher floating rate. The suddenly increased monthly payments sometimes caused borrowers to experience "payment shock" and to default on their loans, adding to the risk.

In addition to subprime loans, Washington Mutual made a variety of high risk loans to "prime" borrowers, including its flagship product, the Option Adjustable Rate Mortgage ("Option ARM"). Washington Mutual's Option ARMs typically allowed borrowers to pay an initial teaser rate, sometimes as low as 1% for the first month, and then imposed a much higher floating interest rate linked to an index, but gave borrowers the choice each month of paying a higher or lower amount. These loans were called "Option" ARMs, because borrowers were typically given four options: (1) paying the fully amortizing amount needed to pay off the loan in 30 years; (2) paying an even higher amount to pay off the loan in 15 years; (3) paying only the interest owed that month and no principal; or (4) making a "minimum" payment that covered only a portion of the interest owed and none of the principal. If the minimum payment option were selected, unpaid interest would be added to the loan principal. If the borrower repeatedly selected the minimum payment, the loan principal would increase rather than decrease over time, creating a negatively amortizing loan.

After five years or when the loan principal reached 110% (sometimes 115% or 125%) of the original loan amount, the Option ARM would "recast." The borrower would then be required to make the fully amortizing payment needed to pay off the loan within the remaining loan period. The new monthly payment amount was typically much greater, causing payment shock and increasing loan defaults. For example, a borrower taking out a $400,000 loan, with a teaser rate of 1.5% and subsequent interest rate of 6%, could have a minimum payment of $1,333. If the borrower then made only the minimum payments until the loan recast, the new payment using the 6% rate would be $2,786, an increase of more than 100%. What began as a 30-year loan for $400,000 became a 25-year loan for $432,000. To avoid having the loan recast, Option ARM borrowers typically refinanced their loans. A significant portion of Washington Mutual's Option ARM business consisted of refinancing existing loans. Borrowers unable to refinance were at greater risk of default.

Washington Mutual and Long Beach sold or securitized most of the subprime home loans they acquired. Initially, Washington Mutual kept most of its Option ARMs in its proprietary investment portfolio, but eventually began selling or securitizing those loans as well. From 2000 to 2007, Washington Mutual and Long Beach securitized at least $77 billion in subprime home loans. Washington Mutual sold or securitized at least $115 billion of Option ARM loans, as well as billions more of other types of high risk loans, including hybrid adjustable rate mortgages, Alt A, and home equity loans. According to its internal documents, by 2006, Washington Mutual was the second largest Option ARM originator and the eleventh largest subprime loan originator in the country.

Lending and Securitization Deficiencies. Over the years, both Long Beach and Washington Mutual were the subject of repeated criticisms by the bank's internal auditors and reviewers, as well as its regulators, OTS and the FDIC, for deficient lending and securitization practices. Long Beach loans repeatedly suffered from early payment defaults, poor underwriting, fraud, and high delinquency rates. Its mortgage backed securities were among the worst performing in the marketplace. In 2003, for example, Washington Mutual stopped Long Beach's securitizations and sent a legal team for three months to address problems and ensure its securitizations and whole loan sales were meeting the representations and warranties in Long Beach's sales agreements.

In 2005, Long Beach had to repurchase over $875 million of nonperforming loans from investors, suffered a $107 million loss, and had to increase its repurchase reserve by nearly $75 million. As a result, Long Beach's senior management was removed, and Long Beach's subprime lending operations were made subject to oversight by Washington Mutual's Home Loans Division. Despite those changes, early payment defaults and delinquencies surged again in 2006, and several 2007 reviews identified multiple lending, credit, and appraisal problems. By mid-2007, Washington Mutual shut down Long Beach as a separate entity and took over its subprime lending operations. At the end of the year, a Long Beach employee was indicted for having taken kickbacks to process fraudulent or substandard loans.

In addition to problems with its subprime lending, Washington Mutual suffered from lending and securitization deficiencies related to its own mortgage activities. It received, for example, repeated criticisms for unsatisfactory underwriting procedures, loans that did not meet credit requirements, and loans subject to fraud, appraisal problems, and errors. For example, a 2005 internal investigation found that loans originated from two top loan producing offices in southern California contained an extensive level of fraud caused primarily by employees circumventing bank policies. Despite fraud rates in excess of 58% and 83% at those two offices, no steps were taken to address the problems, and no investors who purchased loans originated by those offices were notified in 2005 of the fraud problem. In 2006, securitizations with elevated delinquency rates were found to contain lower quality loans that did not meet the bank's credit standards. In 2007, fraud problems resurfaced at the southern California offices, and another internal review of one of the offices found a fraud rate of 62%. In 2008, the bank uncovered evidence that employees at still another top producing loan office were "manufacturing" false documentation to support loan applications. A September 2008 internal review found that loans marked as containing fraudulent information had nevertheless been securitized and sold to investors, identifying ineffective controls that had "existed for some time."

Compensation. The Long Beach and Washington Mutual compensation systems contributed to these problems by creating misplaced incentives that encouraged high volumes of

risky loans but little or no incentives to ensure high quality loans that complied with the bank's credit requirements. Long Beach and Washington Mutual loan officers, for example, received more money per loan for originating higher risk loans and for exceeding established loan targets. Loan processing personnel were compensated according to the speed and number of the loans they processed. Loan officers and their sales associates received still more compensation if they charged borrowers higher interest rates or points than required in bank rate sheets specifying loan prices, or included prepayment penalties in the loan agreements. That added compensation created incentives to increase loan profitability, but not loan quality.

A second problem related to compensation was the millions of dollars paid to Washington Mutual senior executives even as their higher risk lending strategy began to lose money and increase the risk in the bank's own investment portfolio. Washington Mutual's chief executive officer, Kerry Killinger, for example, received each year a base salary of $1 million, cash bonuses, stock options, and multiple stock awards. He also received benefits from four pension plans, a deferred bonus plan, and a separate deferred compensation plan. In 2008 alone, the year he was asked to leave the bank, he received $21 million, including a $15 million severance payment. Altogether, from 2003 to 2008, Washington Mutual paid Mr. Killinger nearly $100 million, on top of multi-million-dollar corporate retirement benefits.

Failure of Washington Mutual. In July 2007, after the Bear Stearns hedge funds collapsed and the rating agencies downgraded hundreds of mortgaged backed securities, including over 40 Long Beach securities, the secondary market for subprime loans dried up. By September 2007, Washington Mutual had discontinued its subprime lending. It also became increasingly difficult for Washington Mutual to sell its high risk loans and related mortgage backed securities, including its Option ARMs. By the end of the year, Washington Mutual began to incur significant losses, reporting a $1 billion loss in the fourth quarter of 2007, and another $1 billion loss in the first quarter of 2008.

In February 2008, based upon increasing deterioration in the bank's asset quality, earnings, and liquidity, OTS lowered the bank's safety and soundness rating to a 3 on a scale of 1 to 5, signaling that it was a troubled institution. In April, the bank closed multiple offices, firing thousands of employees. That same month, Washington Mutual's parent holding company raised $7 billion in new capital, providing $3 billion of those funds to the bank.

In July 2008, a $30 billion mortgage lender, IndyMac, failed and was placed into receivership by the government. In response, depositors became concerned about Washington Mutual and withdrew over $9 billion in deposits, putting pressure on the bank's liquidity. After the bank disclosed a $3.2 billion loss for the second quarter, its stock price continued to drop, and more deposits left.

On September 15, 2008, Lehman Brothers declared bankruptcy. Three days later, on September 18, OTS and the FDIC lowered Washington Mutual's rating to a "4," indicating that a bank failure was a distinct possibility. The credit rating agencies also downgraded the bank's credit ratings. Over the span of eight days starting on September 15th, nearly $17 billion in deposits left the bank. At that time, the federal Deposit Insurance Fund contained about $45 billion, an amount which could have been exhausted by the failure of a $300 billion institution like Washington Mutual. As the financial crisis worsened each day, regulatory concerns about the bank's liquidity and viability intensified.

On September 25, 2008, OTS placed Washington Mutual Bank into receivership, and the FDIC facilitated its immediate sale to JPMorgan Chase for $1.9 billion. The sale eliminated the need to draw upon the federal Deposit Insurance Fund.

Findings. Washington Mutual was not the only mortgage lender to fail during the financial crisis. Nor was its high risk lending practices unusual. To the contrary, the Subcommittee investigation indicates that Washington Mutual was emblematic of practices at a number of financial institutions that originated, sold, and securitized high risk home loans from 2004 to 2008. Based upon the Subcommittee's investigation to date, we make the following findings of fact related to Washington Mutual Bank and its parent holding company, Washington Mutual Inc.

(1) **High Risk Lending Strategy.** Washington Mutual ("WaMu") executives embarked upon a high risk lending strategy and increased sales of high risk home loans to Wall Street, because they projected that high risk home loans, which generally charged higher rates of interest, would be more profitable for the bank than low risk home loans.

