

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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

**DECLARATION OF CHARLES EDWARD SMITH
IN SUPPORT OF ENTRY OF AN ORDER CONFIRMING THE
SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS
PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE**

I, Charles Edward Smith, pursuant to 28 U.S.C. § 1746, hereby declare that the following is true and correct to the best of my knowledge, information and belief:

1. I currently serve as Executive Vice President, General Counsel & Secretary of Washington Mutual, Inc. (“WMI”), a holding company incorporated in the State of Washington, which is the direct parent of WMI Investment Corp. (“WMI Investment”), a Delaware corporation which served as an investment vehicle for WMI and holds a variety of securities. WMI and WMI Investment are debtors and debtors in possession (the “Debtors”) in the above-captioned chapter 11 cases. I have been employed by WMI since November 17, 2008. In my capacity as Executive Vice President, General Counsel & Secretary of WMI, I am generally familiar with the Debtors’ day-to-day operations, businesses, and financial affairs. In addition, I have been involved in the process of formulating the Plan (as defined below) and the negotiation of the Global Settlement Agreement (as defined below) underlying the Plan.

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.



2. On September 25, 2008 (the “Receivership Date”), the Director of the Office of Thrift Supervision (“OTS”), by order number 2008-36, appointed the Federal Deposit Insurance Corporation (“FDIC-Receiver”) as receiver for Washington Mutual Bank (“WMB”), the FDIC Receiver purportedly sold substantially all the assets of WMB, including the stock of Washington Mutual Bank fsb (“WMBfsb”), to JPMorgan Chase Bank, National Association (“JPMC”) pursuant to that certain *Purchase and Assumption Agreement, Whole Bank*, dated as of September 25, 2008.

3. Prior to the Receivership Date, I was employed by WMB for a period of approximately six (6) years and held the position of First Vice President, Assistant General Counsel and Team Lead (Corporate Finance). In that regard, I was responsible for supporting certain of the ongoing operations of WMB, as well as WMI and various other affiliated and subsidiary entities. As a result of my experience at WMB and WMI, I am generally knowledgeable about the business operations of these entities prior to the Receivership Date.

4. I submit this Declaration in support of confirmation of the *Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, dated October 6, 2010 (as may be modified, the “Plan”).² The Plan embodies, and is premised upon, that certain Amended and Restated Settlement Agreement, dated as of October 6, 2010, by and among the Debtors, JPMC, the FDIC Receiver and in its corporate capacity (“FDIC Corporate”), the official committee of unsecured creditors (the “Creditors’ Committee”) and certain other creditors (as it may be subsequently amended, the “Global Settlement Agreement”), setting forth the compromise and settlement between these parties. I am familiar with the terms

² Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed to such terms in the Plan or in the *Memorandum of Law in Support of Confirmation of the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, filed contemporaneously herewith.

and provisions of the Plan, the related disclosure statement for the Plan (the “Disclosure Statement”), the documents comprising the Plan Supplement, as well as the Global Settlement Agreement. In addition, I have reviewed the requirements for confirmation of the Plan pursuant to section 1129 of the Bankruptcy Code (or have reviewed such requirements with counsel).

5. Except as otherwise indicated, all facts set forth in this Declaration are based upon my personal knowledge, my review of relevant documents, or my experience, knowledge, and information concerning the Debtors’ operations. If called upon to testify, I can and will testify competently to the facts set forth herein.

A. Background of Cases, the Debtors, the Plan and Summary of the Settlement

6. On September 26, 2008 (the “Commencement Date”), each of the Debtors commenced with this Court a voluntary case pursuant to chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On October 3, 2008, the Court entered an order, pursuant to Bankruptcy Rule 1015(b), authorizing the joint administration of the Debtors’ chapter 11 cases.

7. On October 15, 2008, the United States Trustee for the District of Delaware (the “U.S. Trustee”) appointed the Creditors’ Committee. On January 11, 2010, the U.S. Trustee appointed the Equity Committee. By agreed order, dated July 22, 2010, the Court directed the U.S. Trustee to appoint an examiner to investigate certain matters. On July 26, 2010, the U.S. Trustee appointed Joshua R. Hochberg of McKenna Long & Aldridge LLP as examiner (the “Examiner”).

8. Prior to the Commencement Date, WMI operated as a savings and loan holding company that owned WMB and, indirectly, such bank’s subsidiaries, including

WMBfsb. WMI still owns all of the outstanding stock of WMB, and WMI also has certain non-banking, non-debtor subsidiaries (the “Non-Debtor Subsidiaries”). Like all savings and loan holding companies, WMI was subject to regulation by the OTS. WMB and WMBfsb, in turn, like all depository institutions with federal thrift charters, were also subject to regulation and examination by the OTS. In addition, WMI’s subsidiaries were overseen by various federal and state authorities, including the Federal Deposit Insurance Corporation (the “FDIC”).

