

VIA EXPRESS MAIL

May 9, 2011

Hon. Mary F. Walrath
 United States Bankruptcy Court
 District of Delaware
 824 Market Street, 5th Floor
 Wilmington, DE 19801

FILED
 MAY 10 PM 12:47
 CLERK
 U.S. BANKRUPTCY COURT
 DISTRICT OF DELAWARE

Re: In re Washington Mutual, Inc., et al., Case Number 08-12229 (MFW) (Jointly Administered)

Objection to Confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors filed by James Berg

Dear Judge Walrath, the Debtors, and others to whom it may concern,

I am a preferred and common shareholder of WMI. At the latest Disclosure Statement hearing, I raised a number of issues, including some issues I stated that I believed were Plan confirmation issues. I raised them then because in my view they were serious enough that a new Disclosure Statement would be required to be fully addressed. As they were obviously Plan confirmation issues, Judge Walrath elected not to address them when she made her ruling from the bench which ultimately resulted in the approval of that Disclosure Statement after some modifications. I thank this Court's indulgence in allowing me to raise these serious issues earlier, and I now take this opportunity to address these Plan confirmation issues in their proper forum.

The confirmation issues were regarding the Liquidation Trust; potential causes of action against third parties which were intended to be released under earlier Plans but are not to be released in the Modified Sixth Amended Joint Plan; and most importantly, releases that the Debtors propose to provide to FDIC Corporate under all versions of the Plan to date. Additionally, I'd like to address the effect of the 5 year lookback tax refunds on the unrestricted Net Operating Losses ("NOLs") which result from WMB's worthless stock deduction.

Liquidation Trust Issues

As a preferred shareholder of WMI, under previous plans I was potentially able to receive a *de minimus* distribution from the assets of the Liquidation Trust. I note without surprise that in the Plan Supplement in Support of Modified Sixth Amended Joint Plan of Affiliated Debtors [Docket #7217, filed 04/28/2011], the Debtors dispense with this fiction entirely by not listing any Preferred Equity Interests in any of the Tranches (Denoted in Annex C) to be paid by the Liquidating Trust. This is consistent with the Debtor's apparent goal to minimize or eliminate any Equity distribution despite the fact that they have admitted that the reorganized company may be able to take advantage of an unrestricted NOL of \$5.45 billion. I note that even after discounting by the Federal tax rate, the potential value of these unrestricted NOLs is far in excess of the claims the PIERS and other potential holders are likely to have against the Liquidation Trust.

William C. Kosturos, WMI's Chief Restructuring Officer ("CRO") is slated to become the Liquidating Trustee. While it is expected to be the responsibility of the Liquidation Trust Advisory Board to make decisions regarding the initiation of litigation, I still believe a fresh set of eyes may be able to see recoveries Mr. Kosturos cannot. Certainly Mr. Kosturos's talents would be wasted in what is expected to be a wind down of assets and the prosecution or settlement of outstanding litigation.



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I believe the Equity Committee's attorneys would be better suited to serve than Mr. Kosturos, and that they are excellent candidates due to the demonstrated efficient use of estate resources, their unquestionable desire to obtain a recovery for equity, and the knowledge that if Equity gets paid, all other creditors will have been paid in full. Further, an Equity recovery may depend upon the successful prosecution or settlement of litigation, an area in which they excel.

Also, the Liquidation Trust Advisory Board is expected to be represented entirely or almost entirely by groups who have in the past demonstrated a very adverse relationship to Equity. The Settlement Noteholders, in particular, have already negotiated the GSA which proposes to trade away claims which could result in an Equity recovery, just so that these Settlement Noteholders claims can be paid quickly in cash. They are effectively converting what should be a Chapter 11 reorganization into a Chapter 7 liquidation despite significant NOLs which could be more effectively utilized by the reorganized company if these funds were not immediately paid out to Creditors. This NOL utilization could also provide another avenue for an Equity recovery should these funds be used for the expansion of WMMRC.

Third Party Causes of Action

Upon information and belief, this Court has directed that claims against third parties other than JPM and the FDIC are not to be released, in large part because there is no consideration being received from these parties. Despite Judge Walrath's opinion stating that these third party releases were impermissible, the Debtors have not declared their intent for the Liquidation Trust to prosecute even one of these causes of action. I foresee the potential for litigation against FDIC Corporate, against Banco Santander for Sherman anti-trust violations, against Goldman Sachs, and possibly the OTS and the Treasury Department (if not time-barred) and other parties related to their pre-bankruptcy conduct which may have harmed WMI.

The Liquidation Trustee should have a fiduciary duty to prosecute these claims, but the latest Plan Supplement makes no mention of these potential causes of action as assets of the Liquidation Trust. I believe they must be spelled out if the Liquidation Trustee to have authority to prosecute them. Some Liquidation Trust assets may have to be set aside to allow sufficient funds to prosecute this litigation. I find it completely unacceptable that a detailed list of these causes of action has not been provided as failure to provide this list may foreclose upon another avenue with which Equity may obtain a recovery.

Since this Liquidation Trust may represent the sole consideration received by Liquidation Trust Beneficiaries for releases to be granted to the Debtors, JPM, and the FDIC, it is imperative that full disclosure of these causes of action be made whether or not WMI presently believes that they should be pursued. To do otherwise would needlessly limit the recoveries available to the Liquidation Trust with no corresponding benefit to the Estate.

Releases to be Provided to FDIC Corporate

As I stated at the latest Disclosure Statement hearing, the FDIC is not one, but two separate, legally distinct entities. These are FDIC Corporate ("FDIC-C"), which provides regulatory oversight and typically negotiates and conducts bank sales, and FDIC Receiver ("FDIC-R"), a unique legal entity created at each bank seizure solely to manage that failed bank's Receivership. In WMB's case, it was FDIC-C who determined when and how to sell WMB's assets, arranging a sale even while WMI was attempting to sell WaMu on the open market. The FDIC-C ran the auction process, negotiating and consummating the P&A agreement with JPM. It was the FDIC-C who accepted JPM's bid without a clear understanding of the value of WMB's assets. This legal separation normally serves to protect FDIC-C's Deposit Insurance Fund ("DIF") and other assets from a bank's Creditors as those Creditors have recourse only to Receivership assets provided that all FDIC procedures were properly followed.

What we have in WMI's case, though, is that rare exception that makes the rule. Though the FDIC now claims that they had plenty of time to arrange a sale of WMB's assets through a Receivership, the facts at the time of seizure indicate otherwise. Most importantly, WMI was never directed to increase the capital of WMB, nor allowed the time to do so. This capital warning letter (or more accurately, the lack of one) is critical to WMI's case, since FIRREA would protect the FDIC from most causes of action had one been issued but WMI been unable to comply.

The FDIC knows it made a serious error when it seized WMB without this capital warning letter, evidenced by the great pains taken in every subsequent bank failure to issue the required capital warning letter, and by the provision of an appropriate or even overly generous amount of time for the entity to attempt to raise capital.