(2) **Shoddy Lending Practices.** WaMu and its affiliate, Long Beach Mortgage Company ("Long Beach"), used shoddy lending practices riddled with credit, compliance, and operational deficiencies to make tens of thousands of high risk home loans that too often contained excessive risk, fraudulent information, or errors.

(3) **Steering Borrowers to High Risk Loans.** WaMu and Long Beach too often steered borrowers into home loans they could not afford, allowing and encouraging them to make low initial payments that would be followed by much higher payments, and presumed that rising home prices would enable those borrowers to refinance their loans or sell their homes before the payments shot up.

(4) **Polluting the Financial System.** WaMu and Long Beach securitized over $77 billion in subprime home loans and billions more in other high risk home loans, used Wall Street firms to sell the securities to investors worldwide, and polluted the financial system with mortgage backed securities which later incurred high rates of delinquency and loss.

(5) **Securitizing Delinquency-Prone and Fraudulent Loans.** At times, WaMu selected and securitized loans that it had identified as likely to go delinquent, without disclosing its analysis to investors who bought the securities, and also securitized loans tainted by fraudulent information, without notifying purchasers of the fraud that was discovered.

(6) **Destructive Compensation.** WaMu's compensation system rewarded loan officers and loan processors for originating large volumes of high risk loans, paid extra to loan officers who overcharged borrowers or added stiff prepayment penalties, and gave executives millions of dollars even when its high risk lending strategy placed the bank in financial jeopardy.

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EXHIBIT 2

MEMORANDUM

To: Members of the Permanent Subcommittee on Investigations

From: Senator Carl Levin, Subcommittee Chairman
Senator Tom Coburn, Ranking Member

Date: April 16, 2010

Re: **Wall Street and the Financial Crisis: The Role of Bank Regulators**

On Friday, April 16, 2010, beginning at 9:30 a.m., the Permanent Subcommittee on Investigations will hold the second in a series of hearings examining some of the causes and consequences of the recent financial crisis. This hearing will focus on the role played by federal bank regulators, using as a case history Washington Mutual Bank, the largest bank failure in U.S. history.

Subcommittee Investigation. In November 2008, the Permanent Subcommittee on Investigations initiated a bipartisan investigation into some of the causes and consequences of the financial crisis. Since then, the Subcommittee has engaged in a wide-ranging inquiry, issuing numerous subpoenas; conducting over 100 interviews and depositions; and consulting with dozens of government, academic, and private sector experts on banking, securities, financial, and legal issues. The Subcommittee has also accumulated and initiated review of over 50 million pages of documents, including court pleadings, filings with the Securities and Exchange Commission, trustee reports, prospectuses for securities and private offerings, corporate board and committee minutes, mortgage transactions and analyses, memoranda, marketing materials, correspondence, and email. The Subcommittee has also reviewed documents prepared by or sent to or from banking and securities regulators, including bank examination reports, reviews of securities firms, enforcement actions, analyses, memoranda, correspondence, and email.

To provide the public with the results of its investigation, the Subcommittee is holding a series of hearings addressing the role of high risk lending, regulators, credit rating agencies, investment banks, and others in the financial crisis. These hearings will examine issues related to mortgage backed securities, collateralized debt obligations, credit default swaps, and other complex financial instruments. After the hearings, a report on the investigation will be prepared.

Washington Mutual Case History. The initial hearing in the series, on April 13, used Washington Mutual Bank as a case study to examine the role of high risk loans in the U.S. financial crisis. Headquartered in Seattle, with branches and loan centers across the country, Washington Mutual Bank had over 100 years of experience in the home loan business and had grown to become the nation's largest thrift with more than $300 billion in assets, $188 billion in deposits, and 43,000 employees. Washington Mutual's thrift charter required the bank to concentrate on home loans and maintain most of its assets in mortgage related activities. Each year, it originated or acquired billions of dollars of home loans through multiple channels, including loans originated by its own loan officers, loans brought to the bank by third party mortgage brokers, and loans purchased in bulk from other lenders or firms. In addition, its

affiliate, Long Beach Mortgage Company ("Long Beach"), originated billions of dollars in home loans brought to it by third party mortgage brokers specializing in subprime lending.

Washington Mutual kept a portion of its home loans for its own investment portfolio, and sold the rest either to Wall Street investors, usually after securitizing them, or to Fannie Mae and Freddie Mac. At first, Washington Mutual worked with Wall Street firms to securitize its home loans, but later built up its own securitization arm, Washington Mutual Capital Corporation.

Until 2006, Washington Mutual's operations were profitable. In 2007, many of its high risk loans began experiencing increased rates of delinquency and loss, and after the subprime mortgage backed securities market collapsed in September 2007, Washington Mutual was unable to sell its subprime loans. In the fourth quarter of 2007, the bank recorded a loss of $1 billion. In 2008, Washington Mutual's stock price plummeted against the backdrop of a worsening financial crisis, including the forced sales of Countrywide Financial Corporation and Bear Stearns, government takeover of IndyMac, bankruptcy of Lehman Brothers, taxpayer bailout of AIG, and conversion of Goldman Sachs and Morgan Stanley into bank holding companies. In the first half of 2008, Washington Mutual lost another $4.2 billion, and its depositors withdrew a total of over $26 billion from the bank. On September 25, 2008, Washington Mutual Bank was placed into receivership by its primary regulator and was immediately sold to JPMorgan Chase for $1.9 billion.

Washington Mutual's Regulators. Washington Mutual's primary federal regulator was the Office of Thrift Supervision ("OTS"). OTS was created in 1989, in response to the savings and loan crisis to charter and regulate the thrift industry. It is part of the U.S. Department of the Treasury and headed by a Presidentially-appointed Director. Like other bank regulators, OTS is charged with ensuring the safety and soundness of the financial institutions it oversees. Its operations are funded through semiannual fees assessed on the institutions it regulates, with the fee amount based on the size, condition, and complexity of each institution's portfolio. Washington Mutual provided 12-15% of OTS revenue from 2003 to 2008.

OTS supervises its thrifts through four regional offices led by a Regional Director, Deputy Director, and Assistant Director. The regional offices assign an Examiner In Charge, supported by other examination personnel, to each thrift. OTS currently oversees about 765 thrift-chartered institutions. In all, approximately three-quarters of the OTS workforce reports to the four regional offices, while the remaining quarter works at the OTS Washington headquarters. Washington Mutual was supervised by the West Region whose office was, through the end of 2008, based in Daly City, California.

In addition to OTS, Washington Mutual was regulated by the Federal Deposit Insurance Corporation ("FDIC"). The mission of the FDIC is to maintain stability and public confidence in the nation's financial system by insuring deposits, examining and supervising financial institutions for safety and soundness and consumer protection, and managing failed institutions placed into receivership. To carry out these responsibilities, FDIC has backup supervisory authority over approximately 3,000 federally insured depository institutions whose primary regulators are the OTS, Office of the Comptroller of the Currency, or Federal Reserve. The

Deposit Insurance Fund is financed through fees assessed on the insured institutions, with assessments based on the amount of deposits requiring insurance and the degree of risk posed by each institution to the insurance fund.

For the eight largest institutions, the FDIC assigns at least one Dedicated Examiner to work on-site at the institution. The examiner's obligation is to evaluate the institution's risk to the Deposit Insurance Fund and work with the primary regulator to lower that risk. The FDIC has entered into a 2002 inter-agency agreement with the primary bank regulators to facilitate and coordinate their respective oversight obligations and ensure the FDIC is able to protect the Deposit Insurance Fund. Pursuant to that agreement, the FDIC may request to participate in examinations of large institutions or higher risk financial institutions, recommend enforcement actions to be taken by the primary regulator, and if the primary regulator fails to act, take its own enforcement action with respect to an insured institution. Washington Mutual had a FDIC-assigned Dedicated Examiner who worked with OTS examiners to oversee the bank.

Federal bank regulators have a wide range of informal and formal enforcement actions that may be used to ensure the safety and soundness of a financial institution. Informal enforcement actions, which are not made public, include issuing examination findings to the bank and both recommending and requiring corrective action, notifying the Board of problems, and requiring the Board to issue a resolution with commitments for corrective actions. Formal enforcement actions, which become public, include requiring the bank to enter into a Memorandum of Understanding with commitments for corrective action, imposing monetary fines, issuing cease and desist orders, and removing bank personnel.

The Examination Process. The stated mission of the OTS is "[t]o supervise savings associations and their holding companies in order to maintain their safety and soundness and compliance with consumer laws, and to encourage a competitive industry that meets America's financial services needs." The OTS Examination Handbook, in section 10.2, requires "[p]roactive regulatory supervision" with a focus on evaluation of "future needs and potential risks to ensure the success of the thrift system in the long term."