9. On October 6, 2010, the Debtors filed the Plan and the Disclosure Statement. The Plan embodies, and is premised upon, a global compromise and settlement of certain issues in dispute among the Debtors, the FDIC, and JPMC, as set forth in the Global Settlement Agreement. On October 21, 2010, the Court entered an Order approving the Disclosure Statement as containing “adequate information” within the meaning of section 1125 of the Bankruptcy Code and establishing December 1, 2010 as the date for the hearing on confirmation of the Plan.

10. I am submitting this Declaration in support of confirmation of the Plan, by providing factual evidence necessary to meet and satisfy certain confirmation standards and requirements.³ Specifically, this Declaration outlines (1) the conditional exchange by which certain hybrid securities (the “Trust Preferred Securities”) were automatically exchanged for interests in WMI’s Perpetual Non-Cumulative Fixed and Fixed-to-Floating Rate Preferred Stock in Series, I, J, L, M and N, as applicable (the “WMI Preferred Shares”); (2) the agreement embodied in the Global Settlement Agreement and the Plan with respect to the Debtors’ right to a priority recovery of certain proceeds of the Washington Mutual Financial Institution Blended

³ Other factual elements in support of confirmation not addressed herein are provided in one or more of the other declarations filed contemporaneously herewith.

Liability Program for the policy period May 1, 2007, to May 1, 2008 (the “2007-08 Blended Tower”) and (3) the release, injunction, and exculpation provisions found in sections 43.5 through 43.8 of the Plan are consistent with the section 1123(b)(6) of the Bankruptcy Code.

11. After months of litigation and careful analysis of the merits of the Debtors’ claims and the claims asserted against the Debtors by JPMC, the FDIC Receiver, and FDIC Corporate, among others, the Debtors decided to enter into the Global Settlement Agreement to resolve their disputes with such parties on the terms set forth therein. The Plan is premised upon the Bankruptcy Court’s approval of the Global Settlement Agreement.

B. The Conditional Exchange of the Trust Preferred Securities

12. The Trust Agreements that govern the Trust Preferred Securities explicitly provide that the Trust Preferred Securities are automatically exchanged for WMI Preferred Shares upon the direction of the OTS based on the occurrence of an “Exchange Event.” The Trust Agreements define “Exchange Event” to include any supervisory action by the OTS “that limits the payment of dividends by WMB.”

13. On September 7, 2008, WMB entered into a Memorandum of Understanding (“MOU”) with the OTS which, among other things, limited the ability of WMB to declare a dividend or authorize any other capital distribution without prior approval of the OTS. A true and correct copy of the MOU is attached hereto as Exhibit 1.

14. On September 25, 2008, the OTS sent a letter to the Board of Directors of WMI citing the MOU’s limitations on WMB’s ability to pay dividends, concluding that an “Exchange Event” had occurred with respect to the Trust Preferred Securities and directing the Conditional Exchange of the “WaMu REIT Preferred Securities to a like amount of preferred stock in Washington Mutual Incorporated.” A true and correct copy of the September 25, 2008

OTS letter directing the Conditional Exchange is attached hereto as Exhibit 2. The OTS letter did not set forth the date and time upon which the Conditional Exchange was to occur. The Trust Agreements governing the Trust Preferred Securities provide that if a date for the Conditional Exchange is not set forth in the applicable OTS directive, then the Conditional Exchange shall occur “as of 8:00 A.M., New York time, on the earliest possible date such exchange could occur consistent with the directive” as evidenced by the issuance by WMI of a press release prior to such time.

15. The OTS’s directive was delivered to representatives of WMI and WMB, including John Robinson, the Director of Regulatory Relations, and Cathy Doperalski, the Deputy Director of Regulatory Relations, just prior to 7:30 a.m., Pacific time, on September 25, 2008.

16. I received a copy of this letter shortly thereafter on the morning of September 25, 2008. Later that day, I arranged for Steve Rotella, President and Chief Operating Officer of WMI, to send a letter to the OTS related to the OTS directive regarding the Conditional Exchange. The letter acknowledged the automatic nature of the Conditional Exchange as set forth in the documents governing the Trust Preferred Securities, including Section 2 of the Exchange Agreement, and noted that WMI would issue a press release no later than 8:00 a.m. (New York time) the following day announcing the Conditional Exchange. A true and correct copy of the September 25, 2008 letter from Steve Rotella to the OTS is attached hereto as Exhibit 3.

17. The OTS representatives directed that WMI execute an agreement evidencing the assignment to WMB of all right, title and interest in the Trust Preferred Securities, certain other preferred securities and the Issuer Trusts themselves. A representative

of the OTS was on site at WMB's corporate offices in Seattle and demanded immediate compliance with prior commitments made by WMI to contribute the Trust Preferred Securities to WMB upon the occurrence of the Conditional Exchange. In response to the OTS's demands, and on the basis that the OTS had directed the Conditional Exchange earlier in the day, I arranged for WMI and WMB to execute an assignment agreement on September 25, 2008 (the "Assignment Agreement"). A true and correct copy of the Assignment Agreement is attached hereto as Exhibit 4.

