UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	: Chapter 11
	:
WASHINGTON MUTUAL, INC., et al.,	: Case No. 08-12229 (MFW)
	:
Debtors.	: (Jointly Administered)
	:
	:

WRITTEN ARGUMENT IN OBJECTION TO CONFIRMATION OF THE SIXTH AMENDED MODIFIED PLAN OF REORGANIZATION BY JAMES BERG

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Regulations

INTRODUCTION

1. Your Honor, I am James Berg, a Series R preferred and common equity shareholder of WMI. While I appear solely on my own behalf, it is my hope that my work will prove to be a benefit to the thousands of Washington Mutual Inc. stakeholders, whether they be Creditors, Preferred stockholders in Class 19 and 20, Dime Litigation Tracking Warrant Holders, or Common shareholders. My objection to this version of the Plan is [D.I. #7447], which I include by reference.

ARGUMENT

I. Summary of Argument

2. The Settlement Noteholders and the Debtors have acted in an unethical manner throughout these bankruptcy cases. They actually worked to minimize certain parts of the Estate value, such as the NOLs and the value of WMMRC, in order to eliminate Equity. Had they succeeded in their plan, Equity would already have been cancelled, and they would be off spending their outsized gains on their next "distressed" investment. The Liquidation Trust should be run and controlled by Equity, as we are the only ones with the motivation to see that all stakeholders receive a recovery. FDIC Corporate is providing no consideration, so must not be released under the GSA. Similarly, analysis is provided which clearly demonstrates that JP Morgan is providing inadequate consideration for releases under the GSA. While the Debtors would argue that both of these matters are precluded by the law of the case, the Supreme Court's decision in Stern v. Marshall, 131 S.Ct. 2594 (June 23, 2011) raises significant jurisdictional issues. Stern requires further review of this and all other non-core litigation to be settled under the GSA. I will also address the addition of the Examiner and his firm as third party litigation targets, and the effect of WMI's tax refunds on the potentially unrestricted Net Operating Loss ("NOL") available to the reorganized company.

II. Settlement Noteholders and Debtors Behave Unethically, Undervalue WMMRC

3. When I arrived in Wilmington for this confirmation hearing, I was concerned that the Settlement Noteholders had misused their position in this bankruptcy in an attempt to obtain extraordinary gains. This confirmation hearing has only served to magnify my concerns. Appaloosa and Aurelius representatives have stated that WMI was not asking enough from JP Morgan, but their concern apparently evaporated once the waterfall they helped negotiate reached and nearly paid in full their claims in the PIERS. By setting a $2 million floor on PIERS holdings to obtain an interest in Reorganized WMI, the Settlement Noteholders tried to strip this value from other PIERS holders and other classes below them in the waterfall, so they would obtain a greater recovery than allowed by bankruptcy law. Despite the fact that they acquired a fiduciary duty to the entire Estate by negotiating the GSA on behalf of WMI, the Settlement Noteholders worked to enrich themselves while denying Preferred or Common Equity even a seat at the table.

4. The Settlement Noteholders and the Debtors collaborated to spin a tale that is quite believable to anyone without a finance background. But relatively minor changes in their assumptions can significantly affect the final outcome. The Owl Creek representative, for example, could not conceive of a plan which would allow more than a trivial use of the NOLs, when it is obvious to anyone with even general knowledge of the bankruptcy exception in IRC Section 382(l)5 that there are ways which could allow full usage of the NOLs. In their Memorandum of Law in support of confirmation of the modified sixth amended join plan [D.I. #8121], the Debtors acknowledge this, but immediately dismiss the possibility by claiming that the Creditors are to obtain WMMRC. It simply requires a possibility neither could imagine: existing Common Equity must retain a greater than 50 percent ownership in the reorganized company, and there must be no further ownership changes within two years.

5. One of many ways this could be done is a split of ownership between Preferred and Common Equity of WMI. Anticipating this argument, the Debtors attempt to further distance themselves from the possibility that Section 382(l)5 could be used by quoting Treasury Regulation section 1.269-3(d):

> [a]bsent strong evidence to the contrary, a requisite acquisition of control or property in connection with an ownership change to which section 382(l)5 applies is considered to be made for the principal purpose of evasion or avoidance of Federal income tax unless the corporation carries on more than an insignificant amount of an active trade or business during and subsequent to the [bankruptcy] case [aside from temporary cessations due to business exigencies].

I would think that the unwarranted seizure of WMB's assets requiring three years of litigation to obtain compensation would certainly qualify as a business exigency. While the Debtors may be correct in their belief that the Creditors intention in acquiring reorganized WMI is tax avoidance, the same cannot be said for WMI's Common stockholders. Perhaps I am an idealist, but it is my understanding that reorganization is the intended purpose of a Chapter 11 bankruptcy. I don't want WMI to liquidate its' parts, I want WMI to rebuild itself into the healthy, prosperous, profitable company it once was. With hard work, I know it can be done.

6. To address the Owl Creek representative's other concerns, the reorganized WMI should exit as a holding company rather than the captive mortgage reinsurer WMMRC. If WMI exits as the holding company it now is, there is no $5 billion capital injection into a shell which could run afoul of IRS rules, since the money is already WMI's. Also, a holding company would be better able to meet the business continuity requirements of IRC Section 382 since a holding company's purpose is to acquire and run other businesses to produce a profit. I believe the Settlement Noteholders' intent was to retain WMI Investments along with WMMRC so that they could make full use of Reorganized WMI's NOLs while still falling within the business continuity requirements. And they certainly could have located a suitable merger partner for

an investment company, since hedge funds are in the investment business. The fact that WMMRC had no business plan or management would have become a positive if the intent was to merge it with another investment company as soon as the law allowed.