To carry out its mission, OTS traditionally conducted an examination of its thrifts every 12-18 months and provided the results in an annual Report of Examination ("ROE"). In 2006, OTS initiated a "continuous exam" program for its largest thrifts, requiring its examiners to conduct a series of specialized examinations during the year with the results from all of those examinations included in an annual ROE. The Examiner in Charge led the examination activities which were organized around a rating system called CAMELS that is used by all federal bank regulators. The CAMELS rating system evaluates a bank's: (C) capital adequacy, (A) asset quality, (M) management, (E) earnings, (L) liquidity, and (S) sensitivity to market risk. CAMELS ratings use a scale of 1 to 5, with 1 being the best rating and 5 the worst. In the annual ROE, OTS provided its thrifts with an evaluation and rating for each CAMELS component, as well as an overall composite rating on the bank's safety and soundness.

At Washington Mutual, OTS examiners conducted both on-site and off-site activities to review bank operations, and maintained frequent communication with bank management through

emails, telephone conferences, and meetings. Washington Mutual formed a Regulatory Relations office charged with overseeing its interactions with OTS, the FDIC, and other regulators. During the year, OTS examiners issued "findings memos," which set forth particular examination findings, and required a written response and corrective action plan from Washington Mutual management. The findings ranged from "observations," to "recommendations," to "criticisms." The most serious findings were elevated to the Washington Mutual Board of Directors through designation as a Matter Requiring Board Attention ("MRBA"). MRBAs were set forth in the ROE and presented to the Board in an annual meeting attended by OTS and FDIC personnel. Washington Mutual tracked OTS findings and its responses through its Enterprise Issue Tracking System ("ERICS"). In a departure from its usual practice, OTS did not maintain a separate tracking system but simply relied on Washington Mutual's ERICS system to identify past examination findings and the bank's responses.

The FDIC also examined Washington Mutual, relying primarily on the examination findings and ROEs developed by OTS. The FDIC assigned its own CAMELS ratings to the bank. In addition, for institutions with assets of $10 billion or more, the FDIC has established the Large Insured Depository Institutions ("LIDI") Program to assess and report on emerging risks that may pose a threat to the Deposit Insurance Fund. Under this program, the Dedicated Examiner and other regional case managers perform ongoing analysis of emerging risks within each insured institution and assign a quarterly risk rating, using a scale of A to E, with A being the best rating and E the worst. In addition, senior FDIC analysts within the Complex Financial Institutions Branch analyze specific bank risks and develop supervisory strategies.

Washington Mutual's Examination History. From 2003 to 2008, OTS repeatedly identified significant problems with Washington Mutual's lending practices, risk management, and asset quality, and requested corrective action. Washington Mutual promised year after year to correct identified problems, but failed to do so. OTS failed to respond with meaningful enforcement action, resisted FDIC recommendations for stronger measures, and even impeded FDIC examination efforts.

OTS findings memoranda and ROEs repeatedly identified serious underwriting and risk management deficiencies at Washington Mutual. OTS elevated these issues to Washington Mutual's board by issuing MRBAs on underwriting deficiencies every year from 2003-2008. For most of those years, OTS determined that either Single Family Residential loan underwriting at Washington Mutual or subprime underwriting at Long Beach was "less than satisfactory." It also issued MRBAs on the need for stronger risk management from 2004-2008. In 2007, an OTS examiner noted that WaMu had nine different compliance officers in the past seven years, and that "[t]his amount of turnover is very unusual for an institution of this size and is a cause for concern."[1]

[1] Draft OTS Exam Findings Memo, "Compliance Management Program," May 31, 2007, Franklin_Benjamin-00020408_001.

In January 2005, Washington Mutual made a strategic decision to shift its focus from low risk fixed rate and government-backed loans to higher risk subprime, home equity, and Option ARM loans. OTS examiners expressed concern about but did not restrict a number of high risk lending practices at the bank, including accepting stated income loans without verifying the borrower's assets or ability to repay the loan, low documentation loans, loans with low FICO scores and high loan-to-value ratios, loans that required interest only payments, and loan payments that did not cover even the interest owed, much less the principal.[2] When one OTS examiner attempted to restrict "No Income No Asset (NINA loans)" in which the lender did not have to verify information about a borrower's income or assets, the OTS West Region overruled him and ignored an OTS policy official in Washington, D.C., discouraging use of such loans, calling him a "lone ranger" within the agency.

When Washington Mutual announced its shift to higher risk loans, OTS examiners observed that robust risk management practices would be necessary to function as a check and balance on the high-risk lending strategy. Yet from 2005 through 2008, OTS examiners consistently found Washington Mutual's risk management practices lacking. In addition, as noted above, throughout this period, OTS examiners continuously criticized Washington Mutual's underwriting standards and practices as "less than satisfactory" and the amount of underwriting errors as "higher than acceptable." OTS also observed over the years loans with erroneous or fraudulent information, loans that did not comply with the bank's credit requirements, or loans that contained other problems. Notwithstanding the many control weaknesses the bank's underwriting and risk management practices, OTS examiners took no action to bring about change in these areas.

OTS examiners were also aware that many Washington Mutual and Long Beach loans were brought to the bank by third party mortgage brokers or lenders over which the bank exercised weak oversight, but again took little action. For example, when OTS examiners noted in a 2007 findings memo that Washington Mutual had only 14 full-time employees overseeing over 34,000 third-party brokers, the examiners made only the following observation: "Given the . . . increase in fraud, early payment defaults, first payment defaults, subprime delinquencies, etc., management should re-assess the adequacy of staffing."[3] Washington Mutual management agreed with the finding, but provided no corrective action plan, stating only that "[s]taffing needs are evaluated continually and adjusted as necessary."

In 2006, due to increasing concerns about lax lending practices and exotic high-risk mortgages, federal bank regulators worked together to draft inter-agency guidance on

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[2] *See, e.g.*, OTS Report of Examination for Washington Mutual Bank, March 14, 2006, at 19, OTSWMEF-0000047030 ("We believe the level of delinquencies, if left unchecked, could erode the credit quality of the portfolio. Our concerns are increased when the risk profile of the portfolio is considered, including concentrations in Option ARMS to higher-risk borrowers, in low and limited documentation loans, and loans with subprime or higher-risk characteristics. We are concerned further that the current market environment is masking potentially higher credit risk.").

[3] OTS Examination Findings Memo, "Broker Credit Administration," June 7, 2007, Hedger_Ann-00027930_001.

nontraditional mortgage products ("NTM guidance"). During the drafting process, OTS argued for less stringent lending standards than other regulators were advocating, using data supplied by Washington Mutual in order to protect the bank's loan volume. Once the guidance was issued in October 2006, while other bank regulators told their institutions that they were expected to come into immediate compliance, OTS took the position that compliance was something institutions "should" do, not something they "must" do, and allowed its thrifts over a year to comply.

For example, the NTM guidance required banks to evaluate a borrower's ability to repay a mortgage using a fully-indexed interest rate and fully-amortized payment amount. Washington Mutual, after learning that compliance with that requirement would lead to a 33% drop in loan volume due to borrowers who would no longer qualify for the loans, determined to "hold[] off on implementation until required to act for public relations ... or regulatory reasons."[4] OTS allowed Washington Mutual to continue qualifying borrowers using lower loan payment amounts for another year, resulting in the bank's originating many Option ARM loans that would later suffer significant losses.

OTS justified its regulatory stance in part by pointing to Washington Mutual's profits and low level of mortgage delinquencies during the height of the mortgage boom, reasoning that the lack of losses made it difficult to require the bank to reduce the risks threatening the bank's safety and soundness. The OTS Examiner in Charge put it this way in a 2005 email: "It has been hard for us to justify doing much more than constantly nagging (okay, 'chastising') through ROE and meetings, since they have not been really adversely impacted in terms of losses."[5] Another examiner concerned about the bank expressed her frustration this way: "I'm not up for the fight or the blood pressure problems. . . . It doesn't matter that we are right . . . They [Washington Mutual] aren't interested in our 'opinions' of the program. They want black and white, violations or not."[6]

FDIC evaluations of Washington Mutual were consistently more negative than those of the OTS, with LIDI ratings that showed a higher degree of bank risk than OTS CAMELS ratings indicated, creating friction between the two agencies. In 2006, OTS began to exclude FDIC staff from active bank oversight by limiting the number of staff allowed on site, temporarily disrupting FDIC access to office space and bank information, and refusing to allow FDIC to review loan files, even for higher risk loans that could affect the FDIC's assessment of insurance fees on Washington Mutual or pose a threat to the deposit insurance fund. In February 2007, OTS refused to allow the FDIC to review loan files to evaluate Washington Mutual's compliance with the NTM guidance. In April 2007, when FDIC officials raised the issue with the OTS West Region Director, he disclosed for the first time to the FDIC that OTS was allowing the bank additional time to comply with the guidance before conducting file reviews.

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[4] Email from Ron Cathcart to David Schneider, dated March 19, 2007, JPM_WM02571598.