There was no obvious need to conduct a fire sale of WMB's assets; in fact the FDIC has a statutory duty under the Federal Deposit Insurance Act ("FDI Act") to maximize the net present value of each Receivership's assets. The FDI Act authorizes a number of different strategies to achieve that end, and it is up to the FDIC to choose the best strategy for each situation. The FDIC-C could have formed a bridge bank as they did with IndyMac, operating the bank(s) until such time as the markets had stabilized and a buyer or buyers could be found. WMB could have easily been broken up into smaller regional pieces which would have allowed many more bidders to be qualified to bid, further increasing the value received by the Receivership and ultimately delivered to WMB's Creditors and Stockholders. In WMB's case, however, it appears that the FDIC may have purposely structured the "auction" so that only one qualified bidder would emerge, armed with detailed knowledge lacking in other competitors.

FIRREA does limit WMI's claim against the FDIC to the liquidation value of WMB's assets, but due to the quantity and nature of the assets (WMB was the Nation's sixth largest bank with over 2200 branches and hundreds of billion in assets) those claims could easily be in the tens of billions of dollars or more. Due to the FDIC's status as a quasi-governmental agency, any damages eventually awarded would likely be paid directly by the US Government, so collection of an award is unlikely to be a concern.

In the DC Court, WMI has filed a number of significant liquidated and unliquidated claims against both FDIC-R and FDIC Corporate. The fact that WMI exhausted the FIRREA claims process, filed a lawsuit against the FDIC in all of its' capacities in Judge Collyer's DC Court, and survived a motion to dismiss in that DC Court provides confirmation that FDIC Corporate may indeed be subject to significant liability for their actions leading up to the WMB seizure. Judge Collyer asked pointed questions about the legal separation of FDIC-C and FDIC-R, then declined to dismiss FDIC-C from the lawsuit because she felt that WMI's claims could exhaust the \$1.888 billion in Receivership assets.

The FDIC's attorneys have long known about this legal separation, and that all FDIC claims to be settled under the GSA are solely property of FDIC-R. In their Limited Statement in Support and Partial Reservation of Rights of the FDIC, as Receiver for Washington Mutual Bank [Docket #5768, filed 11/4/2010], the FDIC-R in paragraph 1 states, *"The FDIC-Receiver filed a timely proof of claim in this jointly administered case [Docket No. 2140, dated March 30, 2009] (the "FDIC-R POC")."*

Upon information and belief, all of the claims against WMI which the FDIC proposes to provide as consideration for the GSA releases are property of the FDIC-R, since WMB's Receivership effectively stepped into the shoes of WMB when that Receivership was formed. FDIC-C retained no claims whatsoever, since doing so would defeat the purpose of the Receivership arrangement intended to protect FDIC-C's assets. No doubt they were quietly holding their breath, hoping no one else would notice that FDIC Corporate, a signatory to the GSA, anticipated this Court's approval of very valuable releases for FDIC-C for no consideration whatsoever. We now know why Mr. Califano stated in open Court that he was prepared to stipulate that he was "motivated to settle." At that point, he expected that he would soon receive a "Get out of jail free" card, and be allowed to pass "Go" five million times.

While releases are often rejected by bankruptcy courts when the parties intended to receive those releases are providing inadequate consideration, Equity is indeed fortunate that Judge Walrath has already rejected in this case any provision of releases when there is no consideration being provided. Given this, the law of the case requires that FDIC Corporate also be denied releases under the Modified Sixth Amended Joint Plan of Affiliated Debtors since they too are providing no consideration..

Releases to be Provided to FDIC Corporate: Project Fillmore

I know Your Honor was not interested in hearing about Project Fillmore at the Disclosure Statement hearing, and am hesitant to bring it up again, but I feel that I cannot overstate the importance of the information that I intended to provide and I cannot take the chance that my previous letters addressing the subject were simply filed on the Docket and ignored. I believe that the information I have which proves Project Fillmore's existence provides conclusive proof that WMB should not have been seized, and that it elevates the FDIC's actions from Constructive to Actual Fraudulent Transfers.

As I feel you are an honorable person, I believe you would not knowingly wish to be a party to the concealment of what appears to be intentional, premeditated, fraudulent activity. If I am wrong in my assessment of your character, feel free to skip to the next section.

If I am right, I know that you would wish to know what the Debtors, JP Morgan, and the FDIC in both of its' capacities are asking of you when they request your approval of the releases provided in this Modified Sixth Amended Joint Plan. At the Disclosure Statement hearing, I stated that Project Fillmore went directly to the viability of the claims against the FDIC which are pending in Judge Collyer's DC Court. But that description while true is wholly inadequate; much like describing the tornado which recently ripped through Tuscaloosa Alabama as a "localized weather phenomenon causing property damage." The only way to fully understand either that tornado damage or Project Fillmore is walk through, step by step, so that you can see and comprehend the full extent of what has happened. It is simply too difficult to believe otherwise.

To obtain enlightenment, please read through my Project Fillmore Presentation Materials included in [Appendix 7], referring to Appendices 1 through 6 as directed by the bold text as you proceed. See if at the end, you are also convinced that WMB should not have been seized, and left with the persistent question, "Why?" in your head and a strong suspicion that the FDIC may have committed actual fraud.

I believe that Project Fillmore provides conclusive evidence that WMB would have survived if not seized, even if given no TARP money. FOIA requests seeking the status of OTS request R5-2008-0248 have been met with stonewalling, and those two requests for WMBfsb capital distributions, which had previously been found on the OTS website, are no longer found when a search is conducted.

It is beyond the scope of the Project Fillmore discussion in [Appendix 7], but it appears likely (based upon e-mails between the FDIC and Treasury) that Treasury was behind the push to seize WMB. They were behind the FDIC's "contingency planning" to prepare for a potential sale of WMB's assets. Treasury benefitted by eliminating a problem bank, by stabilizing JPM whose failure may have been catastrophic, and by obtaining nearly immediate approval of \$700 billion in TARP funds to use at their discretion during the crisis. Based upon what other similarly sized banks received, WaMu likely would have qualified for \$10 billion in TARP aid. But had the regulators approved Project Fillmore \$20.75 billion infusion, WMB would likely have not needed any external assistance to survive.

The FDIC certainly knew or should have known about Project Fillmore's plan to inject \$20.75 billion in capital into WMB. The OTS definitely knew about it, as they were the ones who assigned the number R05-2008-0248 to WMBfsb's Capital Distribution Request. Doreen Logan has confirmed under oath that the request was indeed sent to the OTS, WMB's primary regulator.

The Fed, whose purpose is to provide an external source of liquidity to banks in time of crisis, was actually working to close WMB's access to the discount window, while at the same time throwing that same window open to allow even foreign banks to borrow multiple billions of dollars. Prior to WMB's seizure, the Federal Home Loan Banks ("FHLB") which had maintained large deposit accounts at WMB and WMBfsb adamantly insisted that their accounts be transferred to JPM not later than September 26, 2008. This date was eventually revealed to have been the planned seizure date of WMB.

Even if the FDIC was a completely unwitting dupe in this whole transaction, they are still liable due to their failure to ensure that WMB had received a capital warning letter, and their requirement to maximize the net present value of the WMB Receivership assets. Had this been an action movie, Treasury would have been the shady underworld character ordering WMB to be killed; WMB and WMBfsb the victims along with the OTS as collateral damage; with the FDIC cast as the hitman. JPM would have been the greedy competitor seeking to maximize his profit from WMB's demise.

Project Fillmore (WMB's own internally funded version of TARP) quick facts:

WMBfsb was consistently profitable, generating significant profits even through the housing downturn.