7. Had Mr. Maxwell's calculated 15.8 percent discount rate been used by the Debtors' expert instead of the 25 percent that was actually used, Blackstone's value would have increased, making Solomon's value even more conservative than the Debtors'. Mr. Maxwell has confirmed that he believes additional value should flow to the estate if more funds were available allowing better NOL utilization. One way to achieve this, apparently discounted by the Debtors, would have been to simply re-age WMI's existing debt. It simply makes no sense for the Debtors to plan to pay out over $6 billion to WMI's noteholders, then complain about the difficulties of raising money for WMMRC without running afoul of the IRS tax code. Also, re-aging WMI's existing debt could further reduce WMI's Weighted Average Cost of Capital. This could result in an even lower discount rate, and so increase Reorganized WMI's Net Present Value even further.

8. Washington State's twelve percent per year pre-judgment interest rate allows for an additional $1.36 billion in cash which could flow into this estate due to the deposit held at JP Morgan Chase. This amount is enough to put preferred equity solidly in the money if the Debtors' earlier 510(b) subordinated claims estimates are correct. Interestingly, the Debtors' response was to threaten to get out their shovel, go to their claims graveyard, dig up the Marta claim, and re-animate its' corpse. While it may walk, talk, and move under the Debtors direction, there can be no doubt that the whole thing smells.

9. Twelve percent annual interest on WMI's $4 billion deposit is approximately $40 million per month. This could more than offset the alleged reason for the Debtors urgency to resolve these cases: the $30 million per month burn rate (quoted at the higher contract rate, of course) plus attorneys fees. JP Morgan would no doubt relinquish WMI's funds in a hurry if they were ordered to pay to WMI sixty times the trivial twenty basis points they've paid while holding the deposit hostage. Washington State law would have required 1200 basis points amounting to over $460 million per year. Under the GSA, JP Morgan has received a $1.34 billion interest windfall by paying a mere $8 million annually on WMI's $4 billion deposit.

III. Liquidation Trust Should be Run and Controlled by Equity Representatives

10. Mr. Kosturos' rate of $725 per hour represents a significant drain on Estate resources, and I question whether the Estate is receiving a corresponding benefit from his continued employment, particularly given WMMRC's expected runoff status. Given this, it simply makes no sense for Mr. Kosturos or the proposed Liquidation Trust Advisory Board members to be the ones to whom Equity must look for a recovery. All of these have been extremely hostile to Equity in the past. If they believed they were negotiating in the Estate's best interest when their negotiations denied Equity a recovery, why should they be given another chance for a repeat performance? I believe that very significant NOLs of at least $6 billion or greater could be available with a January 2012 exit, providing significant value to the Liquidation Trust Beneficiaries if utilized properly. Equity should be in control, since all Creditors would be paid in full before Equity would receive any recovery.

IV. Consideration for Releases: Introduction

11. Your Honor, I find myself in a most enviable position. In my May 10, 2011 Plan Confirmation Objection, I stated my belief that some of WMI's litigation leads to areas where

bankruptcy court jurisdiction is unclear. I further stated that this Court's determination of "fair and reasonable" should be explicitly limited to those litigation areas in which this Court has clear jurisdiction. I thought that my observations were logical and based upon a reasonable interpretation of jurisdiction as I understood it. I had no idea at the time that the Supreme Court would soon decide the Stern v. Marshall matter [Stern v. Marshall, No. 10-179 (U.S. June 23, 2011), slip opinion], effectively making my argument law of the land.

12. The crux of the Supreme Court's finding in Stern comes down to this: Cases under Article III Court jurisdiction must ultimately be decided in an Article III Court. If certain conditions are met and all parties agree to have their Article III Court matters adjudicated in an Article I Bankruptcy Court, those Article III matters must have final approval by an Article III Court to be implemented. It would appear that WMI's complex, cross-jurisdictional bankruptcy case could be the largest to be decided based on this ruling, so this case is likely to be heavily scrutinized as it will be the precendent referred to in many cases to follow.

13. I'm not sure of the level of review by an Article III Court even if WMI were to meet all the conditions necessary for the non-core matters to be adjudicated in here as the Debtors request. But it is unlikely to be a mere rubber stamp based on this admonishment provided by the Supreme Court to Courts considering whether to approve settlements:

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all the facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgement which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

14. In light of this Supreme Court's Stern ruling, Your Honor, I would like to bring to your attention a few issues which I believe would not withstand even the barest of scrutiny by an Article III Judge, so that you may take the action you believe appropriate. They would undoubtedly be brought to the attention of the Court from which ultimate approval is to be obtained.

V. FDIC Corporate is Providing No Consideration so Must Not be Released

15. The FDIC is not one, but two separate, legally distinct entities. These are FDIC Corporate ("FDIC-C", or "Corporate"), which provides regulatory oversight and typically negotiates and conducts bank sales, and FDIC Receiver ("FDIC-R", or "Receiver"), a unique legal entity created at each bank seizure solely to manage that failed bank's Receivership. The legal separation between FDIC Corporate and Receiver serves to protect FDIC-C's Deposit Insurance Fund ("DIF") and other Corporate assets. A failed bank's Creditors normally have recourse only to FDIC Receiver's assets, provided all FDIC procedures were followed. WMI, however, was never directed to increase the capital of WMB, nor allowed the time to do so. WMI had nearly $4 billion in cash on hand, and there were over twenty billion dollars in assets awaiting regulatory approval to upstream to WMB. A Prompt Corrective Action notice (or more accurately, the lack of one) is critical to WMI's case, since many of FIRREA's protections for the FDIC simply disappear if one was never sent. Also, FIRREA was never intended to shield the FDIC from its own actual fraud or intentional misconduct.