[5] EIC Lawrence Carter email to West Region Deputy Director Darrel Dochow, Sept. 15, 2005, OTSWMS05-002 0000535.

[6] Email from Mary Suzanne Clark to EIC Ben Franklin, dated June 3, 2007, OTSWMS07-013 0002576.

When asked why the FDIC did not use its independent enforcement authority at Washington Mutual, one senior FDIC official told the Subcommittee that the agency had never used that authority because its fellow banking agencies would view an independent enforcement action as "an act of war" – an invasion of their regulatory turf that would irreparably harm the FDIC's working relationships with those agencies. Rather than take independent enforcement action, the FDIC had restricted itself to urging action by the primary bank regulator.

In July 2007, U.S. financial markets took a turn for the worse. Credit rating agencies suddenly downgraded hundreds of subprime mortgage backed securities, including over 40 Long Beach securities, and the subprime market collapsed. Washington Mutual was suddenly stuck with billions of dollars in unmarketable subprime loans and securities, and reported a $1 billion loss in the fourth quarter of 2007. In late February 2008, OTS downgraded Washington Mutual for the first time, changing its CAMELS rating from a 2 to a 3, signifying a troubled bank. At that point, consistent with its own practice, OTS should have concomitantly issued an enforcement action, but did not do so. Washington Mutual lost another $1 billion in the first quarter of 2008, and $3.2 billion in the second quarter. Its stock price plummeted, and depositors began withdrawing substantial sums.

In March 2008, at the urging of the FDIC, Washington Mutual invited potential buyers of the bank to review its information. Several institutions responded, and JPMorgan Chase made an offer which Washington Mutual turned down. The bank raised additional capital of $7 billion instead to reassure the market. In July 2008, IndyMac, another thrift with high risk loans, failed and was taken over by the FDIC. In response, Washington Mutual depositors began to withdraw more funds from the bank, eventually removing over $9 billion.

During this liquidity run on the bank, the FDIC formally challenged the OTS CAMELS rating, advocating a downgrade to a 4, indicating significant concern about the bank's long-term viability. The two agencies argued amongst themselves over the rating for weeks during the summer of 2008, as the bank's condition continued to deteriorate. Finally, in September 2008, as the FDIC's judgment of Washington Mutual's risk profile became more severe, the FDIC independently downgraded the bank to a 4. In response, mere days before the bank's failure, OTS agreed to the 4 rating. In addition, on September 7, 2008, OTS took its first formal enforcement action, requiring the bank to enter into a Memorandum of Understanding. Even then, the MOU did not require the bank to strengthen its lending or risk management practices, instead directing it to hire a consultant to revise its business plan. FDIC contributed the strongest measure, requiring development of a plan to increase the bank's capital. Apart from the capitalization plan, OTS' Chief Operating Officer described the MOU as a "benign supervisory document."

After Washington Mutual failed, the OTS Examiner in Charge at the bank expressed his frustration with the role played by the bank regulators, writing to an OTS colleague: "You know, I think that once we (pretty much all the regulators) acquiesced that stated income lending was a reasonable thing, and then compounded that with the sheer insanity of stated income, subprime, 100% CLTV [Combined Loan-to-Value], lending, we were on the figurative bridge to nowhere. Even those of us that were early opponents let ourselves be swayed somewhat by

those that accused us of being 'chicken little' because the losses were slow in coming, and let[']s not forget the mantra that 'our shops have to make these loans in order to be competitive'. I will never be talked out of something I know to be fundamentally wrong ever again!!"[7]

OTS' failure to act allowed Washington Mutual to engage in unsafe and unsound practices that cost borrowers their homes, led to a loss of confidence in the bank, and sent hundreds of billions of dollars of toxic mortgages into the financial system with its resulting impact on financial markets at large.

Findings. Federal bank regulators are supposed to ensure the safety and soundness of individual U.S. financial institutions and, by extension, the U.S. banking system. Washington Mutual was just one of many financial institutions that federal banking regulators allowed to engage in such high risk home loan lending practices that they resulted in bank failure and damage to financial markets. The ineffective role of bank regulators was a major contributor to the 2008 financial crisis that continues to afflict the U.S. and world economy today.

Based upon the Subcommittee's ongoing investigation, we make the following findings of fact regarding the role of federal regulators in the Washington Mutual case history.

(1) **Largest U.S. Bank Failure.** From 2003 to 2008, OTS repeatedly identified significant problems with Washington Mutual's lending practices, risk management, and asset quality, but failed to force adequate corrective action, resulting in the largest bank failure in U.S. history.

(2) **Shoddy Lending and Securitization Practices.** OTS allowed Washington Mutual and its affiliate Long Beach Mortgage Company to engage year after year in shoddy lending and securitization practices, failing to take enforcement action to stop its origination and sale of loans with fraudulent borrower information, appraisal problems, errors, and notoriously high rates of delinquency and loss.

(3) **Unsafe Option ARM Loans.** OTS allowed Washington Mutual to originate hundreds of billions of dollars in high risk Option Adjustable Rate Mortgages, knowing that the bank used unsafe and unsound teaser rates, qualified borrowers using unrealistically low loan payments, permitted borrowers to make minimum payments resulting in negatively amortizing loans (*i.e.*, loans with increasing principal), relied on rising house prices and refinancing to avoid payment shock and loan defaults, and had no realistic data to calculate loan losses in markets with flat or declining house prices.

(4) **Short Term Profits Over Long Term Fundamentals.** OTS abdicated its responsibility to ensure the long-term safety and soundness of Washington Mutual by concluding that

[7] OTS EIC Benjamin Franklin email to OTS Examiner Thomas Constantine, Oct. 7, 2008, Franklin_Benjamin-00034415.

short-term profits obtained by the bank precluded enforcement action to stop the bank's use of shoddy lending and securitization practices and unsafe and unsound loans.

(5) **Impeding FDIC Oversight.** OTS impeded FDIC oversight of Washington Mutual by blocking its access to bank data, refusing to allow it to participate in bank examinations, rejecting requests to review bank loan files, and resisting FDIC recommendations for stronger enforcement action.

(6) **FDIC Shortfalls.** FDIC, the backup regulator of Washington Mutual, was unable to conduct the analysis it wanted to evaluate the risk posed by the bank to the Deposit Insurance Fund, did not prevail against unreasonable actions taken by OTS to limit its examination authority, and did not initiate its own enforcement action against the bank in light of ongoing opposition by the primary federal bank regulators to FDIC enforcement authority.

(7) **Recommendations Over Enforceable Requirements.** Federal bank regulators undermined efforts to end unsafe and unsound mortgage practices at U.S. banks by issuing guidance instead of enforceable regulations limiting those practices, failing to prohibit many high risk mortgage practices, and failing to set clear deadlines for bank compliance.

(8) **Failure to Recognize Systemic Risk.** OTS and FDIC allowed Washington Mutual and Long Beach to reduce their own risk by selling hundreds of billions of dollars of high risk mortgage backed securities that polluted the financial system with poorly performing loans, undermined investor confidence in the secondary mortgage market, and contributed to massive credit rating downgrades, investor losses, disrupted markets, and the U.S. financial crisis.

(9) **Ineffective and Demoralized Regulatory Culture.** The Washington Mutual case history exposes the regulatory culture at OTS in which bank examiners are frustrated and demoralized by their inability to stop unsafe and unsound practices, in which their supervisors are reluctant to use formal enforcement actions even after years of serious bank deficiencies, and in which regulators treat the banks they oversee as constituents rather than arms-length regulated entities.

EXHIBIT 3

Statement of

John M. Reich
Former Director, Office of Thrift Suprvision
Former Vice Chairman, Federal Deposit Insurance Corporation

regarding

Washington Mutual Bank

Before the

U.S. Senate Permanent Subcommittee on Investigations
United States Senate

April 16, 2010

Good morning, Mr. Chairman, and Members of the Subcommittee, my name is John Reich. I retired in February 2009 after a 49 year career that included 25 years as a community bankers in Illinois and Florida – 12 years as CEO; followed by nearly 12 years in the U.S. Senate as a staff member with former Senator Connie Mack – the last three years as his chief of staff; and eight (8) years from January 15, 2001 to February 27, 2009 as a member of the Board of Directors of the FDIC that included five (5) years as an inside director serving as Vice Chairman. In 2005, the White House asked if I would move to the Office of Thrift Supervision to serve as its Director, and on August 5, 2005, I took the Oath as OTS Director and served in that capacity for three and one-half years until I retired on February 27, 2009.

When asked by the White House to move to OTS, I agreed to do so - with some level of concern. The banking industry was at the peak of a six year boom, recording successively increasing earnings records, and a decline seemed likely. In addition, OTS staffing numbers had experienced a decline in recent years, with no new hiring at any level, and a diminishing priority had been given to the compliance function, partially evidenced by the elimination of senior level Compliance and Consumer Protection management positions in Washington, DC.