18. Execution of the Assignment Agreement took place prior to the delivery of the notice by the OTS regarding the closure of WMB and the related receivership. I sent the Assignment Agreement to members of the OTS, including Darrel Dochow shortly after the Assignment Agreement was executed.

19. As contemplated by section 4.08(b) of the relevant Trust Agreements for the Trust Preferred Securities, I coordinated the preparation and publication of a press release announcing that an Exchange Event had occurred, that such occurrence triggered a Conditional Exchange, and that accordingly the Trust Preferred Securities were being exchanged automatically for a like amount of newly issued WMI Preferred Shares. A true and correct copy of this press release is attached hereto as Exhibit 5. At approximately 4:45 a.m. Pacific time, (7:45 a.m. New York time), on September 26, 2008 WMI issued this press release.

20. In light of WMI's chapter 11 petition, and because of the automatic nature of the Conditional Exchange, WMI took no further steps to document the exchange as contemplated by the applicable transaction documents.

C. The Tower Insurance Proceeds

21. The 2007-08 Blended Tower is a program of banker's professional liability, employment practices liability, fiduciary liability and financial institution bond primary and excess coverage. If approved, pursuant to the terms of the Global Settlement Agreement, the Debtors will be entitled to a priority recovery with respect to the first Sixty Million Dollars (\$60,000,000.00) of coverage under the 2007-08 Blended Tower (the "Threshold"), as against any right of recovery the JPMC Entities (as defined in Article 1 of the Plan, and the FDIC Receiver and FDIC Corporate (the "FDIC Entities") may have, for all claims made by or on behalf of any Insured Party against the policies and bonds in the 2007-08 Blended Tower. Such priority amount shall be used in connection with the defense and settlement of the Buus Litigation and the ERISA Litigation, as defined in Article 1 of the Plan, and, to the extent that payment is made by one of the insurers in such 2007-08 Blended Tower to any Party other than WMI, prior to the reconciliation and determination of all other claims made by any Insured Party under the 2007-08 Blended Tower, such funds paid to and received by such other Party shall be deemed held by such Party in trust for the benefit of WMI until a determination of all claims covered by such policies and bonds in the 2007-08 Blended Tower.

22. Since the execution of the Global Settlement Agreement in May 2010, the Debtors have compromised and settled the Buus Litigation and the ERISA Litigation. The Buus Litigation settlement has been approved by this Court and, on both a preliminary and final basis, by the United States District Court for the Western District of Washington (the "Washington District Court"). As of the date hereof, the ERISA Litigation settlement has been approved by this Court and, on a preliminary basis, the Washington District Court. A hearing to consider approval of the ERISA Litigation settlement on a final basis is scheduled for January 2011.

Based upon the settlements, payments under the 2007-2008 Blended Tower will be less than the Threshold.

23. The terms and provisions of the Global Settlement Agreement do not alter the rights of the insureds, their successors or actual or prospective claimants, and WMI and the FDIC Receiver will be entitled to have such rights to pursue recoveries from the Tower Insurance Programs as are provided under the policies, bonds and applicable law in connection therewith.

24. With respect to the balance of coverage afforded pursuant to the programs providing directors' and officers' liability, banker's professional liability, employment practices liability, fiduciary liability and financial institution bond coverage to WMI and its Affiliates and subsidiaries (the "Tower Insurance Programs"), the rights of the Insured Parties to a priority recovery under the 2007-08 Blended Tower (i) does not preclude the FDIC Receiver from taking action to preserve any potential rights of recovery under the 2007-08 Blended Tower, but solely to the extent consistent with the provisions of the Global Settlement Agreement, and (ii) will terminate upon the earlier to occur of (A) final dismissal of the Buus Litigation and the ERISA Litigation and (B) the exhaustion of the first sixty million dollars (\$60,000,000.00) of coverage from any combination of policies in the 2007-08 Blended Tower through the actual payment of defense and settlement costs associated with the Buus Litigation and the ERISA Litigation.

D. The Plan's Releases Comply with Section 1123(b)(6) of the Bankruptcy Code

25. Sections 43.5 through 43.8 of the Plan contain release, injunction, and exculpation provisions that I generally understand are consistent with section 1123(b)(6) of the Bankruptcy Code. These provisions are (a) an integral component of the complex compromises underlying the Global Settlement Agreement and the Plan; (b) fair and reasonable; (c) supported

by fair and reasonable consideration; and (d) necessary to the Debtors' reorganization and the realization of substantial value for all creditors.

26. The release, injunction, and exculpation provisions in Sections 43.5 through 43.8 of the Plan, as modified by the Modification of Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code [Docket No. 5714] ("First Plan Modification") and Second Modification of Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, filed contemporaneously herewith ("Second Plan Modification"), are the product of extensive arm's length negotiations and were necessary to the formation of consensus to support the Global Settlement Agreement and the Plan. Specifically, the Plan contains releases by the Debtors, holders of Claims and Equity Interests, as defined in Article 1 of the Plan, and a customary exculpation provision.