16. The FDIC Receiver filed a timely proof of claim [D.I. #2140, dated March 30, 2009], though many of their claims are quite dubious. Their largest claim is for $15 billion in back dividends for the five year period prior to seizure. The FDIC appears to have forgotten that they were WMB's backup regulator during that period, and that they had no problem with the

issuance of those dividends at the time. In my opinion, FDIC Receiver's most viable claim is the $1.5 billion tax receivable on WMB's books and records as of the seizure date.

17. FDIC Corporate, on the other hand, has no claims against WMI since they were all transferred to FDIC Receiver immediately upon seizure. I'm not sure why FDIC Corporate is even involved in this bankruptcy, Your Honor, since WMI's claims against Corporate fall exclusively under Title 12 jurisdiction. FDIC Corporate has never filed a claim in this Court.

18. The FDIC in its' Corporate capacity has caused significant damage to WMI, resulting in the majority of the claims filed against the FDIC in the DC Action before Judge Collyer. In an August 6, 2008 e-mail, OTS Director Reich warned FDIC Corporate that their actions were likely to cause irreparable harm to WaMu. Knowing this, Corporate continued to market WMB's assets, well before the mid-September bank run which was eventually used as the justification for the seizure.

19. It was FDIC Corporate who determined when and how to sell WMB's assets, arranging a sale even while WMI was attempting to sell WMB or selected WMB assets on the open market. Despite the fact that the FDIC's bid instructions did not allow modification to the terms, significant changes were later made exclusively for JP Morgan. It was Corporate who negotiated a special $500 million indemnity solely for JPM's breach of their contract with WMI, without disclosing this fact to any of the other bidders. Corporate ran the auction process, negotiating and consummating the P&A agreement with JPM. Corporate accepted JPM's bid without a detailed understanding of the value of WMB's assets, in clear violation of their statutory duty under the Federal Deposit Insurance Act to maximize the net present value of WMB's estate.

20. FDIC Receiver could not have been responsible for any of these actions, since it only came into being when WMB's seizure took place. It was also FDIC Corporate who directed the OTS to order WMB to initiate the exchange event. This was not an attempt to shore up WMB's liquidity as intended by the agreement with OTS. Others tiptoe around the issue, but I'll come out and say it as I see it: this is a crystal clear case of actual fraud by FDIC Corporate. FDIC Receiver knowingly participated in this fraud by attempting to force WMI to turn the TPS assets over to JP Morgan following the seizure. The FDIC's intent was obviously to defraud TPS holders and WMI Equity holders alike. They stripped out the TPS assets while shifting the liability to WMI's stockholders by adding $4 billion in preferred stock liabilities to WMI. Confirmed by JPM's bid cover letter and the FDIC's e-mail response, they collaborated in a scheme to enrich JPM while reducing any potential impact on the Deposit Insurance Fund.

21. On November 25, 2008, a heavily redacted copy of JP Morgan's bid cover letter was obtained via a Freedom Of Information Act request number 08-0704. JP Morgan's bid cover letter [Appendix A] was faxed at 18:52 hours, September 24, 2008, to Ken Blincow with the FDIC's Division of Resolutions and Receiverships. This bid cover letter highlighted a number of clarifying points to JP Morgan's $1.888 billion bid for WMB's assets. In it, they confirmed the $500 million indemnification provisions in Section 12.1 of the P&A Agreement, designed to partially protect JP Morgan from a potential breach of contract suit by WMI for violation of their Spring 2008 standstill agreement. JPM learned of the conditional exchange agreement in their Spring 2008 due diligence, but they apparently didn't know the exchange event could not be completed in one day. JP Morgan's bid cover letter stated, *"With respect to the REIT preferred securities and the conditional exchange permitted by the terms thereof, the Office of the Thrift Supervision will direct the exchange and the holding company immediately will contribute the trust preferred securities it receives upon exchange to the bank."*

22. Sheila Bair, FDIC Chairwoman, responded to Jamie Dimon by e-mail at 8:23 pm that same evening [Appendix B]. Rather than deny JP Morgan's bid cover letter request for the FDIC to commit actual fraud against WMI and the TPS holders, she simply described JPM's request as a "technical issue" which could be easily addressed. And apparently it was – the next day (which ended up being the day of the seizure), an OTS representative arrived at WMB's offices, and would not leave until the transfer of the TPS assets was put in motion. In her response, (formatting and punctuation as in original, italics added), Ms. Bair wrote,

From: sbair@fdic.gov
Sent: Wednesday, September 24, 2008 8:23 PM
To: Jamie Dimon/IL/ONE <jamie.dimon@jpmchase.com>
Subject: Congrats

You are the high bid. The technical issues you raised in your cover letter can be easily addressed. The board will approve this friday morning and we will complete the transfer cob friday
One problem. Both the wsj and nytimes are on to stories about the fdic "auction". We may have to accelerate the announcement. Our lawyers are trying to head them off but may not be able to
I'm at home now if you want to discuss. [redacted] *I only have your work phone*
Sheila

23. In the DC Court, WMI has filed a number of significant liquidated and unliquidated claims against both FDIC Corporate and FDIC Receiver. The fact that WMI survived a motion to dismiss in that DC Court provides confirmation that FDIC Corporate may indeed be liable. Judge Collyer asked pointed questions about the legal separation of FDIC Corporate and Receiver, then declined to dismiss Corporate from the lawsuit, because she felt that WMI's claims could exhaust the $1.888 billion in Receivership assets.

24. 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. Corporate retained no claims whatsoever, as doing so would defeat the purpose of the Receivership arrangement intended to

protect FDIC Corporate's assets. FDIC Corporate, a signatory to the GSA, was undoubtedly hoping no one would notice that they anticipated this Court's approval of very valuable releases for no consideration whatsoever.