Jun 30, 2008: WMBfsb was exceptionally well capitalized, with an amazing capital ratio of 165.24%
Jun 30, 2008: WMBfsb's net assets (Total Assets – Liabilities) were \$29.23 billion
Jun 30, 2008: WMBfsb had \$7.16 billion in cash and short term securities
Jul 22, 2008: Ms. Bair informs OTS that she wants WMI to raise another \$5 billion; OTS rebuffs
Aug 06, 2008: OTS Dir. Reich warns Ms Bair that her actions may cause irreparable harm to WaMu
Aug 14, 2008: Mr. Frellinger requests WMBfsb BOD approval to upstream \$20 billion in 2008-2009
Aug 15, 2008: WMBfsb Board approves the request, significantly accelerating upstream schedule
Aug 15, 2008: WMBfsb submits request and detailed projections to OTS for regulatory approval
Sep 15, 2008: Lehman Brothers files for bankruptcy, initiating WaMu's bank run
Sep 19, 2008: WMI's \$3.67 billion WMB deposit moved to WMBfsb, backdated due to clerical error
Sep ??, 2008: FHLB banks insist that their large accounts be moved to JPM by Sep 26, 2008
Sep 25, 2008: WMB's seizure conducted Thursday evening, allegedly due to a "media leak"
Sep 26, 2008: WMB's planned seizure date, on a typical seizure Friday
Sep 30, 2008: WMBfsb's first planned transfer of \$13.95 billion (including \$3.67 B deposit) to WMB
Dec 31, 2008: WMBfsb's second planned transfer of \$6.8 billion to WMB, completing Project Fillmore

Litigation where Judge Walrath lacks jurisdiction

I realize this is a touchy area, but it has become apparent to me that both the Examiner and Judge Walrath were unwilling to discuss the prospects of any litigation which might eventually implicate the FDIC or call into question their actions surrounding the seizure. I now believe that this is because that litigation leads to areas where Judge Walrath's jurisdiction is unclear.

These litigations which must remain unnamed are some of the most significant claims from which Equity is expected to obtain a recovery. Unfortunately for Equity, Judge Walrath believes that by excluding these areas from analysis, the GSA can be found to be "fair and reasonable." I simply argue that it is not possible to determine the GSA is "fair and reasonable" if only a subset of the litigation claims to be compromised are analyzed. That would be like a doctor giving an emergency room patient who has just had a heart attack a clean bill of health because he examined that patient from the neck up and found his head to be in fine shape. This Court's determination of "fair and reasonable" should be explicitly limited to those litigation areas in which this Court has clear jurisdiction.

Effect of Tax Refunds on Net Operating Losses

The Debtors state in the most recent Modified Plan filed after the Disclosure Statement hearing, *"Note that, pursuant to certain consolidated return rules, WMI's adjusted tax basis in the stock of WMB is reduced, on a dollar-for-dollar basis, by the amount of WMB NOLs and capital losses carried back to prior tax years."*

Due to a private letter ruling from the IRS, this accumulated tax basis in the stock of WMB can also be converted, on a one for one basis, into an unrestricted NOL once that WMB stock is declared worthless.

Clearly, the use of WMB's tax basis (and thus WMI's eventual unrestricted NOL) in this manner significantly depletes an Estate asset while providing the majority of the gains achieved through this NOL utilization to JPM and the FDIC in a manner that is, or should be, contrary to bankruptcy law. Based on the data provided in the MORs, WMI's use of this lookback will use up over \$20 billion of the tax basis of WMB's stock which could have been converted into an unrestricted NOL. Accordingly, the tax refund amounts paid under the GSA to JPM and the FDIC should be reduced or disallowed in a manner which alleviates WMI's loss of estate assets.

In the alternative or perhaps in addition to the foregoing, the Debtors should explore the possibility of obtaining a private letter ruling which reduces the tax basis of WMB stock not on a dollar-for-dollar basis as above, but on an adjusted basis since the present IRS rule is illogical. A reasonable interpretation would have this WMB stock tax basis reduced by the actual tax benefit obtained to WMI through utilization of WMB's NOLs rather than dollar-for-dollar as presently implemented.

Conclusions and Requests for Relief

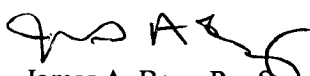
The FDIC in its' Corporate capacity is providing no consideration, so should not be released from liability in the DC litigation. This very significant, viable litigation should be allowed to proceed.

Perhaps Judge Walrath's earlier concern (stated in her Opinion denying the plan) about JP Morgan's ability to pay out even WMI's \$3.67 billion deposit without failure is valid, although it seems likely JPM could pay in their own common stock in a worst-case scenario. Fortunately for WMI, the FDIC-C would be almost certainly be backstopped by the full faith and credit of the United States Government should a significant judgement be entered against it.

I humbly request that the Court:

- (i) Reject releases for FDIC Corporate as they have provided no consideration to warrant them;
- (ii) Deny confirmation of this Modified Sixth Amended Joint Plan of Affiliated Debtors;
- (iii) Find that the claims of JPM and the FDIC on WMI's tax refunds should be reduced or eliminated due to Estate property (WMI's unrestricted NOL) being used to obtain them; and
- (iv) Direct all parties (including the Equity Committee) to attend mediation intended to arrive at an appropriate settlement which resolves all of these outstanding issues in a manner which complies with the bankruptcy code.

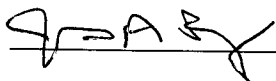
Respectfully,



James A. Berg, Pro Se
429 4th Street South #5
Moorhead MN 56560
WMI Preferred Shareholder

I, James A. Berg, hereby certify that I caused, on May 9, 2011, one copy of the foregoing document to be served upon each of the parties in the attached list by First Class US Mail.

Signature



Date 05/09/2011

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James Berg Exhibits

Supplemental Disclosure Statement Hearing

March 21, 2011

Exhibit 1

Washington Mutual Bank FSB Thrift Financial Report

Excerpt: Pgs 1, 5, 17

**For Full Report, See
Appendix B of James Berg Letter,
Docket #5864**

June 30, 2008

Washington Mutual Bank FSB
 6250 NORTH SAGEWOOD DRIVE
 PARK CITY, UT 84098
 Docket Number: 11905
 for the quarter ending: 06/30/2008

Office of Thrift Supervision
 2008 Thrift Financial Report
 Schedule - SC
 Consolidated Statement of Condition

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ASSETS		Lines	(Report in Thousands of Dollars)	
Cash, Deposits, and Investment Securities:		Total	SC11	7,160,335
Cash and Non-Interest-Earning Deposits			SC110	101,528
Interest-Earning Deposits in FHLBs			SC112	1,248
Other Interest-Earning Deposits			SC118	0
Federal Funds Sold and Securities Purchased Under Agreements to Resell			SC125	0
U.S. Government, Agency, and Sponsored Enterprise Securities			SC130	3,362,053
Equity Securities Subject to FASB Statement No. 115			SC140	74
State and Municipal Obligations			SC180	1,400,726
Securities Backed by Nonmortgage Loans			SC182	1,059,221
Other Investment Securities			SC185	1,196,729
Accrued Interest Receivable			SC191	38,756
Mortgage-Backed Securities:		Total	SC22	16,877,894
Pass-Through:				
Insured or Guaranteed by an Agency or Sponsored Enterprise of the U.S.			SC210	5,124,697
Other Pass-Through			SC215	1,328
Other Mortgage-Backed Securities (Excluding Bonds):				
Issued or Guaranteed by FNMA, FHLMC, or GNMA			SC217	2,547,923
Collateralized by Mortgage-Backed Securities Issued or Guaranteed by FNMA, FHLMC, or GNMA			SC219	0
Other			SC222	9,125,023
Accrued Interest Receivable			SC228	78,923
General Valuation Allowances			SC229	0
Mortgage Loans:		Total	SC26	8,644,219
Construction Loans on:				
1-4 Dwelling Units			SC230	0
Multifamily (5 or More) Dwelling Units			SC235	0
Nonresidential Property			SC240	0