27. Importantly, pursuant to the Second Plan Modification, and in response to certain concerns raised by various parties in interest, the Debtors have substantially scaled back the releases provided in Section 43.6 of the Plan. Specifically, the releases to be granted to non-Debtor third parties are now limited to being granted by Claim and Equity Interest holders on a consensual basis only. In addition, the Debtors have carved out, in most instances, the release of acts of gross negligence or willful misconduct, and the Debtors have cut out substantially all Related Persons from receiving such releases. Second Plan Modification ¶¶ 6-8. Accordingly, the releases comply with applicable law.

28. Without these releases, viewed in their entirety, the Debtors could not have achieved the Global Settlement Agreement to be effectuated by the Plan. The significance attached to the releases by parties whose cooperation was necessary to the Global Settlement

Agreement, as well as the dramatic increase in value available to creditors as a result of successfully consummating the Plan, demonstrate that the releases are fair and integral to the Plan.

29. Releases by the Debtors. Section 43.5 of the Plan sets forth certain releases to be given by the Debtors. In particular, pursuant to this provision, the Debtors are releasing the Released Parties, including among others, (a) the WMI Entities, (b) WMB, (c) the Debtors' estates, (d) the Reorganized Debtors, (e) the Creditors' Committee, (f) the Trustees, (g) the Liquidating Trust, (h) the Liquidating Trustee, (i) the JPMC Entities, (j) the Settlement Note Holders, (k) the FDIC Receiver, and (l) FDIC Corporate, all as defined in Article 1 of the Plan – and each of their respective Related Persons – from any and all claims or causes of action that the Debtors have or may have against the Released Parties relating to any period prior to the Effective Date. These releases are critical to the successful implementation of the Global Settlement Agreement and confirmation of the Plan.

30. Many of the Released Parties share an identity of interest with the Debtors. The WMI Entities and WMB are all Affiliates of the Debtors and, thus, clearly are related. Similarly, the Reorganized Debtors, the Liquidating Trust, and the Liquidating Trustee will be successors in interest to the Debtors and, thus, share an identity of interest. With respect to certain Related Persons, the officers and directors of the Debtors are covered by contractual indemnification rights, as detailed in section 36.6 of the Plan, such that a judgment against an officer or director, in certain circumstances, must be reimbursed by the Debtors. Thus, a claim against one of these individuals effectively is a claim against the Debtors.

31. The other Released Parties — including (i) the JPMC Entities and the FDIC Entities, who are providing releases pursuant to the Plan and Global Settlement

Agreement, as well as consideration for distributions; and (ii) the Settlement Note Holders and the Creditors' Committee, who were instrumental in negotiating and formulating the Plan and Global Settlement Agreement — share an identity of interest with the Debtors in implementing a settlement that will maximize recoveries to stakeholders and ensuring that the Plan is successful.

32. Each of the Released Parties made a substantial contribution to the Plan by adding value, foregoing certain rights and distributions, and/or assisting with the negotiation and implementation of the Plan as follows:

33. As set forth in the Debtors' plan support letter, dated October 18, 2010 (a copy of which was submitted to the Court under Certification of Counsel with the proposed Disclosure Statement Order [Docket No. 5960]), the FDIC Entities and the JPMC Entities have agreed to release certain Claims, as defined in section 1.63 of the Plan, against the Debtors and have relinquished ownership of certain disputed assets with significant value, including, among others, over \$4 billion in Deposits and \$2.49 to \$2.55 billion in Tax Refunds, resulting in approximately \$6.1 to \$6.8 billion in additional value available for distribution to the Debtors' stakeholders. In addition, although JPMC has an Allowed Claim, as defined by section 1.13 of the Plan, against the Debtors, pursuant to Section 2.5 of the Global Settlement Agreement, JPMC waived all rights to receive distributions on account thereof.

34. Furthermore, JPMC has negotiated the treatment of and agreed to pay pursuant to the Global Settlement Agreement for certain of the Debtors' other liabilities. For example, JPMC has agreed to pay \$50 million in cash to be used in connection with the satisfaction of Allowed WMI Vendor Claims and will pay all Allowed WMB Vendor Claims, each as defined by Article 1 of the Plan. Global Settlement Agreement, § 2.14. JPMC is paying \$25 million for the Visa Shares and has agreed to assume the liabilities and obligations of the