25. While these releases might be appropriate if there were reason to believe that WMI's claims were indeed worthless, that is simply not the case here as demonstrated by Judge Collyer's refusal to dismiss FDIC Corporate. Facts that support this assertion are JPM's heavily redacted bid cover letter, requesting that the FDIC have the OTS order the exchange event, and the special $500 million indemnity FDIC Corporate negotiated only for JP Morgan Chase in Section 12.1 of the P&A. The fraudulent exchange event provided an additional $4 billion in assets to JP Morgan. Despite a duty to run a free and fair bidding process where all bidders have access to the same information, the FDIC never disclosed these facts to the other potential bidders.

26. Simply put, WMI has potentially viable claims against FDIC Receiver, and FDIC Receiver has potentially viable claims against WMI. Given this, a reviewing Court might find the Global Settlement Agreement ("GSA") to be fair and reasonable solely with respect to FDIC Receiver. FDIC Corporate has no claims against WMI. WMI has significant, potentially viable claims against Corporate. While releases are often rejected for inadequate consideration, Equity is indeed fortunate that Your Honor has already rejected releases when no consideration is being provided. The law of the case and the Supreme Court admonishment both require that FDIC Corporate be denied the releases they seek. When a reviewing Court compares the terms of the compromise with the likely rewards of litigation, it is clear that they will find the GSA neither fair nor reasonable where FDIC Corporate is concerned. But the FDIC in its' Corporate capacity is not the only one with this problem.

VI. JP Morgan's Receipt of WMB Tax Refunds Violates Congressional Intent

27. There are two very significant problems with JPM's receipt of $2.16 billion of WMI's tax refunds. First, as a TARP recipient, JPMC is not eligible to receive any refund due to the 5-year lookback since Congress expressly exluded TARP recipients from recovery under the Worker, Homeownership, and Business Assistance Act of 2009 (H.R. 3548). When WMI made that election, any refund for that five year period became subject to that lookback, so the fiction the Debtors propound regarding a first part or second part tax refund is pure nonsense. This is merely a scheme to enrich JP Morgan. JPMC is also claiming approximately $200 million of an earlier refund, which would be subject to the same argument.

VII. The P&A Agreement Expressly Excludes the Sale of Any Claims Against WMI

28. Second, and most importantly, Section 3.5 of the P&A Agreement explicitly states that JPM did not purchase any claim against "any shareholder or holding company of the failed bank." Since WMI is WMB's sole shareholder and holding company, JP Morgan therefore did not purchase from FDIC Receiver any claim against WMI.

29. I understand that contract law normally only concerns itself with intent of the parties when there is an ambiguity. Section 3.5 spells it out in exceedingly clear language, Your Honor, but don't take my word for it. I bring you back to the October 22, 2009 hearing where JP Morgan was trying to assert setoff rights against WMI's Deposit. This is from the transcript of that hearing, with the Debtor's attorney, Mr. Elsberg speaking:

> MR. ELSBERG: Your Honor, if you look at the top, Section 3.5 says assets not purchased by assuming bank. The assuming bank does not purchase, acquire or assume or accept, as otherwise expressly provided in this Agreement, obtain an option to purchase, acquire or assume under this Agreement the assets or assets listed on the attached schedule 5. Then what

> does schedule 5 say? It's pretty simple, Your Honor. This is not a difficult provision to understand although they try to make it as difficult to understand as possible. It says the following is excluded from what was purchased, and I'm quoting -- and I'm quoting the bolded language now. JP did not purchase any interest, right, action, claim or judgment against, and then you look at little 3, any shareholder or holding company of the failed bank. Well, Your Honor, that's us, the holding company of the failed bank. They didn't acquire any claims. Your Honor, there's no justification for going past that plain language of the Agreement. Even if you did, Your Honor, and this is remarkable and ties into the -- what's missing in their Affidavits, but even if you did go past that plain language and the Court respectfully, we submit should not, look at the party's practical construction of this thing. The FDIC has filed Proofs of Claim for the same WMB legacy claims that JP would like to use as a basis for setoff, like the tax refunds, the trust preferred securities, that's at FDIC brief 13 through 14. So, Your Honor, it can't be that both the FDIC and JP have the same claims, and this plain language shows what types of claims were not transferred, not claims against the holding company.

30. While Section 3.5 of the P&A Agreement obviously applies to the tax refunds due to the Tax Sharing Agreement, it also applies to any other pre-petition claim against WMI as well. The only claim filed by JPM against WMI that I can say with certainty is a post-petition claim is JP Morgan's administrative claim where they seek reimbursement for litigation expenses incurred in any disputes over the Debtors' assets. Apparently they would like to be compensated for their expenses because WMI didn't immediately hand over the Deposit, the TPS Assets, or any other valuables as JP Morgan demanded. This brings to mind a mugger, who after sizing up the victim's thick wallet and fancy clothing, then demands the victim withdraw additional funds from an ATM.

31. The examiner mentioned the P&A Section 3.5 argument in his report, but attempted to dismiss it by claiming that it didn't matter which of JP Morgan or the FDIC had a claim. He completely ignored the fact that JP Morgan was receiving a much higher percentage

distribution than the FDIC agreed to receive from the supposed "first" or "second" tax refunds. And he apparently assumed that the litigation prospects would remain the same, no matter who the defendant was, despite the fact that they may have different defenses. Further, he assumed Section 3.5 didn't apply to all of the other pre-petition claims JPM had filed. These assumptions on his part are demonstrably false.