At the beginning of my tenure as OTS Director, the agency had 899 employees, 4 Regional Offices, and no centralized Compliance and Consumer Protection function in the Washington, DC headquarters office. I spent a good portion of my first year becoming familiar with staff and structure throughout the agency, initiating a number of changes. I learned very early that OTS had operated its Regions with a high degree of decentralization and autonomy. This presented challenges with achieving consistency in carrying out our responsibilities, and we sought during the duration of my tenure to change the culture to more standardized procedures with greater direction and leadership from the headquarters office.

Much of this effort was facilitated by regular meetings of senior regional staff with senior Washington, DC management, usually, but not always, including me. These Regional Management Group (RMG) meetings occurred approximately 6 times a year, rotating among Regional offices around the country and the Washington, DC office. The meetings generally lasted two to two and one-half days, and the Agenda almost always included briefings from each Region on the current status of high risk cases. Thus, Washington Mutual Bank (WaMu) was formally discussed several times a year by OTS management, and in fact, during the last year of its existence,

was discussed informally on virtually a daily basis by Washington, DC management.

The Failure of Washington Mutual Bank

There are three points I would like to make concerning the failure of WaMu on September 25, 2008:

1. Though Asset Quality was a growing and continuing concern at WaMu, this was a liquidity failure, not a capital failure, brought on because of a $16.4 billion run on deposits, during the 10-day period preceding September 25th, with zero cost to the Deposit Insurance Fund or to taxpayers.
2. A majority of WaMu's mortgages were in California and Florida – two of the states hit with the most severe price declines.
3. WaMu suffered with a lack of diversity in its asset portfolio because of restrictions imposed by the HOLA statute under which savings institutions operate. Though they attempted asset diversity, all of the categories were in real estate related loans.

The liquidity failure at WaMu was induced by the decline in public confidence in large financial institutions, brought on by a series of prior significant events in 2008:

a. the March failure of Bear Stearns;
b. the July failure of IndyMac,
c. the early September government takeover of Fannie Mae and Freddie Mac;
d. the mid-September collapse of Lehman and bailout of AIG;
e. the September 21st weekend approval by the Fed for Goldman Sachs and Morgan Stanley to become bank holding companies.
f. On September 25th, WaMu was closed by OTS with zero cost to the Deposit Insurance Fund or to taxpayers.

These events were followed by:

a. The September 29th acquisition of Wachovia announced by Citi
b. The October 3rd acquisition of Wachovia announced by Wells Fargo
c. The October 3rd announcement by the FDIC of an increase in deposit insurance to $250,000 per depositor – an event which might have prevented the closure of WaMu if it had occurred a couple of weeks earlier.
d. The November 24th announcement of a government bailout of Citigroup (not the first, by the way)

Had WaMu's liquidity crises occurred 2 weeks later, there would have been no failure, as the FDIC's October 3rd announcement of an increase in deposit insurance to $250,000 per depositor would likely have mitigated the run on deposits which took place. Whether there would have been a later capital failure is pure conjecture. Furthemore, though I do not personally support the "Too Big to Fail" public policy which presently exists, the informal definition of which in reality was acknowledged and expanded when regulators publicly mandated a capital stress test of the 19 largest institutions in the country in 2009 with over $100 Million in Total Assets – WaMu again would have been prevented from failure. Under an inconsistent and moving public policy, WaMu was in fact a systemically important institution and should have been treated as such. It is noteworthy that Secretary Hank Paulson in his recent book, *On The Brink*, states (on page 293) that... "I see that, in the middle of a panic, this was a mistake.

WaMu, the sixth-biggest bank in the country, was systemically important." I agree with Secretary Paulson's revised view.

WaMu and OTS and Staffing

During my tenure at OTS, I believe WaMu at its peak size represented approximately 23% of the Total Assets in institutions supervised by OTS, and its assessment revenue represented approximately 12 to 13% of OTS's Total Assessment Revenue.

As Director of the agency, I never ever felt beholden to 'preserve' WaMu or any other chartered entity under our supervision for the purpose of preserving OTS's revenue stream or its standing as a separate regulatory agency.

I'm fully aware there is a belief - long held by some - that a supervising agency dependent on those it supervises for significant components of its revenue stream, may tend to supervise or administer with a lighter touch in order to preserve the future of the supervising agency. I understand why that belief is held – for in Material Loss Reviews and case studies throughout all of the Federal Banking Agencies over the years, including OTS, OCC, FDIC, and the Fed, there are examples cited indicating that examination information was known and recommendations made by examiners calling attention to serious weaknesses which if not corrected

could jeopardize an institution's safety and soundness. In a number of instances in recent years, including WaMu, these prophecies came true, though in WaMu's case, I strongly maintain the immediate cause of OTS's decision to close the institution and appoint the FDIC as receiver was not a depletion of capital, but a depletion of liquidity.

Some opinions to the contrary, I firmly believe that size of an institution and its proportion of an agency's revenue stream are irrelevant factors. It is also an insult to the integrity of nearly 5,000 bank examiners and professional regulators around the country to suggest their priorities and motivations would be anything other than to provide for the safety and soundness of our nation's financial institutions. Anyone aware of the psyche of the typical career bank examiner or career regulator would understand this view. These are dedicated public servants committed to their mission, and are often described by bankers as overly-zealous.

OTS, though a small agency, had sufficient resources dedicated to the examination of WaMu, including resident examiners and assigned specialists. In 2005, at the time I became Director of OTS, the agency was performing full-scope annual 'point-in-time' examinations. In 2007, OTS moved to a 'continuous' examination process, issuing 'findings memoranda"

to bank management during the year, and including these as necessary in a final Report of Examination.

With regard to Agency staffing, we restored a hiring and internal professional development program, and over the period 2005 to 2009, with approximately 45 to 50 retirements per year, OTS recruited well over 200 new employees, and total staffing stood at approximately 1,030 employees at the time of my retirement, with an approved staffing level of 1,060. In addition, we almost immediately restored and staffed a centralized Compliance and Consumer Protection management function in Washington, DC, coordinating compliance and consumer protection through Regional Compliance and Consumer Protection managers and gave increased emphasis on compliance and consumer protection examinations. Many new hires were directed into the compliance examiner training program.

OTS Supervision of WaMu

I believe the record (Reports of Examination) and any external Inspector General reviews of OTS's work will show that OTS examiners were diligent and rigorous in the conduct of their work and in identifying matters requiring attention. Many issues and weaknesses were brought to bank management's attention during the examination process, not waiting for the production of a Report, but communicated through periodic

memorandums which contained findings classified as Criticisms, Recommendations, or Observations.

Asset Quality was an underlying concern at WaMu monitored continuously by OTS examiners and highlighted in Reports of Examination. As worldwide liquidity markets crashed in August, 2007, considerable losses developed in WaMu's loan portfolio because of stated income, low doc and no doc loans. For some time I had been concerned about these types of loans. As a former banker, these concepts were anathema to me, having grown up in an era when loans were made, regardless of type, based upon the 5 C's of Credit: Character, Collateral, Capacity, Capital, and Conditions. My greatest regret as a regulator is that I did not act to eliminate these types of loans. I was influenced by the argument that these types of loans had been successfully underwritten and administered by institutions on the West Coast of the United States for more than 20 years with minimal loss experience. As simplistic as it may seem, regardless of size of institution, if the 5 C's of credit administration had been followed in the past, and if they are utilized as fundamental components of lending policies in the future, any meltdown such as we have recently experienced will be far less traumatic.

Long Beach Mortgage Company (LBMC) was a source of concern from the bottom to the top of OTS management because of its subprime

mortgage practices. My recollection is that OTS insisted that certain underwriting improvements take place before WaMu was permitted to integrate LBMC into the bank. In the second half of 2007, WaMu ceased making subprime loans, though – in my recollection - not before this component of their portfolio represented a little over 10% of their entire portfolio.

Relationship with FDIC

As previously mentioned, I spent five of my eight years as a regulator as an inside Director within the FDIC, serving as Vice Chairman for several years, and as Acting Chairman for several weeks during 2001 prior to Donald Powell taking the Oath as Chairman. During this period, the failure of Superior Bank FSB, Hinsdale, Illinois occurred. The institution was supervised by OTS, and it became necessary for me to make the then-OTS Director aware that OTS's Regional Office in Chicago had declined FDIC's request to participate in a joint examination. My call resulted in the reversal of OTS's decision, but it was too late to preserve the institution. I cite this experience to indicate that I am well aware of the FDIC's need for timely examination visits and information, and am generally predisposed to agree to such requests.

Part of the tension is attributable to the composition of the FDIC Board – currently five members, with three inside Director positions and two outside Director positions – the Comptroller of the Currency and the Director of the OTS. I believe a diverse board is an asset. There are occasional differences of opinion on policy issues which come before the FDIC Board resulting in a 3-2 split. The inside directors may think the outside directors are viewing issues from their own independent agency's parochial point of view and not from the standpoint of what is in the best interests of the FDIC and its Deposit Insurance Fund. Conversely, the outside directors may believe the inside directors view issues from an overly narrow perspective and do not always appreciate the potential for unintended consequences and negative impacts on institutions the FDIC does not supervise and about which they may not have an informed perspective.