Retained Earnings

SC880 618,293

Other Components of Equity Capital

SC891 0

Total Equity Capital

SC80 29,229,987

Total Liabilities, Minority Interest, and Equity Capital

SC90 46,048,007

Other	CCR450	1,799,469
Total (430 + 435 + 440 + 445 + 450)	CCR455	36,062,620
20% Risk-Weight Total (455 x 20%)	CCR45	7,212,524
50% Risk-Weight:		
Qualifying Single-Family Residential Mortgage Loans	CCR460	198,772
Qualifying Multifamily Residential Mortgage Loans	CCR465	2,276,016
Mortgage and Asset-Backed Securites Eligible for 50% Risk Weight	CCR470	148,711
State and Local Revenue Bonds	CCR475	744,057
Other	CCR480	43,399
Total (460 + 465 + 470 + 475 + 480)	CCR485	3,410,955
50% Risk-Weight Total (485 x 50%)	CCR50	1,705,478
100% Risk-Weight:		
Securities Risk Weighted at 100% (or More) Under the Ratings-Based Approach	CCR501	196,793
All Other Assets	CCR506	9,026,166
Total (501 + 506)	CCR510	9,222,959
100% Risk-Weight Total (510 x 100%)	CCR55	9,222,959
Amount of Low-Level Recourse and Residual Interests Before Risk-Weighting	CCR605	0
Risk-Weighted Assets for Low-Level Recourse and Residual Interests (605 x 12.50)	CCR62	0
Assets to Risk-Weight (420 + 455 + 485 + 510 + 605)	CCR64	49,002,031
Subtotal Risk-Weighted Assets (40 + 45 + 50 + 55 + 62)	CCR75	18,140,961
Excess Allowances for Loan and Lease Losses	CCR530	0
Total Risk-Weighted Assets (75 - 530)	CCR78	18,140,961
Total Risk-Based Capital Requirement (78 x 8%)	CCR80	1,451,277
CAPITAL AND PROMPT CORRECTIVE ACTION RATIOS:		
Tier 1 (Core) Capital Ratio (Tier 1 (Core) Capital / Adjusted Total Assets)	CCR810	63.45 %
Total Risk-Based Capital Ratio (Total Risk-Based Capital / Risk-Weighted Assets)	CCR820	165.60 %
Tier 1 Risk-Based Capital Ratio ((Tier 1 (Core) Capital – Deduction for Low-level Recourse and Residual Interests) / Risk-Weighted Assets)	CCR830	165.24 %

Exhibit 2

**WaMu Memo Re: Project Fillmore
Decapitalization of WMB fsb**

**Copied from Exhibit N of
Appendix to the Brief in Support of the Motion
of Plaintiffs for Summary Judgement**

**[http://www.kccllc.net/
documents/0812229/08122291002080000000000003.pdf](http://www.kccllc.net/documents/0812229/08122291002080000000000003.pdf)**

Arrived at kccllc.net on February 8, 2010



WaMu®

MEMORANDUM

DATE: August 14, 2008
TO: Board of Directors of Washington Mutual Bank fsb
FROM: Peter Frellinger, Senior Vice President
RE: Project Fillmore - Decapitalization of WMB fsb

Action Requested: Approve the proposed capital distribution not to exceed \$20 billion from Washington Mutual Bank fsb to Pike Street Holdings.

Summary: Since the execution of Project Jefferson in February 2004, WMB fsb has generated a large amount of excess cash through asset sales, funding transactions and net income. WMB fsb has lent the excess funds to Washington Mutual Bank through a master note arrangement. The master note with WMB is not a qualified thrift asset. In the past WMB fsb had deployed the excess funds on the master note by purchasing loans or securities, in a tax efficient manner, from WMB. The loans or securities are pledged to secure additional funding which then grosses up the balance sheet of WMB fsb. The balance sheet of WMB fsb, since 2004, has grown from approximately \$30 billion to \$47 billion.

We propose to decapitalize WMB fsb by returning \$20 billion of capital to its parent. The \$20 billion will include the master note of approximately \$7 billion, proceeds from \$3.5 billion of Discount Notes and cash generated through additional wholesale deposits and advances from FHLB Seattle. We propose the payment of at least \$10 billion by September 30, 2008 and the remaining \$10 billion through December 2009.

The net balance sheet of WMB fsb will be approximately \$34 billion to \$36 billion after Project Fillmore. The leverage ratio will decrease to 25% from 62%. A well-capitalized institution requires an 8% or higher leverage ratio.

The benefits at the WMB fsb entity level are:

Allows maximization of funding without negatively affecting the QTL

Page 2

QTL will be increased to over 90% on a long-term basis

Distribution of excess capital will allow normal balance sheet management

Glossary: Under the Qualified Thrift Lender test, an institution must hold qualified thrift assets equal to at least 85 percent of its portfolio assets. Loans and MBS are qualified thrift assets. The master note between WMB fsb and WMB is not a qualified thrift asset.

Exhibit 3

Notice or Application for Capital Distribution for WMBfsb

**Copied from Exhibit N of
Appendix to the Brief in Support of the Motion
of Plaintiffs for Summary Judgement**

**[http://www.kccllc.net/
documents/0812229/08122291002080000000000003.pdf](http://www.kccllc.net/documents/0812229/08122291002080000000000003.pdf)**

Arrived at kccllc.net on February 8, 2010

Docket Number: 11905

OFFICE OF THRIFT SUPERVISION

NOTICE OR APPLICATION FOR CAPITAL DISTRIBUTION

Office of Thrift Supervision
Applications Unit
2001 Junipero Serra Boulevard, Suite 650
Daly City, CA 94014-1976

Date of Filing: August 15, 2008

We, the undersigned executive officer and secretary, prior to the resolution of a majority of the members of the board of directors, of:

Washington Mutual Bank fdb
Savings Institution Name

6250 N Sagewood Drive, Park City, UT 84098
Street Address of Savings Institution (include City, State and Zip Code)

(hereinafter the Institution), hereby provide _____ notice / x application (select one) to the Office of Thrift Supervision (OTS) that the Institution intends to issue a capital distribution in an amount not to exceed \$20,000,000,000 (3rd and 4th Quarter Capital Distribution), pursuant to 12 C.F.R. Section 563.140, and do hereby certify:

1. That to the best of our belief, the institution x qualifies / _____ does not qualify (select one) for expedited treatment, pursuant to 12 C.F.R. Section 563.143 and 516.25(a);
2. That the Institution has attached any additional information required, pursuant to 12 C.F.R. Section 563.146; and
3. That we are aware that the OTS may request additional information required or may impose conditions for the distribution of capital and may determine that such distribution does not comply with the requirements of 12 C.F.R. Section 563.143.