VIII. Value of WMI's Counterclaims: Background

32. Mr. Hochberg investigated alleged leaks of confidential information designed to drive down WMI's share price. In his investigation, he discussed several meetings JPMC had with Moody's, Fitch, and S&P between September 19 to 24. Due to the proximity to the seizure date, the examiner then concluded that no harm to WMI had occurred. However, the first leak that I am aware of was not on September 19, 2008 as the examiner alleges. The first leak was a "constructive" leak, rather than the direct leak of information Mr. Hochberg apparently anticipated. It happened when JPM made its' offer to acquire WMI in April of 2008.

33. Once JPM had completed their initial due diligence, they made WMI a non-binding purchase offer at $8 per share. But in fact, once you read the details of the offer, it was apparent that it was actually an offer for $5 per share, with a contingent $3 which depended upon the loan performance of WMB's most risky HELOC loans. And now to explain what I mean by a "constructive" leak: WMI's common stock was trading at the time at approximately $13 per share. So JPM's non-binding bid of $5 per share screamed to the market, "Danger, Danger! We came in, we looked at their books, and WaMu's got some serious issues with their loans. They're not even worth half of what everyone else thinks they are! Stay Away!"

34. This offer was widely reported in the press, planting the first seeds of doubt about WMB's assets. This was also the first public aspect of Project West, JP Morgan's plan to obtain WaMu's assets and West Coast branch footprint for the lowest possible price. It is JP Morgan's execution of Project West which gave rise to the ANICO suit, and to WMI's similar Business Tort claims for the damage JP Morgan caused in the intentional destruction of WaMu.

35. Serious bidders looking to make an acquisition do not make lowball non-binding bids at less than fourty percent of the market is value of a company. They determine an appropriate premium as incentive for shareholders to accept the offer. JPM's non-binding offer was not just a non-offer offer, it was intended to destroy the market's confidence in WaMu. It was meant to give the impression that JPM, after going through their books with a fine-toothed comb, felt WaMu was nearly worthless. So this bid was at best a "constructive" leak of the confidential, proprietary information WMB provided; at worst it was that "constructive" leak augmented with propaganda and lies intended to deceive the market of the true worth of WaMu's assets.

IX. Value of WMI's Counterclaims Against JPM: Introduction

36. WMI has filed counterclaims against JPM via a number of legal theories to recover the value of WMB's assets subsequently transferred to JP Morgan. The largest of these seek compensation for either JP Morgan's unjust enrichment or avoidance of the P&A transaction itself as a fraudulent transfer. Though JP Morgan has not provided an inventory of the assets received under the P&A, we can get a ballpark number for the Debtors most significant claims by backtracking through JP Morgan's actions and public statements. For simplicity, I'll refer to these as unjust enrichment, though these numbers could also be used to value the P&A fraudulent transfer claim or any of the other legal theories against JP Morgan or the FDIC.

X. Value of WMI's Counterclaims Against JPM: Market Value Method

37. Let's examine for a moment exactly how much money this strategy has actually saved JP Morgan as of the date the FDIC handed over WaMu's assets. WMI at the time of the offer had approximately 1 billion shares outstanding, placing a value on the JPM's offer of $5 to $8 billion with JPM assuming all assets and liabilities. The market at the time valued WMI's 1 billion shares at about $13 per share, for a total of approximately $13 billion.

38. Now I'll contrast the deal JP Morgan would have obtained, had they paid the market value with no additional premium, with the one they actually received via the FDIC auction which stripped away most non-deposit liabilities. Instead of the $13 billion market value, JPM's winning bid was $1.888 billion. So that's a savings of $11.1 billion right off the top. Next we add back in the liabilities JP Morgan didn't assume: WMB liabilities, $13.8 billion; WMI liabilities, $7.0 billion; PIERS; $0.75 billion; TPS Preferred, $4.0 billion; WMI preferred, $3.4 billion; Capital contributions from April 18 2008 until the seizure date; $5.5 billion. I did not include WMI's $550 million tax payable shown in the MORs, since I was unsure whether it was actually valid. The capital contributions to WMB (and thus eventually JPM) were the result of a cash infusion of $7.2 billion from TPG Capital and their group. These should be included because they were transferred to JPM and the funds from which they were made were not present when JPM made its' lowball offer to purchase WMI. Totalling the savings and avoided liabilities gives us a conservative number for JPM's unjust enrichment: $45.55 billion.

XI. Value of WMI's Counterclaims: Accounting Gains Method

39. For those who feel those numbers are completely out of line or think that there must be a mistake, here is a completely different approach which yields similar numbers: JP Morgan,

immediately after the seizure, wrote down WaMu's loans by $31 billion by using purchase accounting. Next, by using another accounting trick, they wrote down all of WaMu's approximately $10 billion in tangible assets, such as real estate, to zero. When JP Morgan's quarter ended a few days after all of those writedowns, they reported a $1.9 billion gain due to negative goodwill in conjunction with the WaMu acquisition. I will now unmask their most obvious accounting tricks.

40. Negative goodwill is very rare as it only happens when someone sells an asset below its' true value. So we'll start with the $1.9 billion gain. Add to this the $10 billion in now extremely undervalued tangible assets, and we're up to $11.9 billion. Robert Willens, a former Lehman Brothers Holdings Inc. executive who runs a tax and accounting consulting firm in New York, analyzed the WaMu loans that JP Morgan acquired. In a Bloomberg article, he stated, "It will benefit these guys dramatically," "There's a great chance they'll be able to record very substantial gains going forward." The article goes on to state, "When JPMorgan bought WaMu out of receivership last September for $1.9 billion, the New York-based bank used purchase accounting, which allows it to record impaired loans at fair value, marking down $118.2 billion of assets by 25 percent. Now, as borrowers pay their debts, the bank says it may gain $29.1 billion over the life of the loans in pretax income before taxes and expenses."