Some Members of Congress seem to believe that disagreement among regulators is unseemly and an indication the process is broken and needs to be changed. I could not disagree more with that view. Like the U.S. Congress, differences of opinion are desirable, productive, and usually result in the best policy being adopted.

In the exercise of its backup supervisory authority, the FDIC has the unfettered right to examine any 3, 4,or 5 rated institution. For institutions

rated 2 or higher, the FDIC must have the consent of the primary federal regulator in order to perform or participate in an examination of an institution that it does not directly supervise. These backup policies and practices exist for basically four reasons in my opinion:

1. The statutory authority of the primary supervisory gives that supervisor the responsibility for the oversight of the institution.

2. The presence of another supervisory authority creates room for confusion among the staff of the financial institution over what agency really is in charge.
3. Past experience has highlighted situations that occur among financial institutions over the additional regulatory burden presented when an additional agency's staff is on site making requests, sometimes duplicative.

4. Finally, the presence of FDIC staff in an institution for which it is not the primary federal regulator heightens concern and alarm within an institution and a community if it becomes known that the FDIC is on site.

Conclusion

WaMu failed because of an acute run on deposits totaling $16.4 Billion during the 10 days preceding September 25, 2008, resulting in backup liquidity lines at the Federal Home Loan Bank of Seattle, the Federal Home Loan Bank of San Francisco, and the Federal Reserve Bank of San Francisco being reduced or pulled. Its financial condition was exacerbated over the years by the fact it operated under an obsolete HOLA statute which essentially mandates two-thirds of a savings institution's assets be invested

in real estate related loans. Hence by definition, a savings institution's portfolio is a concentration of assets in what has now proven to be a vulnerable component of our economy – the housing market.

In my opinion, the current thrift charter is obsolete. Savings institutions need the flexibility for greater asset diversity, and Congress needs to provide for that capability in any reform legislation. In addition, the competitive landscape needs to be leveled from a regulatory point of view. We cannot continue to have an environment where highly regulated institutions compete against lesser or unregulated entities for the same or similar financial products.

EXHIBIT 4

☐ EXPEDITE
✓ No hearing set
☐ Hearing is set:
Date:
Time.
Judge/Calendar:

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF THURSTON

MICHAEL WILLINGHAM and ESOPUS CREEK VALUE LP,

Plaintiffs,

vs.

WASHINGTON MUTUAL, INC., a Washington corporation,

Defendant.

No.

[Clerk's Action Required]

COMPLAINT TO COMPEL SHAREHOLDERS' MEETING

Plaintiffs Michael Willingham and Esopus Creek Value LP ("Plaintiffs"), shareholders of defendant Washington Mutual, Inc. ("Defendant" or "WaMu"), bring this action pursuant to RCW 23B.07.030 to compel a WaMu shareholders' meeting.

I. NATURE OF ACTION

1. This action is brought as a result of Defendant's failure, for more than two years, to convene its annual shareholders' meeting.

2. During the last two years, defendant, a publicly traded company, also has failed to submit certain annual, quarterly, and other periodic reports, including financial statements, required to be filed with the U.S. Securities and Exchange Commission ("SEC").

3. By failing to hold an annual shareholders' meeting, Defendant has deprived Plaintiffs and other shareholders from nominating and voting for WaMu directors.

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4. Plaintiffs seek an order pursuant to RCW 23B.070.030(1)(a), summarily compelling Defendant to hold the required shareholders' meeting on a date certain, to be fixed by the Court, in accordance with Washington law, and to issue additional orders pursuant to RCW 23B.070.030(2).

II. PARTIES

5. Michael Willingham is an individual who resides in Pittsburg, Texas.

6. Michael Willingham is the beneficial owner of approximately 1,030,000 shares of common stock in WaMu.

7. Michael Willingham is a shareholder of WaMu.

8. Michael Willingham is entitled to vote in the election of directors of WaMu at an annual meeting.

9. Esopus Creek Value LP ("Esopus") is a limited partnership organized and existing under the laws of the State of Delaware.

10. Esopus maintains its principal place of business at 150 JFK Parkway, Suite 100, Short Hills, New Jersey 07078.

11. Esopus is the beneficial owner of the following equity securities of WaMu: approximately 100,000 shares of common stock and approximately 15,000 shares of preferred stock.

12. Esopus is a shareholder of WaMu.

13. Esopus is entitled to vote in the election of directors of WaMu at an annual meeting.

14. WaMu's 2007 fiscal year follows the calendar year, and ended on December 31, 2007.

15. WaMu's last shareholder meeting was held on or about April 20, 2008.

16. WaMu is a corporation organized and existing under the laws of the State of Washington.

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17. WaMu maintains its registered office in Thurston County, Washington.

18. WaMu's registered agent for service of process in Washington is Corporation Service Company, 300 Deschutes Way SW, Suite 304, Tumwater, Washington 98501.

19. WaMu is a savings bank holding company and the owner of Washington Mutual Bank, which was the largest savings and loan association in the United States of America.

20. On September 25, 2008, the United States Office of Thrift Supervision ("OTS") seized Washington Mutual Bank from WaMu and placed it into the receivership of the Federal Deposit Insurance Corporation ("FDIC").

21. The FDIC sold WaMu's banking subsidiaries (minus unsecured debt or equity claim) to JP Morgan Chase for $1.9 billion.

22. The holding company, WaMu, was left with $33 billion in assets and $8 billion in debt after being stripped of its banking subsidiary by the FDIC.

23. On September 26, 2008, Defendant filed for Chapter 11 voluntary bankruptcy in Delaware.

24. On April 21, 2010, the Honorable Mary Walrath held that the automatic bankruptcy stay did not apply to bar shareholders from exercising their corporate governance rights.

III. VENUE AND JURISDICTION

25. This court has jurisdiction over this matter pursuant to RCW 23B.07.030 and Washington law.

26. WaMu's registered office is in Thurston County, Washington.

27. Venue is proper in Thurston County.

IV. CAUSE OF ACTION

28. Washington statute, at RCW 23B.07.030(1), provides that the superior court of the county in which a corporation's registered office is located may, after notice to the

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corporation, summarily order a meeting to be held: (a) On application of any shareholder of the corporation entitled to vote in the election of directors at an annual meeting, if an annual meeting was not held within the earlier of six months after the end of the corporation's fiscal year or fifteen months after its last annual meeting or approval of corporate action by shareholder consent in lieu of such a meeting; or (b) On application of a shareholder who executed a demand for a special meeting valid under RCW 23B.07.020, if: (i) Notice of the special meeting was not given within thirty days after the date the demand was delivered to the corporation's secretary; or (ii) The special meeting was not held in accordance with the notice.

29. Plaintiffs are shareholders of WaMu, and Plaintiffs are entitled to vote in the election of directors of WaMu at an annual meeting.

30. WaMu's registered office is in Thurston County, Washington.

31. WaMu's fiscal year runs from January 1 to December 31.

32. WaMu has not held a shareholders' meeting since April 20, 2008.

33. An annual WaMu shareholders' meeting was not held within six months after the end of WaMu's 2008 fiscal year.

34. An annual WaMu shareholders' meeting was not held within fifteen months after its last annual meeting or approval of corporate action by shareholder consent in lieu of such a meeting.

35. Washington statute, at RCW 23B.07.030(2), also provides that the court may, after notice to the corporation, fix the time and place of the meeting, determine the shares and shareholders entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the manner, form, and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting, or direct that the votes represented at the meeting constitute a quorum for

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approval of those matters, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

36. WaMu has not set a date for an annual meeting of shareholders in 2010.

37. WaMu did not hold an annual meeting within 15 months after its last annual meeting.

38. WaMu has not taken any action by written consent to elect WaMu directors in lieu of an annual meeting.

39. WaMu should be compelled to schedule and hold an annual shareholders' meeting on a date certain, pursuant to RCW 23B.07.030.

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order:

A. Directing Defendant to promptly convene and hold an annual shareholders' meeting for the nomination and election of directors;

B. Designating the time and place of the annual meeting, as well as the form of notice of the meeting to be delivered to all shareholders by Defendant; and

C. Entering further orders as necessary to accomplish the purposes of the meeting.

Dated this 26th day of April, 2010.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 34211
Ben W. Markovich, WSBA #13580
Colin Folawn, WSBA #34211
Attorneys for Plaintiffs

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EXHIBIT 5

Hearing Transcript Excerpts

EXHIBIT 5a

January 28, 2010
Pages 88-90

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
WASHINGTON MUTUAL, INC., *et al.*,	.	Case No. 08-12229(MFW) (Jointly Administered)
	.	January 28, 2010 4:00 p.m.
Debtors.	.	(Wilmington)
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	.	
Plaintiff,	.	
v.	.	Adv.Proc.No. 09-50551(MFW)
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.,	.	
Plaintiffs,	.	
v.	.	Adv.Proc.No. 09-50934(MFW)
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	.	
Defendant.	.	