Senior Vice President


Secretary

Date of Receipt by OTS

cc: Darrel Dochow
Penny Marshall

Enclosures

OTS Form 1583

Washington Mutual Bank feb
Capital Distribution - Income Limitation
8/16/2008

Objective: To determine if an application with the OTS of the proposed Dividend is required in accordance with the Income Limitation set forth in Sec. 563.143 of 12 CFR.

2008 Capital Distribution:

(dollars in millions)

In-kind dividend paid on credit card receivables -- 1st quarter in-kind dividend	\$ 29.3
Proposed cash dividend on common stock -- 3rd Quarter Common Dividend	750.0
Proposed cash dividend -- 3rd and 4th Quarter Capital Distribution	20,000.0
Total	<u>\$ 20,779.3</u>

Income Limitation:

Net income for 2006 & 2007	\$ 1,869.0
2006 and 2007 capital distributions	<u>(2,692.0)</u>
2006 and 2007 retained net income	(723.0)
Estimated net income through year-to-date December 31, 2008	<u>606.9</u>
Total	<u>\$ (116.1)</u>
Deficit	<u>\$ (20,895.4)</u>

Does the total amount of capital distributions for 2008 exceed net income for 2008 plus retained net income for the years 2006 and 2007?

Yes

Conclusion: Application for OTS approval of the proposed Dividends is required in accordance with the above Income Limitation set forth in Sec. 563.143 of 12 CFR.

WM:Confidential

Washington Mutual Bank fsb
Leverage Capital Ratio
(dollars in thousands)

	Per Capital Projection (Attached)	
	Projected <u>9/30/08</u>	Projected <u>12/31/08</u>
Regulatory Assets	\$ 38,024	\$ 36,425
Tier 1 Capital	16,133	9,339
Leverage Capital Ratio	41.34%	25.64%
"Adequately Capitalized" Minimum Capital Ratio	4.00%	4.00%
"Well-Capitalized" Minimum Capital Ratio	5.00%	5.00%

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08/15/2008 8:12 AM

Washington Mutual Bank fsb
Total Risk-Based Capital Ratio
(dollars in thousands)

	Per Capital Projection (Attached)	
	Projected 9/30/08	Projected 12/31/08
Risk-Weighted Assets	\$ 20,213	\$ 18,877
Risk-Based Capital	16,163	9,389
Total Risk-Based Capital Ratio	79.96%	49.63%
"Adequately Capitalized" Minimum Capital Ratio	8.00%	8.00%
"Well-Capitalized" Minimum Capital Ratio	10.00%	10.00%

\\SEA_REPO\PTG\Dividends\2008\Q08M4\MOT8\fsb8qand4q08Forecast\Ratio.XLS\Risk Based

08/15/2008 8:12 AM

FSB Capital Projections

	Q1-2008	Q2-2008	Q3-2008	Q4-2008	Q1-2009	Q2-2009	Q3-2009	Q4-2009
Beginning GAAP Equity	29,484,169	29,230,275	29,229,987	15,151,978	8,357,989	8,486,515	8,530,377	8,787,007
Earnings	267,515	71,448	171,970	108,011	128,528	143,861	136,710	131,135
Preferred Dividends	0	0	0	0	0	0	0	0
Change in AFS Valuation Reserve	(574,071)	(64,498)	(188,979)	0	0	0	0	0
Other Capital Movement	92,862	(7,238)	(100,000)	(100,000)	0	0	0	0
Hybrids Outstanding	0	0	0	0	0	0	0	0
Qualifying Subdebt Outstanding	0	0	0	0	0	0	0	0
Transactions								
Intercompany Dividends Inflow	0	0	0	0	0	0	0	0
Hybrids Called/Matured	0	0	0	0	0	0	0	0
Hybrids Issued	0	0	0	0	0	0	0	0
Subordinated Debt Issued	0	0	0	0	0	0	0	0
Ending Capital								
GAAP Equity	29,230,275	29,229,987	15,151,978	15,151,978	8,357,989	8,486,515	8,530,377	8,787,007
Tangible Capital Adj. FAS 115/133	(716,586)	(781,084)	(981,063)	(981,063)	(981,063)	(981,063)	(981,063)	(981,063)
Goodwill and Other Intangibles	109	109	109	109	109	109	109	109
Other Tangible Adjustments	0	0	0	0	0	0	0	0
Tangible Equity	29,946,752	30,010,948	16,132,918	16,132,918	9,467,455	9,511,317	9,748,027	9,878,162
Regulatory Capital Adjments	0	0	0	0	0	0	0	0
Qualifying Hybrids	0	0	0	0	0	0	0	0
Total Tier I Capital	29,946,752	30,010,948	16,132,918	16,132,918	9,467,455	9,511,317	9,748,027	9,878,162
Qualifying Loan Loss Reserves	85,612	65,032	64,791	64,791	64,791	64,791	64,791	64,791
Other Adjustments	(30,189)	(34,728)	(34,728)	(34,728)	(34,728)	(34,728)	(34,728)	(34,728)
Total Risk Based Capital	29,986,175	30,041,252	16,162,981	16,162,981	9,497,518	9,641,379	9,778,090	9,908,225
Total GAAP Assets (Ending)	43,637,513	45,325,981	38,727,235	34,128,788	32,829,383	30,957,767	28,410,398	28,045,797
Total Adjusted GAAP Assets	44,300,505	46,048,007	37,448,391	34,849,944	33,250,529	31,688,913	30,131,545	28,787,944
Pretax SFAS 115	(1,150,898)	(1,254,238)	(1,575,355)	(1,575,355)	(1,575,355)	(1,575,355)	(1,575,355)	(1,575,355)
Goodwill & Other Intangibles	109	109	109	109	109	109	109	109
Tangible Assets (Ending)	44,788,192	46,898,968	38,302,480	35,704,043	34,104,628	32,543,012	30,986,645	29,622,043
Regulatory Asset Adjustments	0	0	0	0	0	0	0	0
Other Adjustments	0	0	0	0	0	0	0	0
Total RAP Assets	45,451,084	47,302,134	39,023,628	36,425,189	34,825,775	33,284,189	31,705,791	30,343,188
Risk-based Assets	18,944,675	18,140,969	20,213,228	18,878,917	18,074,018	17,150,486	16,243,042	16,438,933
RWA/Total Assets	43.4%	40.0%	56.0%	55.3%	55.4%	55.4%	55.2%	55.1%
Regulatory Capital Ratios:								
Leverage (<5.00%)	65.89%	63.40%	41.34%	25.84%	27.19%	28.89%	30.74%	32.86%
Total Capital/Risk-based (>11.00%)	163.34%	165.50%	79.96%	49.63%	82.72%	56.22%	80.20%	64.18%
Tier 1 Capital/Risk-based assets	157.85%	185.24%	76.84%	48.29%	82.36%	55.84%	59.80%	63.76%

Exhibit 4

Doreen Logan Affidavit

Excerpt: Page 98

**Copied from Exhibit A of
Appendix in Support of Defendant JPMorgan
Chase Bank, National Association's
Supplemental Opposition to Plaintiffs' Motion
for Summary Judgement**

Full Document Available at:

**[http://www.kccllc.net/
documents/0812229/0812229090914000000000020.pdf](http://www.kccllc.net/documents/0812229/0812229090914000000000020.pdf)**

Arrived at kccllc.net on September 14, 2009

110

1 DOREEN A. LOGAN - ATTORNEY'S EYES ONLY

2 A. There was a -- I don't -- yes,

3 I was aware of a WMI cash optimization

4 project and other things, but master

5 notes were commonly used within the

6 group.