Debtors arising from or relating to the Visa Interchange Litigation and to pay or fund the payment of the Visa Claims. Id., § 2.15. JPMC also will satisfy any and all obligations of the Debtors for clean-up costs and expenses arising from or relating to the BKK Litigation. See id. at § 2.21. JPMC also has agreed to pay or fund the Qualified Plan Claims and Other Benefit Plan Claims. See id. at §§ 2.9, 2.10. Likewise, JPMC has agreed to assume the WMI Medical Plan, and satisfy all obligations to pay or provide benefits accrued thereunder from and after the Receivership Date, and also will pay certain allowed, non-penalty prepetition claims related to the WMI Medical Plan. See id. at § 2.8. JPMC also has agreed to pay or fund the payment of JPMC Rabbit Trust/Policy Claims. See id. at § 2.9. JPMC also will assume the liabilities of certain deferred compensation plans and intercompany obligations. See id. at §§ 2.9, 2.16. Furthermore, JPMC has agreed to release its claims to certain assets of WMI, including, rabbi trusts established by H.F. Ahmanson & Company and certain BOLI- COLI Policies. See id. at § 2.9(b). Pursuant to the Global Settlement Agreement, JPMC also has agreed to transfer all of its interest in the stock of H.S. Loan Corporation to WMI. See id. at § 2.12.

35. Similarly, the Creditors' Committee and the Settlement Note Holders substantially contributed to the preservation and maximization of value in the estates by assisting with the creation and formulation of the Plan and Global Settlement Agreement. Consistent with Section 6.1 of the Global Settlement Agreement, the Settlement Noteholders and the Creditors' Committee agreed to support the Debtors' Plan and have contributed substantial assistance in the resolution of these chapter 11 cases.

36. The Creditors' Committee has made a substantial contribution to the Debtors' chapter 11 cases in their efforts negotiating the Global Settlement Agreement, as well as numerous hours devoted to memorializing the terms and provisions of the settlement in the

form of the Plan. In addition, the Creditors' Committee executed that certain Plan Support Agreement, dated as of October 6, 2010, by and among the Debtors and the Settlement WMB Senior Note Holders (the "Plan Support Agreement"), and submitted a letter in support of the Plan in the Solicitation Packages. These acts helped inform general unsecured creditors in connection with the Plan and encouraged those parties to vote in favor of the Plan.

37. Absent the Global Settlement Agreement, the Debtors would be forced to continue litigation with the FDIC Receiver and JPMC, which would drain the estates' resources and likely would result in significantly less value available for distribution to stakeholders, given the risks and uncertainties attendant to certain of the Debtors' claims and causes of action. The JPMC Entities and the FDIC have agreed to contribute significant consideration in exchange for the releases, and it is this consideration that serves as the basis for the significant distributions to be made to the Debtors' creditors. As a result of the Global Settlement Agreement, total proceeds of approximately \$7.5 billion will be available for distribution to the Debtors' stakeholders, resulting in most creditors receiving full recoveries on account of their Claims. Moreover, the contributions from the JPMC Entities and the FDIC are traceable to the releasors. These contributions, in the amount of \$6.1 to \$6.8 billion in value, will flow to the Debtors' stakeholders, who, absent such contributions, would likely receive diminished recoveries, if any.

38. Releases by Holders of Claims and Equity Interests. In addition to releases by the Debtors, Section 43.6 of the Plan provides for the release of the Released Parties, including certain non-Debtors such as the JPMC Entities, the FDIC Entities, the Creditors' Committee, the Settlement Note Holders, and their respective Related Persons, and by holders of Claims and Equity Interests, as defined in Article 1 of the Plan. Pursuant to the Second Plan Modification, the Debtors substantially carved back the original language of Section 43.6, to

ensure that the releases proposed therein comport with applicable law. As such, the proposed releases set forth in Section 43.6 of the Plan now (i) are only enforceable against holders of Claims against or Equity Interests in the Debtors to the extent they are entitled to receive a distribution pursuant to the Plan and who do not otherwise elect not to grant the releases, (ii) do not extend to most acts of gross negligence or willful misconduct, and (iii) do not apply to “Related Persons,” with limited exceptions.

39. Pursuant to the Plan and the Disclosure Statement Order, the Ballots and election forms distributed to holders of Claims and Equity Interests as well as Non-Filing WMB Senior Note Holders instructed each party to check the box to “opt out” of – or, in some instances “opt in” to – granting the releases set forth in Section 43.6 of the Plan with respect to the Released Parties. Moreover, Section 43.10 of the Plan provides that each holder of a Claim or Equity Interest that submits a Ballot and receives a distribution under or any benefit pursuant to the Plan, and does not elect to withhold consent to the releases in Section 43.6 of the Plan, shall be deemed to have specifically consented to the releases.

40. The releases are a fundamental component of the Global Settlement Agreement and are the product of arm’s length negotiations among the Debtors, the JPMC Entities, the FDIC Entities, the Creditors’ Committee, and the Settlement Note Holders. The releases are fair because the value generated in exchange for the releases is going directly to affected creditors in the form of significantly higher and certain recoveries.

41. Exculpation. The exculpation provision in Section 43.8 of the Plan limits liability arising out of the restructuring negotiations, the Plan, and the implementation thereof. It contains an express carve-out for willful misconduct and gross negligence. I understand that this type of provision is standard in chapter 11 cases.