41. So Mr. Willens has found JP Morgan admitting to an additional $29.1 billion in value from WaMu's loans by using more accurate, industry standard life of loan losses rather than the purchase accounting JPM used initially. Adding the prior $11.9 billion, we get a total of $41 billion in unjust enrichment. Since the market value method included the $4 billion in TPS assets, for comparison purposes we should add those as well. This brings the total unjust

enrichment obtained by this accounting gains method to $45 billion. The fact that I was able to obtain nearly identical ballpark numbers for JP Morgan's unjust enrichment using two entirely different, unrelated methods lends credence to my calculations. The two methods differed by just $0.55 billion out of a total $45.55 billion.

42. Unimpressed with JPM's writedown to zero of WaMu's tangible assets, the FDIC quickly changed their rules to prevent the use of this practice in the future. The reason behind JPM's accounting trickery is obvious: A nearly immediate $1.9 billion gain on the transaction, or an approximately 100 percent return, appears on the surface to be a smart business move. In those uncertain times, it drew little scrutiny other than by WMI shareholders, as it appeared to be appropriate compensation for the risk involved.

43. Had JP Morgan not been able to write down the $10 billion in tangible assets to zero, they would have been faced with the recognition of an $11.9 billion gain, or an immediate gain of a staggering 6.3 times their initial investment. Eyebrows would raise, and people in Congress would have asked serious questions of the actions of both JPM and the FDIC in negotiating such a sweet deal. Similarly, by also initially selecting more accurate life of loan losses rather than the purchase accounting they did use, in even the most conservative case (by excluding the disputed TPS assets), JP Morgan would have reported a $41 billion gain. This represents a windfall of over 20 times their purchase price. WMI would have challenged the seizure, certain Members of Congress would have been incensed, and the heads of those responsible would have been served up on platters.

XII. Value of Other Counterclaims Against JPM

44. WMI has other large, viable claims against JPM such as the business tort claim, the fraudulent conveyance claim for the entire value of the WMB assets transferred, the $6.5 billion claim for capital contributions made to WMB in the year before seizure, and a variety of protective claims in the event litigation losses increase the value of the assets seized and ultimately transferred to JP Morgan. Keep in mind that none of the numbers I've just listed add any of the billions in additional value in post-seizure assets such as the tax refunds, the wind farm, Visa shares, BOLI/COLI, Anchor litigation, or any other assets JPM is to receive under the GSA. I'll ignore these for the moment so that I can focus on the big picture. For now, we'll just call that the icing on the very large, $45+ billion cake that the FDIC baked for the select few invited to the WaMu seizure party.

XIII. Consideration for Releases: JP Morgan's Contributions Under the GSA

45. What exactly is JPM providing to the estate? They claim it's seven billion dollars! Certainly, on the face of it, that sounds like a staggering amount of money. The problem is that these funds are not actually being contributed by JP Morgan because they don't actually have a viable claim to those $7 billion of WMI's assets. At the confirmation hearing, Mr. Kosturos confirmed that JPM's main claims against the Estate are for the Deposit and the TPS Assets. The Deposit claim is tenuous at best, and the TPS Asset claim is based upon actual fraud committed by FDIC Corporate at JP Morgan's request.

XIV. Consideration for Releases: Benefit to WMI from JPM's GSA Contributions

46. To come up with this $7 billion figure, JPM is returning WMI's Deposit, giving up part of their alleged claim to tax refunds, purchasing the Visa shares (with assumption of the Visa agreement), and funding the BKK litigation cleanup. They are also giving up any other claim

they may hold against WMI. The largest component of that $7 billion is the approximately $4 billion Deposit Account. Your Honor hasn't ruled on the deposit yet, but in Your Opinion Denying Confirmation of the Sixth Amended Plan of Reorganization, [D.I. #6528], you stated that WMI would likely prevail. So it's unlikely that JPM is providing any value by returning the deposit. In fact, WMI is effectively losing money under the GSA since they're also giving up the right to Washington State's twelve percent pre-judgement interest which would be due on the Deposit, totalling $1.36 billion. In exchange, WMI is to receive approximately $20 million in interest which has accrued to date. Deposit benefit to WMI: negative $1.34 billion.

47. The Tax refunds total over $5.5 billion. Under the GSA, the Debtors receive $2.196 billion. JPM is to receive $2.16 billion, the FDIC Receiver $850 million, and Senior WMB bondholders receive $335 million. Though there is a potential offset due to the chance the FDIC Receiver's claim could be enforced instead of JP Morgan's claim, a plain reading of Section 3.5 excludes the sale of any claim against WMI. A strong possibility also exists that the FDIC Receiver's share could be limited to the $1.5 billion portion that was on the books and records of WMB at seizure. It is even possible that the FDIC seizure completely voided the tax sharing agreement with respect to WMB, and that the FDIC Receiver is due nothing whatsoever under that agreement. JPM Tax refund benefit to WMI: negative $2.16 billion.

48. At the last confirmation hearing, we were informed that JP Morgan could "write a check" for $25 million to purchase 3.147 million Class B Visa shares. (Just a side note: the Debtors, early in the bankruptcy, certified that there were 5.4 million Class B Visa shares. I have never seen any explanation for this discrepancy, and these missing shares have a market value of over $91.7 million.) With the Class A share price at $83.41 and the Class B to Class A conversion ratio currently at .4881, the 3.147 million shares have a current market value of

$128.1 million. The Visa agreement value is unknown, but it is likely a small liability. Let's just estimate it as being $25 million for a nice round number. So JPM is effectively providing $50 million in value for shares with a market value of $128.1 million. Visa shares benefit to WMI: negative $78.1 million if the estimate is correct.