7 Q. So what was the WMI cash

8 optimization project?

9 A. Where WMI subs, nonbank subs

10 had not dividended cash to WMI, to

11 dividend that cash or put a master note

12 in place so it could loan its cash to

13 WMI.

14 Q. So you understood at that

15 point in time that program at least was

16 an effort to get cash to WMI?

17 A. Sure.

18 Q. Independent of that, or in

19 addition to that, were you not aware of

20 an ongoing effort to reduce the use of

21 master notes?

22 A. No, I'm not aware of that at

23 all.

24 Q. But you are aware of the --

25 what you refer to as Project Fillmore,

111

1 DOREEN A. LOGAN - ATTORNEY'S EYES ONLY

2 which would have involved the elimination

3 of the fsb master note, the note by which

4 WMB borrowed from fsb?

5 A. I wouldn't characterize

6 Project Fillmore as that purpose. The

7 Project Fillmore's purpose was to reduce

8 the capital base of the fsb and part of

9 that capital release would be to dividend

10 the master note.

11 Q. To Pike Street?

12 A. Yes.

13 Q. That application had already

14 gone into the regulators, correct?

15 A. The OTS, yes.

16 Q. So while that was pending,

17 this was a transaction that was to have

18 the effect, if it was effective, of

19 increasing the outstanding amount on the

20 master note by \$3.67 billion?

21 A. Yes.

22 Q. And you didn't regard that as

23 inconsistent?

24 A. It was a -- it was a

25 short-term problem that would be fixed

112

1 DOREEN A. LOGAN - ATTORNEY'S EYES ONLY

2 when we had the capital release approved

3 by the OTS.

4 Q. How did you know this was a

5 short term -- oh, I'm sorry the capital

6 released?

7 A. Yes.

8 Q. Meaning you would have just

9 dividended it back up?

10 A. Yes.

11 Q. Is there anything else that

12 you recall speaking about with Ms. Logan

13 -- Ms. Schulte, that you, Ms. Logan,

14 spoke about with Mr. Schulte --

15 A. Nothing.

16 Q. -- on the subject of what

17 either of you understood to be the

18 purpose for this transaction?

19 A. No.

20 Q. Did you and Ms. Schulte

21 discuss whether -- at the time you

22 engaged in -- you got your instructions

23 and began to execute on them, did you

24 understand that the interests of WMI,

25 Washington Mutual Bank and Washington

113

1 DOREEN A. LOGAN - ATTORNEY'S EYES ONLY

2 Mutual Bank fsb might diverge?

3 MR. ABENSOHN: Objection to

4 form.

5 A. That's -- that would require

6 conjecture. I'm not certain I can answer

7 that question.

8 Q. I'm asking you what you were

9 thinking of at that point in time. Were

10 you thinking that the interests of these

11 three, any of these three entities might

12 diverge from one another?

13 A. No.

14 Q. At the time you did this were

15 you aware that there was the possibility

16 that Washington Mutual Bank would be

17 taken over by the regulators?

18 A. I can honestly say no, I had

19 no -- I had no concept that the

20 regulators would be taking over WMB.

21 Q. Then did it perplex you then

22 that the bank, that Washington Mutual,

23 Inc. was attempting to move its funds to

24 a better capitalized bank within the

25 Washington Mutual family given that you

Exhibit 5

Missing Links at the OTS Website

March 17, 2011

Office of Thrift Supervision (<http://www.ots.gov/public/>)

We're Sorry...

The document you requested can not be found or is undergoing routine maintenance.

If this is a system error, the website administrator has been automatically notified. Please check back soon for updated content.

Office of Thrift Supervision (<http://www.ots.gov/public/>)

We're Sorry...

The document you requested can not be found or is undergoing routine maintenance.

If this is a system error, the website administrator has been automatically notified. Please check back soon for updated content.

Exhibit 6

WaMu's Bank Run

Excerpt: Page B259 (pdf page 264)

**Copied from Exhibit A
of the Thomas M. Blake Report**

**Contained in:
Appendix in Support of Defendant JPMorgan
Chase Bank, National Association's Opposition
to Plaintiffs' Motion for Summary Judgement**

**Full Document Available at:
[http://www.kccllc.net/
documents/0812229/08122290907240000000000027.pdf](http://www.kccllc.net/documents/0812229/08122290907240000000000027.pdf)**

Payroll Days

Bank run begins (Lehman failure)

Seizure Date 9/25

Missing Dates? →

8/13/2008	136,357	(119)
8/14/2008	136,357	(119)
8/15/2008	138,063	1,698
8/18/2008	137,018	(403)
8/19/2008	137,018	(403)
8/20/2008	137,256	107
8/21/2008	137,256	107
8/22/2008	137,974	(239)
8/23/2008	137,974	(239)
8/24/2008	137,974	(239)
8/25/2008	137,974	(239)
8/26/2008	137,974	(239)
8/27/2008	137,974	(239)
8/28/2008	137,974	(239)
8/29/2008	137,974	(239)
8/30/2008	137,974	(239)
8/31/2008	137,974	(239)
9/1/2008	137,974	(239)
9/2/2008	137,974	(239)
9/3/2008	137,974	(239)
9/4/2008	137,974	(239)
9/5/2008	137,974	(239)
9/6/2008	137,974	(239)
9/7/2008	137,974	(239)
9/8/2008	137,974	(239)
9/9/2008	137,974	(239)
9/10/2008	137,974	(239)
9/11/2008	137,974	(239)
9/12/2008	137,974	(239)
9/13/2008	137,974	(239)
9/14/2008	137,974	(239)
9/15/2008	137,974	(239)
9/16/2008	137,974	(239)
9/17/2008	137,974	(239)
9/18/2008	137,974	(239)
9/19/2008	137,974	(239)
9/20/2008	137,974	(239)
9/21/2008	137,974	(239)
9/22/2008	137,974	(239)
9/23/2008	137,974	(239)
9/24/2008	137,974	(239)
9/25/2008	137,974	(239)
9/26/2008	137,974	(239)
9/27/2008	137,974	(239)
9/28/2008	137,974	(239)
9/29/2008	137,974	(239)
9/30/2008	137,974	(239)
10/1/2008	137,974	(239)
10/2/2008	137,974	(239)
10/3/2008	137,974	(239)
10/4/2008	137,974	(239)
10/5/2008	137,974	(239)
10/6/2008	137,974	(239)

Notes & Sources

¹From 7/14/2008 - 7/24/2008 'Total RBFS (excl Misc)' presented as sum of 'Consumer Noninterest', 'Consumer IBD', and 'Small Business'.

²From 7/25/2008 - 10/6/2008 'Total RBFS (excl Misc)' presented as sum of 'Consumer IBD + Small Biz' and 'Consumer Noninterest'.

³Net Change in deposit balance from previous daily ending.

B-259

Exhibit 7

Project Fillmore Presentation Materials

March 21, 2011

The Debtors have stated that WMBfsb was a subsidiary of Washington Mutual Bank ("WMB"), the entity that was seized and sold by the FDIC to JP Morgan ("JPM"). Since WMB owned all of the common stock of WMBfsb, that stock ownership was included in the sale under the Purchase and Assumption Agreement ("P&A"). WMBfsb itself did not pass through the receivership as its' stock sale was treated like any other asset transferred. WMBfsb was exceptionally well capitalized. In letters filed earlier with this Court, I have provided justification for my belief that WMBfsb itself was worth at least \$20 billion, even in the distressed market at the time of seizure.