MS. TAGGART: We do have to show that the discovery that we request relates to the Debtors and that it is necessary for our investigation.

THE COURT: Right. Why is it necessary?

MS. TAGGART: It is possible - -

THE COURT: For an investigation?

MS. TAGGART: It is possible because we don't yet have the third party documents that those may be sufficient to determine that. What we know is that the FDIC has relevant documents to determining whether there were claims in a very material way. I know I go back to it, but for example, that indemnification clause is really at the heart of whether or not JPMorgan believed that it may be exposed to the very tort claims we're pursuing. Without, right now, because we still don't have the documents from third parties or really correspondence with third parties, I can't tell you whether once we get those, those will be sufficient. But I know the FDIC has relevant documents that will be important to evaluating the merits of these claims. And I believe that meets the standard that's set out for Rule 2004 examinations of third parties

THE COURT: Well, I'm going to deny the Debtors' request, and here's why. I did grant the 2004 discovery. Against JPMC. To allow the Debtor to explore whether the Debtor did have any potential claims against it under a

business tort theory. Despite the arguments that the Debtor could get that information by other means. I felt the 2004 did allow the Debtor to conduct that discovery. But quite frankly, I think issuing subpoenas against dozens of third parties just goes too far. I don't think that's an appropriate use of Rule 2004. I think the Debtor has a dual burden in using 2004. First that it's absolutely necessary that we do an investigation, that we are unable, at this point, to determine we have a claim, that under Rule 11 we can file against JPMC. Now the Debtor has done extensive discovery and gotten extensive numbers of documents from JPMC. I'm not hearing that the Debtor does not believe it has a claim against JPMC or cannot determine that it has a claim against JPMC at this point. But the second prong is the Debtor has to prove that it is absolutely necessary to use Rule 2004 because the Debtor cannot obtain these documents any other way, and I'm not convinced at this point that that's correct. The Debtor already has obtained some voluntarily, the Debtor has obtained extensive discovery from JPMC. What I'm hearing with respect to the FDIC specifically is that really, looking at the discovery request and arguments of counsel, it's getting awfully close to claims that they may have against the FDIC itself. And I think that fact leads me to believe that specifically asked of them, this is really trying an end run against, around the rules

that would otherwise comply with the Federal Rules of Civil Procedure regarding discovery of claims between parties that are in a litigation posture. Again, you're getting documents voluntarily from the third parties. You're getting responses under Freedom of Information, and through other administrative means. I just do not see that the Debtor is prejudiced at this point from not being allowed to issue subpoenas against third parties that go on for paragraph after paragraph, not narrowly tailored to specific claims of a business tort against JPMC. So I'm not prepared to enter the order on the Debtors' motion. Do we want to take another short break?

MR. ROSEN: Well Your Honor, I just wanted to apprise the Court as to where we are. We have one additional matter on the agenda, and I have been informed that all told, it will probably take about an hour and a half to handle that matter.

THE COURT: Okay.

MR. ROSEN: We had informed the Court of that possibility and suggested that we have a Washington Mutual calendar tomorrow at 10:30 on a discrete matter, but that matter should take probably an hour and a half to two hours. If the Court recalls, it's the continuation and hopefully ending of the HF Almonton (phonetic) matter. I don't, and we had asked the Court at that time whether the Court would be

EXHIBIT 5b

April 21, 2010
Pages 64-65

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229 (MFW)

Adv. Case No. 10-50731 (MFW)

Adv. Case No. 10-50788 (MFW)

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- -x

OFFICIAL COMMITTEE OF

EQUITY SECURITY HOLDERS,

Plaintiff,

-against-

WASHINGTON MUTUAL, INC.,

Defendant.

- -x

UNION BANK, N.A.,

Plaintiff,

-against-

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

et al.,

Defendants.

- -x

U.S. Bankruptcy Court

824 North Market Street

Wilmington, Delaware

April 21, 2010

11:31 AM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

wanting to milk more money out of a settlement. The courts have clearly held that wanting that is permissible.

The Manville II case, which Mr. Rosen talks about, is a case that was tried on the merits. And the court in the opinion quotes the trial testimony of the members of the equity committee and the shareholders. It tot -- they don't have anything that resembles that here. There's no suggestion that there's anything that resembles that here where the sole desire was to prevent reorganization at all, where they explicitly testified to that.

Mr. Rosen says that Marvel is distinguishable, but I listened to see how he was going to distinguish it and never heard that. I suggest that Marvel -- the Court in Marvel is owed great deference by this Court and it cannot be distinguished. They may not like it, but it is the law of this district. Thank you, Your Honor.

THE COURT: Anything further?

MR. ROSEN: Your Honor, I would only point out something Mr. Johnson said, and like it or not, as Mr. Susman says, it is the fact. And any actions being undertaken to disrupt or jeopardize the recoveries to creditors, actually the courts have determined to be the most important thing. And what we know now is that based upon the view of the equity committee, Mr. Willingham, and the hundreds of people who filed letters as his constituents, they don't like the settlement.

And unfortunately, in doing so they are potentially disrupting or jeopardizing the recovery to creditors.

Mr. Susman also made a point about Marvel II (sic) and being a trial on the merits. That's exactly what we suggest. I thought he was making my pitch for me there, Your Honor. We believe that there has to be that discovery. We believe there has to be that hearing. We believe that we need to have the members of the equity come in. We believe we need to know whether or not they believe that they are being appropriately or could be appropriately represented in the plan process. I think he said yes, and I think that's the most important thing for the Court. Marvel, when you look at what Judge McKelvie said, he focused on those things that I pointed out in the end: insolvency, clear abuse. He did talk about other things, I grant you that, but he said that these issues were countervailing factors that had to be considered. All we're asking for, Your Honor, is the opportunity for this Court to be able to consider those very important issues. Thank you.

(Pause)

THE COURT: Well, let me say this. I think that it is clear, not only under Marvel but under Johns-Manville itself, that the automatic stay does not bar shareholders from exercising their corporate governance rights. It just is not at all encompassed by 362. It's well settled law that the rights of shareholders to compel a shareholders meeting for

EXHIBIT 5c

April 6, 2010
Page 113

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229 (MFW); Adv. Case No. 10-50731 (MFW)

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- -x

OFFICIAL COMMITTEE OF

EQUITY SECURITY HOLDERS,

Plaintiff,

-against-

WASHINGTON MUTUAL, INC.,

Defendant.

- -x

U.S. Bankruptcy Court

824 North Market Street

Wilmington, Delaware

April 6, 2010

1:59 PM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

release, but it was available for inquiries. And I think it basically speaks for itself. And I'd like to read a paragraph from that statement for the record.

This was -- on March 26th, as the Court knows, the debtor filed a plan of reorganization and a proposed disclosure statement and settlement agreement. The settlement agreement was a proposed settlement agreement, and it was described as such in those filings; and the disclosure statement indicated we hadn't yet finished it, but that we -- I think the debtors said they were hopeful that that would happen soon.

"The FDIC is working with all parties involved to reach agreement with respect to all terms of the proposed settlement. The plan disclosure statement and settlement agreement that were filed today do not reflect the continuing discussions among the parties. Once finalized, the agreement is subject to approval by the FDIC's board of directors."

In no part of that statement, Your Honor, did the FDIC say that it rejected this settlement or it no longer supports the settlement. The FDIC continues to discuss open points with all parties in the hope that we can resolve those points, as is true in every complicated negotiation; reach a definitive agreement; present that to our board of directors and get it approved. That is our firm hope. But we aren't there yet. So whatever conclusions Mr. Flaschen wants to draw, that's the record.

EXHIBIT 5d

May 5, 2010
Page 96

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229 (MFW)

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

May 5, 2010

10:30 AM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

THE COURT: Good afternoon.

MR. CLARKE: John Clarke from DLA Piper, for the FDIC receiver.

As the Court is aware, we haven't taken a position either for or against this motion. I just needed to respond to Mr. Rosen's comments. I would refer back to the comments that I made at the omnibus hearing on April 6 as to the status. We don't have any changed status to report from those comments, and the record stands for itself as to what I said then. Thank you, Your Honor.

THE COURT: You want to remind us what you said then?

MR. CLARKE: We said that there were still significant open issues with the parties to the proposed settlement; that we continued to have discussions with those parties; that we had not yet resolved those issues; and there are other conditions to the settlement that still haven't been satisfied, but we're working with the goal of trying to achieve all that and get the proposed settlement agreed to and presented to this Court.

THE COURT: Thank you.

MR. CLARKE: Thank you.