42. Accordingly, the Plan complies with Section 1123(b)(6) of the Bankruptcy Code.

- Section 1123(c). This section only applies in a case concerning an individual, and as such, this section of the Bankruptcy Code does not apply to these cases.
- Section 1123(d). Section 36.4 of the Plan provides for the satisfaction of default claims associated with each executory contract and unexpired lease to be assumed pursuant to the Plan. All cure amounts, as set forth in that certain *Notice of Filing of Cure Costs Related to Executory Contracts Intended to be Assumed or Assumed and Assigned*, dated November 11, 2010 [Docket No. 5856], were determined in accordance with the underlying agreements and applicable bankruptcy and non-bankruptcy law. In the event of a dispute regarding any cure amount, the cure payments required by section 365(b)(1) of the Bankruptcy Code will be subject to the jurisdiction of the Court and made following the entry of a Final Order resolving such dispute; provided, however, that any objection to the cure amount must be filed within twenty (20) days from the date of service of notice of such cure amount. Accordingly, the Plan is consistent with section 1123(d) of the Bankruptcy Code.

Conclusion

43. In light of the foregoing, I believe that confirmation of the Plan is appropriate, is in the best interest of all parties in interest and should be approved.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of
November, 2010.

By: /s/ Charles E. Smith
Charles Edward Smith
Executive Vice President, General
Counsel & Secretary
Washington Mutual, Inc.

Exhibit 1

FILED UNDER SEAL

Exhibit 2

FILED UNDER SEAL

Exhibit 3

FILED UNDER SEAL

Exhibit 4

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT (as amended, modified or supplemented from time to time after the date hereof, the "Agreement") is effective as of September 25, 2008, and is made by and between WASHINGTON MUTUAL BANK, a federally-chartered savings association, as Assignee (the "Assignee"), and WASHINGTON MUTUAL, INC., a Washington corporation, as Assignor (the "Assignor").

RECITALS

(A) Assignor wishes to assign to Assignee certain securities, and Assignee wishes to accept such assignment, which Securities shall be assigned upon the execution of this Agreement.

AGREEMENT

In consideration of the premises and the mutual agreements hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Assignee and Assignor agree as follows:

ARTICLE I

DEFINITIONS; GENERAL INTERPRETIVE PRINCIPLES

Section 1.01. Definitions.

Whenever used in this Agreement, the following words and phrases, unless the context otherwise requires, shall have the following meanings:

Agreement: This Assignment Agreement, including all exhibits hereto, and all amendments hereof and supplements hereto.

Certificate: Any instrument constituting evidence of ownership of a Security.

Effective Date: September 25, 2008.

Code: The Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder and rulings issued thereunder. Section references to the Code are to the Code, as in effect as the date of this Agreement and any subsequent provisions of the Code, amendatory thereof, supplemental thereto or substituted therefore.

Assignment: The assignment to Assignee by Assignor of Securities pursuant to this Agreement.

Delivery: Is deemed to occur as of September 25, 2008.

WMBWMI Master Securities
Assignment Agreement

Person: Any individual, corporation, limited liability company, partnership, joint venture, association, joint-stock company, trust, unincorporated organization or government or any agency or political subdivision thereof.

Assignee: Washington Mutual Bank, a federally-chartered savings association, and its successors and assigns.

Securities: The securities listed in Exhibit A that are the subject of this Agreement. The term "Securities" includes, without limitation, such securities, any Certificates corresponding to such securities, and all other rights, benefits, proceeds and obligations of the owner of such securities arising from or in connection with such securities, whether now owned or hereafter acquired.

Assignor: Washington Mutual, Inc., a Washington corporation, and its successors and assigns.

Section 1.02. General Interpretive Principles.

For purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires:

- a) the terms defined in this Agreement have the meanings assigned to them in this Agreement and include the plural as well as the singular, and the use of any gender herein shall be deemed to include the other gender;
- b) accounting terms not otherwise defined herein have the meanings assigned to them in accordance with generally accepted accounting principles;
- c) references herein to "Articles," "Sections," "Subsections," "Paragraphs," and other subdivisions without reference to a document are to designated Articles, Sections, Subsections, Paragraphs and other subdivisions of this Agreement;
- d) a reference to a Subsection without further reference to a Section is a reference to such Subsection as contained in the same Section in which the reference appears, and this rule shall also apply to Paragraphs and other subdivisions;
- e) the words "herein," "hereof," "hereunder," and other words of similar import refer to this Agreement as a whole and not to any particular provision; and
- f) the term "include" or "including" shall mean without limitation by reason of enumeration.

ARTICLE II

ASSIGNMENT OF SECURITIES

Section 2.01. Assignment of Securities.

With respect to the Securities listed on Exhibit A attached hereto, Assignor hereby contributes, transfers, assigns, sets over and conveys to Assignee, without recourse, but subject to the terms of this Agreement, all of Assignor's right, title and interest, whether now owned or hereafter acquired, in and to the Securities.