[Refer to Exhibit #1, Page 1]

As shown on page 1 of this June 30, 2008 Thrift Financial Report ("TFR"), WMBfsb's Cash, Deposits, and Investment Securities totaled \$7.16 billion. Most of these appear to be very liquid investments which could have been readily converted to cash in an emergency. The only area of concern I have noted is the entry including investments in Government Sponsored Entities, which may have been investments in Freddie Mac or Fannie Mae both of whose bonds had been declining at that time. More detail would be needed since this \$3.36 billion category also includes US Government and Agency securities. In the timeframe surrounding WaMu's seizure, government securities were trading above par for even short term bonds due to the Lehman Brothers failure and a resultant rush to quality.

These cash assets would have been further bolstered by the transfer on September 19, 2008 of WMI's \$3.67 billion deposit to WMBfsb. WMI's deposit was immediately loaned back to WMB through WMBfsb's Master Note arrangement.

[Refer to Exhibit #1, Page 5]

WMBfsb was commonly referred to as the "Little Bank", but in terms of net assets, it was not little at all. This WMBfsb TFR also listed WMBfsb's Total Equity Capital, sometimes referred to as net assets (or total assets minus deposits and other liabilities), as \$29.23 billion.

[Refer to Exhibit #1, Page 17]

This resulted in an amazing Tier 1 Risk-Based Capital Ratio of 165.24 percent. Since an institution is considered adequately capitalized with a ratio of eight percent, WMBfsb was exceptionally well capitalized. This amount of excess capital is almost unheard of in the banking world. Recognizing this and wishing to guarantee they retained these assets, JPM immediately folded the assets of WMBfsb into itself after the sale. JP Morgan, which now often croons over its "Fortress Balance Sheet", no doubt was assisted significantly in those turbulent times by WMBfsb's net assets detailed in this TFR.

I believe I have established a factual basis to conclude that WMB's subsidiary, WMBfsb, was exceptionally well capitalized, with cash and investment securities of \$7.16 billion and net assets of \$29.23 billion as of June 30, 2008. WMBfsb had an additional \$3.67 billion in cash on hand at seizure due to WMI's deposit which was transferred to WMBfsb on September 19, 2008. But I know many are thinking, "WMBfsb was a cash cow, but so what? The Debtors say that WMBfsb was a subsidiary of WMB, and that it was sold to JPM via the P&A Agreement. It's done and over with, so why is this guy wasting my time?" The answer to that question is Project Fillmore.

What was Project Fillmore, and why is it important? In a nutshell, Project Fillmore was a plan to upstream over \$20 billion of these assets from WMBfsb to its parent. For some unknown reason, neither the Debtors or the Creditors Committee have seen fit to bring it to this Court's attention other than the occasional obscure reference deeply buried in an appendix. Without someone to put them all together to connect the dots, it is very easy to misunderstand their importance.

[Refer to Exhibit 2, Project Fillmore Decapitalization of WMB fsb]

This is a Memo, dated August 14, 2008, from Peter Frellinger, Senior Vice President, addressed to the Board of Directors of WMBfsb.

[———> Read Entire Memo into Court Record, Discuss Pike Street & QTL, OTS Charter]

[Refer to Exhibit 3, Application for Capital Distribution, Page Labeled A-117]

WMBfsb's Board of Directors acted very quickly on this request, which resulted in this filing to the Office of Thrift Supervision ("OTS") the very next day. Moving to Page A-118, we find that WMBfsb is proposing a 3rd Quarter Common Dividend of \$750 million, and proposed dividends totalling \$20.0 billion in the 3rd and 4th Quarter of 2008 for total proposed dividends of \$20.75 billion through 2008.

Since the combined retained earnings from 2006, 2007, and estimated 2008 are not greater than the paid and proposed dividend total, WMBfsb must apply for approval from the OTS, submitting comprehensive capital projections to show that the distribution will not leave the entity undercapitalized. Critics looking at this document would no doubt question whether it was ever received by the OTS, since this copy does not indicate a date of receipt by OTS in the lower right of the first page. This concern is alleviated, though, through the sworn testimony of Doreen Logan.

[Refer to Exhibit 4, Doreen Logan Affidavit]

I direct your attention to the text in the upper left quadrant, starting on Line 24.

[———> Read Doreen Logan Affidavit through Page 112, line 3]

I can't stress enough the importance of this. When the \$3.67 billion deposit was moved to WMBfsb, it was added to the master note. Upon approval of Project Fillmore, that note was to be dividended back, giving WMB all right and title to that significant source of liquid cash. This means that WMB would again have possession of the \$3.67 billion cash asset for an immediate liquidity boost, but that WMBfsb would retain the deposit liability to WMI. This is in addition to the cash balance shown in WMBfsb's Jun 30 2008 Thrift Financial Report.

[Refer to Exhibit 5, Missing Links at the OTS Website]

Some time ago, I had bookmarked direct links at the OTS website documenting two Capital Distribution Requests for WMBfsb. These were R5-2008-0232 filed July 8, 2008, and the Project Fillmore request, R5-2008-0248, filed August 15, 2008. Curiously, both of these files are now reported as missing, stating each time when checked over a period of several days, "We're sorry, the document you requested can not be found or is undergoing routine maintenance." Repeating the search which produced them earlier now shows only WMBfsb's Community Reinvestment Act information.

Given the apparent disappearance of these public documents, I have to wonder if any other important documents which relate to WMB, WMBfsb, WMI, or any other WaMu affiliated entity are also about to go missing. Nearly two and a half years have gone by since the seizure, and it would be a shame for discovery to be stymied should litigation have to be resumed.

[Refer Back to Exhibit 3, Page Labeled A-121]

This transfer was intended to be in two stages. Referring to the Intercompany Dividends to/from in columns Q3-2008 and Q4-2008, we find that WMBfsb had applied to issue dividends of \$13.95 billion by Tuesday, 9/30/2008 (but WMB was seized just 5 days earlier on Thursday, 9/25/2008), and an additional \$6.8 billion by 12/31/2008.

[Refer to Exhibit 3, Page Labeled A-120]

As you see in this table, even after the transfers WMBfsb would have had exceptional Risk Based Capital Ratios. (79.96% on 9/30/08, and 49.63% 12/31/08) Ratios such as these would be the envy of the banking world as they are many multiples of even JPM's "Fortress Balance Sheet." If you look at the bottom right of this page, you can see a creation date of August 15, 2008 at 8:12am. It is obvious that someone was burning the midnight oil to put this application and these projections together.

[Refer to Exhibit 3, Page Labeled A-117]

Typically, regulatory approval would take about 60 days for such a request, but WMB had requested expedited processing so expected approval at any time, as confirmed in the Doreen Logan Affidavit. Instead they were seized and sold for a pittance. While I realize issues surrounding the seizure are more properly put before Judge Collyer in the DC court, it is in your Court that the Debtors, JP Morgan, and the FDIC will seek your approval to dismiss the lawsuits against JPM and the FDIC, providing very broad releases to these parties.