THE COURT: Well, let me make my ruling. First, a preliminary issue. The filing of a motion to appoint a trustee will not eliminate the need for the Court to address the equity committee's motion to appoint an examiner. I made that point

EXHIBIT 5e

April 6, 2010
Page 143

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229 (MFW); Adv. Case No. 10-50731 (MFW)

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- -x

OFFICIAL COMMITTEE OF

EQUITY SECURITY HOLDERS,

Plaintiff,

-against-

WASHINGTON MUTUAL, INC.,

Defendant.

- -x

U.S. Bankruptcy Court

824 North Market Street

Wilmington, Delaware

April 6, 2010

1:59 PM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

you're saying, I think there's a lot of factual issues, actual fraud, I don't need to see Mr. Anker's podium speech put down on a piece of paper, my judicial common sense says this is good enough, I'll sit down on those points.

I can't sit down on a brand new claim filed by this well represented claimant a year after the bar date when we've got a Chapter 11 plan on file. There's clear Third Circuit authority on this, Your Honor. You can't let him out of this problem he's found himself in. If he wants to file a motion under Pioneer, I'll be happy to come back and argue it but he can't do it this way. Your Honor, you can't let him do it with a brief.

THE COURT: Well, as far as the Pioneer issue, I'll decide that as part of the merits of the claim. I'm not going to preclude the debtor from raising that that it's not included in the claim. But I will not require modification or amendment of the proof of claim. I think there is -- the claimants have stated a claim for actual fraud. Again, I don't know what more they could've stated. I think the parties are not going to be sandbagged by their claims.

So, I would encourage the parties to talk and get together a scheduling order.

MR. ANKER: And we'll discuss that on the 16th, Your Honor? Is that how you'd like to proceed?

THE COURT: Yes.

EXHIBIT 5f

May 5, 2010
Pages 94, 96

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229 (MFW)

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

May 5, 2010

10:30 AM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

was within the scope of the work that was done by the creditors' committee.

In conclusion, Your Honor, we want to maximize the value of the estates, and that is also the role of the equity committee. It is in the interests of their constituents, and they should be working toward that goal. An examiner is neither appropriate nor is it necessary for that purpose. Thank you.

MR. ROSEN: Your Honor, very briefly, please. A lot of -- a lot has been said by the equity committee counsel, I think hoping that something will stick on the wall here. But we cannot help Your Honor that Venable was dismissed as counsel. We cannot help that we met with Venable and provided them with information, told them the merits and the deficiencies of claims and causes of action. We cannot help that Venable perhaps has not provided that information to Susman Godfrey at this time.

With respect to the FDIC, Your Honor, a lot seems to be made that the FDIC has not executed the proposed settlement agreement, Your Honor. As the FDIC has said, and we have said several times subsequently, Your Honor, to this Court, there is no dispute that we have an agreement; it's just the final words are still being worked on with the FDIC. And we hope and we expect to file something with the Court in the very near future, along the lines of an amended disclosure statement

THE COURT: Good afternoon.

MR. CLARKE: John Clarke from DLA Piper, for the FDIC receiver.

As the Court is aware, we haven't taken a position either for or against this motion. I just needed to respond to Mr. Rosen's comments. I would refer back to the comments that I made at the omnibus hearing on April 6 as to the status. We don't have any changed status to report from those comments, and the record stands for itself as to what I said then. Thank you, Your Honor.

THE COURT: You want to remind us what you said then?

MR. CLARKE: We said that there were still significant open issues with the parties to the proposed settlement; that we continued to have discussions with those parties; that we had not yet resolved those issues; and there are other conditions to the settlement that still haven't been satisfied, but we're working with the goal of trying to achieve all that and get the proposed settlement agreed to and presented to this Court.

THE COURT: Thank you.

MR. CLARKE: Thank you.

THE COURT: Well, let me make my ruling. First, a preliminary issue. The filing of a motion to appoint a trustee will not eliminate the need for the Court to address the equity committee's motion to appoint an examiner. I made that point

EXHIBIT 6

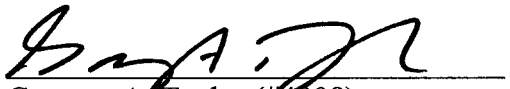
Assets sold to JPMorgan Chase Bank Pursuant to the Proposed Global Settlement Agreement	Citation to Disclosure Statement	Citation to Global Settlement Agreement
Trust Preferred Securities • Washington Mutual Preferred (Cayman) I Ltd. 7.25% Perpetual Non-Cumulative Preferred Securities, Series A-1 • Washington Mutual Preferred (Cayman) I Ltd. 7.25% Perpetual Non-Cumulative Preferred Securities, Series A-2 • Washington Mutual Preferred Funding Trust I Fixed-to-Floating Rate Perpetual Non-Cumulative Trust Securities • Washington Mutual Preferred Funding Trust II Fixed-to-Floating Rate Perpetual Non-Cumulative Trust Securities • Washington Mutual Preferred Funding Trust III Fixed-to-Floating Rate Perpetual Non-Cumulative Trust Securities • Washington Mutual Preferred Funding Trust IV Fixed-to-Floating Rate Perpetual Non-Cumulative Trust Securities	10	14, 15, 17, 18
WMI Medical Plan – Washington Mutual, Inc. Flexible Benefits Plan and certain other employee welfare plans and arrangement obligations and any outstanding checks made out to or received by WMI or otherwise for the benefit of the Medical Plan, including pharmacy rebates in connection with contracts associated with the Medical Plan currently estimated to be $775,000	10, 49	14, 16, 31, 32, Ex. L
JPMC Rabbi Trusts • Two rabbi trust arrangements in connection with thirteen non-qualified deferred compensation plans for employees of Great Western Financial Corporation • One rabbi trust arrangement in connection with two non-qualified deferred compensation plans for employees of American Savings Bank, F.A. • One rabbi trust arrangement in connection with two non-qualified deferred compensation plans for employees of Providian Financial Corporation • Three rabbi trust arrangements in connection with seven non-qualified deferred compensation plans for employees of Dime Inc. and Dime Bank • One rabbi trust arrangement in connection with three non-qualified deferred compensation plans for employees of Coastal Federal Bank, FSB • One rabbi trust arrangement in connection with one non-qualified deferred compensation plan for employees of Pacific First Federal Savings Bank	10, 47, 48, 49	14, 32, 33, 34, Ex. M

JPMC Policies • BOLI-COLI policies – certain Bank Owned and Corporation Owned Life Insurance polices and the proceeds thereof • CCBI split dollar policies	10, 46, 47, 48	14, 32, 33, Ex. N, O
WaMu Pension Plan – defined benefit plan sponsored by WMI and all of WMI's interest in the assets contained in any trusts or otherwise associated with such plan	10, 46	14, 16
Lakeview Pension Plan (Retirement Income Plan for the Salaried Employees of Lakeview Savings Bank) – defined benefit plan sponsored by WMI and all of WMI's interest in the assets contained in any trusts or otherwise associated with such plan	10, 46	10, 14
Anchor Litigation – proceeds of litigation commenced by Anchor Savings Bank FSB against the United States Government for breach of contract arising out of FIRREA and for unspecified damages involving supervisory goodwill related to its acquisition of several troubled savings institutions from 1982-1985	10, 37	14, 37
Visa Shares – 3.147 million Class B shares of Visa Inc. *VISA Strategic Agreement* – Amended and Restated Strategic Agreement dated September 26, 2005 between Providian Financial Corporation and its subsidiaries and VISA U.S.A. Inc.	10, 52, 53	14, 15, 39, 40
Intellectual property – certain trademarks, patents, patent applications, domain names, copyrighted material and internet protocol addresses • Transferred Intellectual Property – as listed on Exhibit W to the Global Settlement Agreement • WMB Intellectual Property – as listed on Exhibit X to the Global Settlement Agreement • Unidentified Intellectual Property – trademarks, patents, domain names and copyrighted materials that were used by WMB by license or otherwise, or were available for WMB's use, prior to the Petition Date, but not otherwise listed on the exhibits to the Global Settlement Agreement	10, 55	14, Exs. W, X
JPMC Wind Investment Portfolio LLC – WMI Investment's indirect membership interest in a portfolio holding company, JPMC Wind Investment Portfolio LLC, which owns an equity interest in certain wind investment projects	10, 52	14, 41, 42

Bonds – certain bonds issued by certain insurance or bonding companies on behalf of WMB and FSB, pursuant to that certain general agreement of indemnity dated June 14, 1999 executed and delivered by WMI	10	7, 14, 44, 45, Ex. D

CERTIFICATE OF SERVICE

I, Gregory A. Taylor, hereby certify that on May 13, 2010, I caused one copy of the foregoing document to be served upon the parties on the attached service list in the manner indicated.



Gregory A. Taylor (#4008)

Washington Mutual, Inc., Case No. 08-12229 (MFW)
Service List for Objection to Disclosure Statement

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