49. On to the BKK landfill cleanup which JP Morgan has graciously agreed to fund. Upon information and belief, the State of California has recourse against either or both of WMB and WMI-Ranier without this settlement. Since JP Morgan assumed this liability with the WMB acquisition, JPM is agreeing to fund the cleanup provided all of WMI Ranier's assets and the insurance proceeds are used to fund the cleanup. BKK Landfill Benefit to California: a cleaned up landfill site. Not having to listen to the California Department of Toxic Substances at each hearing: Priceless. BKK Landfill benefit to WMI: $0.00

XV. JP Morgan's Consideration for Releases: Conclusions

50. JP Morgan purchased no tax or other pre-petition claims from the FDIC, and their post-petition claims do not even approximate the value of WMI's $45 billion in viable counterclaims. The GSA itself is providing JP Morgan many billions in additional value, for only $25 million in cash consideration and the assumption of the Visa agreement. JPM's Deposit claim is questionable, and the TPS claim is based upon a fraud which JP Morgan itself initiated in their bid cover letter. WMI's $45 billion in counterclaims are being given up as well, despite the fact that all of the elements for a strong fraudulent transfer claim are present.

51. And this is without the assets WMI is to provide to JPM free and clear under the GSA: Five billion dollars in face value of BOLI/COLI, one half interest in a wind farm, the $382 million in Anchor litigation proceeds plus any possible tax gross up, and others. The portion

of the GSA solely with respect to JPM is clearly neither fair nor reasonable as JPM is receiving assets and releases worth tens of billions more than the $50 million in consideration they have offered. When you total the numbers, it would appear that WMI is transferring to JP Morgan Chase additional Estate assets worth over $4 billion, all so that WMI can have the opportunity to give up on an additional $45 billion in viable claims against JP Morgan. A reviewing Court would almost certainly find that the settlement under the GSA is neither fair nor reasonable and that the Global Settlement Agreement must not be approved. Releases against JP Morgan must be denied as a result.

XVI. Consideration for Releases: FDIC Receiver

52. Now that we've established that JP Morgan has no pre-petition claims under a plain reading of the P&A Agreement, I'd like to look at the FDIC Receiver's claims on the tax refunds. While the FDIC has been meeting with significant litigation losses as they push too hard to recover assets from failed banks, as the examiner points out in his report, there is the possibility that the FDIC Receiver could win some or all of the litigation they propose. This singular area of litigation seems ripe for a settlement, since it could go either way at trial, and since both sides are already in agreement as to the terms of a compromise. In fact, the FDIC Receiver seems eager to obtain a resolution of their claims, as evidenced by their statement in The FDIC-Receiver's Response to The Consortium of Trust Preferred Security Holders' Submission for Inclusion in the Record of Excerpts of the United States Senate PSI Report, [D.I. $8371]. In their response, they state, *"During the course of these cases, various key parties in interest, including the FDIC-Receiver, engaged in intensive negotiations that culminated in a global settlement agreement."* They go on to state, *"The Plan represents the best opportunity for creditors to receive maximum distributions in these cases, and any further delay in its confirmation will only reduce any creditor recoveries."*

Undoubtedly FDIC Receiver is concerned that this Court will disallow their only viable claim based upon the tax sharing agreement, since they maintain that those refunds were sold to JP Morgan Chase even though the P&A Agreement specifically excludes the sale to JP Morgan of any claims against WMI. It is my view that the Debtors should finalize a settlement agreement with FDIC Receiver and the WMB Bondholders on substantially similar terms to the ones under the present GSA. This would provide needed closure to the FDIC Receiver, WMB bondholders, and WMI alike.

53. The tax refund being provided to FDIC Receiver is $850 million, and Senior WMB bondholders are to receive $335 million, allegedly based upon their claim that WMI defrauded them in some manner. While that $335 million payment rankles many shareholders as they feel it is unwarranted, I view it in a different manner. As I see it, it is effectively an agreement to pay the Receivership $1.185 billion, in exchange for a release for all FDIC Receivership claims against WMI. $335 million is being made as a direct payment to the WMB senior bondholders, who would normally be due that money anyway had it been paid directly to WMB's Receivership. I believe it was set up that way to guarantee that it would not end up in the hands of JP Morgan who has repeatedly sent letters to the FDIC putting them on notice they'd demand compensation for their anticipated losses, should they occur. Plus it has the added bonus of disposing with any claims those WMB bondholders might have pursued in the future. Whether valid or not, WMI would still have to defend itself. I assume that Mr. Califano would be prepared to stipulate that FDIC Corporate has exercised no undue influence over FDIC Receiver in the negotiations surrounding the GSA. That would suggest that FDIC Receiver would then be willing to accept the same terms that are in the GSA, if it were just a settlement agreement with FDIC Receiver and WMI rather than a "Global" one. If I were the Debtors, I would consummate such a settlement immediately, then work on the others later.

XVII. Third Party Causes of Action: Introduction

55. Over two years into the process, following my March 2011 objection to the Supplemental Disclosure Statement where I raised these issues, the Debtors finally retained special counsel Klee Tuchin to investigate potential causes of action against third parties. Since the Liquidation Trust may represent the sole consideration received by Liquidation Trust Beneficiaries for releases to be granted to the Debtors, JPM, and the FDIC, authority must be provided for the Liquidating Trust to pursue these causes of action whether or not the Debtors presently believe 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.