Upon information and belief, WMBfsb's parent, Pike Street Holdings, was a direct subsidiary of WMB. I believe given the urgency with which WMBfsb's BOD responded to the request, WMBfsb stood ready to transfer their most liquid holdings and the Master Note (including full ownership of WMI's \$3.67 billion deposit) immediately, and that Pike Street was prepared to respond in a similar fashion. Regulatory approval of this Application for Capital Distribution R5-2008-0248 aka Project Fillmore could have provided a tremendous source of immediately available liquidity to WMB, reassuring depositors and investors alike.

[Refer to Exhibit 6, WaMu's Bank Run, Page Labeled B-259]

This would have provided a lifeline until the end of month payroll deposits arrived. See for instance, the \$1.698 billion inflow as paychecks arrived mid-month on 08/15/2008, and also the end of month inflow of \$3.312 billion on 08/29/2008. Between these regular monthly deposits, customers typically paid bills resulting in small outflows. Also note the bank run had been tapering off. It officially began on 09/15/2008 after the Treasury Dept., concerned about "moral hazard", declined to help Lehman Brothers so they filed for bankruptcy.

At first there were significant outflows, but they had been tapering off as the second week came to a close. The outflows on the date of the seizure, Thursday 09/25/2008 were \$474 million, and on Friday (the day after the seizure) there was an outflow of only 151 million. 09/27 and 28 were the weekend so excluded, but I find it particularly curious that the dates which should reflect the September end of month inflows are completely missing from the table provided. I suspect it showed a several billion dollar inflow as on 08/29/2008, but cannot verify because JPM excluded those dates in their filing.

Approval of Project Fillmore would have provided needed liquidity while Congress worked to sway a few of the holdouts needed for TARP to pass, guaranteeing WaMu's survival. WMB's Capital Ratios would have increased significantly above the "Well Capitalized" standard it already met according to the OTS, and WMBfsb would have still maintained an exceptionally strong capital ratio.

Ownership of WMI's \$3.67 Billion cash deposit would have been transferred back from WMBfsb to WMB, with WMB retaining the liquid cash while WMBfsb retained the liability to WMI. The Debtors would not be before you today with this complex, cross-jurisdictional case because there would have been no WMB seizure and no bankruptcy filing.

Had the regulatory agencies been truly been acting in good faith, they could have simply have approved Project Fillmore to increase WMB's liquidity so that WMB would survive. For the regulators to have done otherwise suggests an ulterior motive. The resistance to providing any meaningful discovery only adds fuel to this fire. In my opinion, this serves to significantly increase the likelihood that WMI would prevail against the FDIC in Judge Collyer's DC Court, particularly if put before a jury.

While the FDIC is normally protected against fraudulent transfer or avoidance actions, the failure to send WaMu a capital warning letter has left them potentially liable for constructive fraudulent transfer actions. 1828(u)(1) states in part that, *"No person may bring a claim against any Federal banking agency (including in its capacity as conservator or receiver) for the return of assets of an affiliate or controlling shareholder of the insured depository institution transferred to, or for the benefit of, an insured depository institution by such affiliate or controlling shareholder of the insured depository institution, or a claim against such Federal banking agency for monetary damages or other legal or equitable relief in connection with such transfer, if at the time of the transfer— (A) the insured depository institution is subject to any direction issued in writing by a Federal banking agency to increase its capital..."* Many of the FDIC actions could also fall under the realm of actual, rather than constructive, fraudulent transfer actions, and those have no protections under 1828(u).

Sheila Bair, the FDIC chairwoman, should have been making every effort to help WMB survive, but instead she worked to undercut them at every turn, shopping out WMB in part apparently because the OTS regulators snubbed her July 2008 request for WMI to raise an additional \$5 billion in capital . She continued doing so even when interested bidders were conducting due diligence on WaMu to make an open market purchase. That is completely illogical, because the OTS could have ordered the exchange event at any time, putting WMB 80 percent of the way to the FDIC's target. With the stroke of a pen, WMBfsb's Project Fillmore request dated August 15, 2008 would have provided WMB with over four times the amount of additional capital Ms. Bair requested.

The OTS – FDIC squabbles devolved into a heated exchange on August 6 2008, when OTS Director Reich warned Sheila Bair that any back door dealing between FDIC and JPMC (or any other banks) would do "irreparable harms" to Wamu, and subsequently undermine Wamu's efforts to sell itself if such need arises. In Reich's words, *"I also believe there could be a high potential for FDIC actions of the type you are contemplating to cause irreparable harm to Wamu if, at any point in the near future, Wamu wishes to actually seek a buyer. The potential harm could stem from the fact that any such potential buyer may have been all ready been contacted by the FDIC. If in fact any meetings or discussions have already taken place by the FDIC with either JPMC, Wells Fargo, or any other entity, in any capacity in which WaMu was even mentioned, I would like to see a copy of the signed confidentiality agreement signed by the bank ..."*

Ms. Bair has publicly stated various reasons for the seizure she had apparently been planning for many months. First, she claimed it was the bank run despite the fact that she began marketing WMB prior to that run. Then she claimed it was due to all of the "toxic" mortgages, but as shown via charts provided by JPM and included in my second letter, it was later found that the majority of WMB's mortgage portfolio has been performing significantly above industry averages. Her latest claim is that WMB was unable to raise additional capital, despite a pending request (Project Fillmore) to add \$20.75 billion in assets to WMB's capital. While I will not go so far as to accuse Ms. Bair of lying, I will say that I believe she is not telling the whole truth regarding her actions in the seizure of WMB. I can only speculate her motive for doing so.

There is good reason why the FDIC lobbied Congress to extend their powers to encompass bank holding companies. I believe the Treasury knew almost immediately that they made a mistake, and have been working hard to make sure that mistake (WaMu) is never repeated again. Henry Paulson in his book has openly admitted that WaMu should have been declared systemic. Treasury Secretary Geithner literally blew up when Ms. Bair proposed seizing Wachovia as she had done with WaMu, saying, "The policy of the U.S. government is that there will be no more WaMu's."

Conclusions

I honestly believe that Project Fillmore, which I've extensively documented today, is a very significant smoking gun, if not THE smoking gun, for this entire case. If it can be proven that the FDIC also knew about this request (as they certainly should have, given that WaMu was FDIC insured and approval of Project Fillmore would have been a \$20+ billion event), then I believe a clear case can be built for Actual Fraud for issues surrounding WaMu's seizure. Assuming a going concern value for WMB's assets since WaMu should have survived, the potential damages could be enormous for any or all of JP Morgan, the WMB Receivership, and most importantly the FDIC in its' Corporate capacity.

Many of the actions responsible for the loss of value of WMB appear to have been committed before the Receivership came into being, and so by default the FDIC-C must have been responsible for those losses. It was FDIC-C who negotiated the terms of the P&A agreement, deciding to conduct a "whole bank" transaction. It is obvious to me that barring some other systemic reason, the FDIC should have broken WMB up into smaller regional pieces. With more than a handful of banks who could qualify for the bidding process, the FDIC could have fulfilled their statutorily imposed duty under the Federal Deposit Insurance Act to maximize the net present value of WMB's estate.

While much I have said so far is difficult at first to believe, I would remind all parties that there was initially an equal level of disbelief regarding WMI's \$3.67 billion deposit. Although the attorneys representing JP Morgan expressed shock, stating that WMB could not have been seized had WMI owned such a significant deposit, the GSA now proposes to return this entire deposit to WMI.