Upon execution and delivery of this Agreement by Assignor and Assignee, all rights and benefits arising out of the Securities which come into the possession of Assignor, including but not limited to funds which may be received by Assignor on or in connection with the Securities, and the ownership of all records and documents with respect to the Securities which are prepared by or which come into the possession of Assignor, shall immediately vest in Assignee.

Assignee acknowledges that the assignment by Assignor to Assignee under this Agreement are intended to qualify as tax-free transactions under Section 351 of the Code.

ARTICLE III

REPRESENTATIONS AND WARRANTIES

Section 3.01. Mutual Representations and Warranties. Each party hereby represents and warrants to the other that it has all requisite power and authority to enter into and perform its obligations under this Agreement.

It is understood and agreed that the representations and warranties set forth in this Article V shall survive delivery of the respective Securities to the Assignee, and shall continue throughout the term of this Agreement.

ARTICLE IV

COSTS

Section 4.01. Costs.

Each party shall bear its own costs and expenses. All other costs and expenses incurred in connection with the transfer and delivery of the Securities, including without limitation recording and filing fees, shall be paid by Assignee.

Each remittance or distribution made pursuant to this Agreement shall be made in the manner agreed to by the parties. To the extent that the amount of a remittance or distribution made pursuant to this Agreement is greater than the amount that was supposed to be made, each party agrees to give prompt written notice thereof to the other party after discovery thereof, including the amount of such remittance or distribution that was paid in error, and to refund such overpayment immediately.

ARTICLE V

MISCELLANEOUS PROVISIONS

Section 5.01. Amendment.

This Agreement may be amended from time to time only by written agreement signed by Assignor and Assignee.

Section 5.02. Governing Law.

This Agreement shall be construed in accordance with the internal laws of the State of Washington, except to the extent preempted by federal law and without reference to the choice of law doctrine of such state, and the obligations, rights and remedies of the parties hereunder shall be determined in accordance with such laws.

Section 5.03. Notices.

All demands, notices and communications hereunder shall be in writing and shall be deemed to have been duly given if personally delivered at or mailed by registered or certified mail, postage prepaid, to (a) in the case of Assignor,

Washington Mutual, Inc.
1301 Second Avenue, WMC 1411
Seattle, Washington 98101
Attention: Corporate Secretary

or such other address as may hereafter be furnished by Assignor to Assignee in writing;
and

b) in the case of Assignee,

Washington Mutual Bank
1301 Second Avenue, WMC 1411
Seattle, Washington 98101
Attention: Corporate Secretary

or such other address as may hereafter be furnished by Assignee to Assignor in writing.

Section 5.04. Merger; Severability of Provisions.

This Agreement, and the documents and instruments referred to herein, constitute the entire agreement of and is the final and complete expression of the parties relating to the subject matter of this Agreement, and supersedes all prior or contemporaneous negotiations and agreements, whether oral or written, relating to the subject matter hereof.

If any one or more of the covenants, agreements, provisions or terms of this Agreement shall be held invalid for any reason whatsoever, then such covenants,

agreements, provisions or terms shall be deemed severable from the remaining covenants; agreements, provisions or terms of this Agreement and shall in no way affect the validity or enforceability of the other provisions of this Agreement. If the invalidity of any part, provision, representation or warranty of this Agreement shall deprive any party of the economic benefit intended to be conferred by this Agreement, the parties shall negotiate in good faith to develop a structure the economic effect of which is nearly as possible the same as the economic effect of this Agreement without regard to such inability.

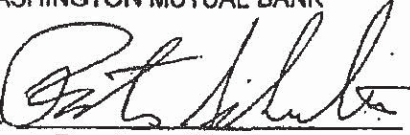
Section 5.05. Execution; Successors and Assigns.

This Agreement may be executed in one or more counterparts and by the different parties hereto on separate counterparts, each of which, when so executed, shall be deemed to be an original; such counterparts, together, shall constitute one and the same agreement. This Agreement shall inure to the benefit of and be binding upon Assignor and Assignee and their respective successors and assigns.

[Signatures on Following Page]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their respective duly authorized officers on the dates shown below, to be effective as of the effective date first set forth above.

WASHINGTON MUTUAL BANK

By: 
Name: Patricia Schwitz
Title: Senior Vice President

WASHINGTON MUTUAL, INC.

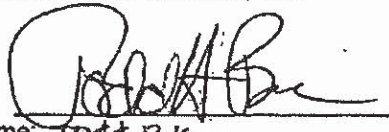

By: 
Name: Todd Baker
Title: Executive Vice President

EXHIBIT A

SECURITIES

- (i) Washington Mutual Preferred (Cayman) I Ltd. 7.25% Perpetual Non-cumulative Preferred Securities, Series A-1
- (ii) Washington Mutual Preferred (Cayman) I Ltd. 7.25% Perpetual Non-cumulative Preferred Securities, Series A-2
- (iii) Washington Mutual Preferred Funding Trust Fixed-to-Floating Rate Perpetual Non-cumulative Trust Securities
- (iv) Washington Mutual Preferred Funding Trust II Fixed-to-Floating Rate Perpetual Non-cumulative Trust Securities
- (v) Washington Mutual Preferred Funding Trust III Fixed-to-Floating Rate Perpetual Non-cumulative Trust Securities
- (vi) Washington Mutual Preferred Funding Trust IV Fixed-to-Floating Rate Perpetual Non-cumulative Trust Securities
- (vii) Washington Mutual Preferred Funding LLC Fixed-to-Floating Rate Perpetual Non-cumulative Preferred Securities, Series 2006-A
- (viii) Washington Mutual Preferred Funding LLC 7.25% Perpetual Non-cumulative Preferred Securities, Series 2006-B
- (ix) Washington Mutual Preferred Funding LLC Fixed-to-Floating Rate Perpetual Non-cumulative Preferred Securities, Series 2006-C
- (x) Washington Mutual Preferred Funding LLC Fixed-to-Floating Rate Perpetual Non-cumulative Preferred Securities, Series 2007-A
- (xi) Washington Mutual Preferred Funding LLC Fixed-to-Floating Rate Perpetual Non-cumulative Preferred Securities, Series 2007-B
- (xii) Any and all right, title and interest of the Washington Mutual, Inc. in and to Washington Mutual Preferred (Cayman) I Ltd. ("WaMu Cayman"), Washington Mutual Preferred Funding Trust ("WaMu Delaware I"), Washington Mutual Preferred Funding Trust II ("WaMu Delaware II"), Washington Mutual Preferred Funding Trust III ("WaMu Delaware III") and Washington Mutual Preferred Funding Trust IV ("WaMu Delaware IV" and, together with WaMu Cayman, WaMu Delaware I, WaMu Delaware II and WaMu Delaware III, the "Trusts"), including any interests of the Trusts in any of the Securities

Exhibit 5

 Print Page Close Window

Washington Mutual, Inc. Announces Conditional Exchange of Preferred Securities

SEATTLE--(BUSINESS WIRE)--

Washington Mutual, Inc. (NYSE:WM) announced today that an "Exchange Event" has occurred under the applicable documents governing the following securities (Securities):

- Washington Mutual Preferred (Cayman) I Ltd. 7.25% Perpetual Non-cumulative Preferred Securities, Series A-1 (to be exchanged into depositary shares representing Series J Perpetual Non-Cumulative Fixed Rate Preferred Stock of WMI);
- Washington Mutual Preferred (Cayman) I Ltd. 7.25% Perpetual Non-cumulative Preferred Securities, Series A-2 (to be exchanged into depositary shares representing Series J Perpetual Non-Cumulative Fixed Rate Preferred Stock of WMI);
- Washington Mutual Preferred Funding Trust I Fixed-to-Floating Rate Perpetual Non-cumulative Trust Securities (to be exchanged into depositary shares representing Series I Perpetual Non-Cumulative Fixed-to-Floating Rate Preferred Stock of WMI);
- Washington Mutual Preferred Funding Trust II Fixed-to-Floating Rate Perpetual Non-cumulative Trust Securities (to be exchanged into depositary shares representing Series L Perpetual Non-Cumulative Fixed Rate Preferred Stock of WMI);
- Washington Mutual Preferred Funding Trust III Fixed-to-Floating Rate Perpetual Non-cumulative Trust Securities (to be exchanged into depositary shares representing Series M Perpetual Non-Cumulative Fixed Rate Preferred Stock of WMI); and
- Washington Mutual Preferred Funding Trust IV Fixed-to-Floating Rate Perpetual Non-cumulative Trust Securities (to be exchanged into depositary shares representing Series N Perpetual Non-Cumulative Fixed-to-Floating Rate Preferred Stock of WMI).

In connection with the Exchange Event, WMI will effect an exchange (Conditional Exchange) of the Securities into depositary shares representing a like amount of preferred stock in WMI, as contemplated by the applicable documents governing the

securities.

In accordance with the terms of the documents governing the Securities, the Conditional Exchange of the Securities will occur on Friday, September 26, 2008 at 8:00 A.M. New York time. As of the time of the Conditional Exchange, each outstanding Security will be exchanged automatically for a like amount of newly issued Fixed Rate Depositary Shares or newly issued Fixed-to-Floating Rate Depositary Shares, as applicable, each representing a 1/1000th interest in one share of the applicable series of preferred stock of WMI.

WMI will mail the notice required under the applicable documents to each holder of record of Securities within 30 days, and WMI will deliver or cause to be delivered to each such holder of record depositary receipts for the Fixed Rate Depositary Shares and Fixed-to-Floating Rate Depositary Shares upon surrender of the Securities. Until such depositary receipts are delivered or in the event such depositary receipts are not delivered, any certificates previously representing Securities will be deemed for all purposes, effective as of 8:00 AM New York time on September 26, 2008, to represent Fixed Rate Depositary Shares or Fixed-to-Floating Rate Depositary Shares, as applicable.

Source: Washington Mutual, Inc.