56. While I listed a number of potential pre-petition causes of action as examples in my objection, it was not my intent to exclude post-petition causes of action. An example of a post-petition litigation target would be the examiner, who had a duty to fairly assess the claims and causes of action of WMI, JPM, and the FDIC, and to respond with unbiased analysis of those claims which were proposed to be released under the GSA. Instead, Mr. Hochberg's report was determined to be hearsay because he neglected to obtain sworn testimony despite authorization, and it suffers from a number of other fatal flaws. In the interest of brevity, I'll focus on the worst of them today, though I would like to state that in my view many of his conclusions are suspect.

XVIII. Examiner's Misunderstanding of Project Fillmore

57. He appears to start with the underlying assumption that WaMu would not have survived in any case, which severely limits much of his analysis. The Project Fillmore materials attached as exhibits to my latest POR Objection [D.I. #7447], provide compelling evidence that WMB could have and indeed should have survived even without any government assistance through

TARP. As additional confirmation of my assertions that WaMu should not have been seized and that the claims WMI holds against FDIC Corporate are indeed valuable, Mr Rotella, in Case No. 2:11-cv-00459 United States District Court Western District of Washington at Seattle, stated in a filing on July 1, 2011: *"More fundamentally, the FDIC's actions took place despite the fact that WaMu's liquidity and capital thresholds remained well above the levels typically required for seizure. (Id.) For example, a bank is considered in danger of being seized if its net liquidity dips below 5% of total assets. (Id.) WaMu had $29 billion in net liquidity—about 9.4% of assets and nearly twice the closure threshold on the day it was seized. (Id.) Likewise, WaMu's capital exceeded all regulatory minimums. (Id.) Its leverage ratio stood at 7.66% of total assets while regulators consider a level of 5% to be well-capitalized. (Id.; 12 C.F.R. § 325.103(b (2011).)"* Mr. Rotella's filing is included in its' entirety in [D.I. #8345, Document 53 in Appendix A].

58. The examiner mentioned Project Fillmore in his report, but there is no indication that he understood the significance of the WMI's $3.67 billion Deposit being added to the master note. Instead, he merely reiterated JPM's assertion that this maneuver was illogical, when that transaction was obviously intended to provide an immediate $3.67 billion boost to WMB's liquidity. What was illogical was not WaMu's plan to increase its' own liquidity, but the FDIC's plan to seize and sell WaMu without a Prompt Corrective Action notice, no matter what anyone tried to do to address the FDIC's alleged liquidity concerns. As an experienced investigator, the examiner should have immediately realized from Doreen Logan's testimony that by dividending this amount up to WMB along with the master note, all right, title, and interest to both the approximately $10 billion master note and this $3.67 billion in cash would pass to WMB, while WMBfsb would have retained the deposit liability to WMI.

59. Considering just the cash from the deposit, WMB's net liquidity would have increased to $32.67 billion, or approximately 10.6% of assets to over twice the closure threshold. Similarly, WMB's master note liability would have declined by approximately $10 billion. On a consolidated basis, WMB's financial statements would have looked exactly the same, but this is of no consequence. In all of their ratios where it mattered, especially those having to do with liquidity and capitalization, WMB would have shown marked improvements to even the well-capitalized status they maintained at seizure. I believe that approval would have elevated WaMu's capital ratios to place them at least within the top three of large banking institutions at that time. WMB's ratios would likely have been exceeded only by Wells Fargo, prior to completion of the Wachovia acquisition.

XIX. Examiner's Misunderstanding of the ANICO Dismissal

60. Notably, Mr. Hochberg cited the ANICO litigation dismissal in Judge Collyer's DC Court as grounds for his belief that WMI's business tort claims faced substantial impediments to recovery. He neglected to consider the the fact that WMI had indeed passed through FIRREA's administrative claims process, or the totality of the circumstantual evidence which would have been presented in a jury trial, should the case proceed. As we now know, the ANICO dismissal has been overturned on appeal, in American National Insurance Co. v. Fed. Deposit Ins. Co., No. 10-5245, (the "Anico Reversal") rendering Mr. Hochberg's previously questionable analysis irrelevant. It is my belief that a jury of regular people would find for WMI awarding a significant judgement after having been presented with the facts of this case, even as we now know them. Given the Debtors' extremely limited discovery, it is likely that much more could unearthed should discovery resume and depositions be conducted.

XX. Examiner's Misapplication of the Emergency Economic Stabilization Act

61. In exchange for access to WMB's confidential, proprietary information in the Spring of 2008, JP Morgan signed a contract with a standstill agreement. That contract was intended to prevent JPM from purchasing any of WaMu's assets from anyone other than WMI for a period of 18 months. The examiner argued that the October 3rd, 2008 passage of the Emergency Economic Stabilization Act, 12 U.S.C. § 1823(c)(11), which occurred after JPM breached this contract giving rise to WMI's claim, strips WMI of any recourse against JPM or the FDIC. If this is true, then any large, politically connected company could enrich their own shareholders by committing insanely profitable, unconscionable acts, then provide large campaign contributions to their favorite politicians in exchange for protecting them from recourse by slipping a few additional lines into a popular bill sure to be enacted into law.

62. The examiner states, *"As to the standstill provision of the Confidentiality Agreement, the Emergency Economic Stabilization Act almost certainly bars any claim based [on] a breach of that provision."* I note that none of the restrictions or prohibitions intended in WMI's standstill agreement were able to be effective as of the legislation's October 3, 2008 passage since the breach had already occurred. JP Morgan materially breached their contract with WMI by purchasing WaMu's assets from the FDIC, rather than from WMI as the contract required. Upon the seizure and immediate sale to JPM, further breaches became impossible because the assets no longer belonged to WMI. Once that breach occurred, nine days prior to the passage of this legislation into law, it became impossible for that standstill agreement to ever affect, restrict, limit, or prohibit any of the actions listed in the statute since all of WMB's assets became property of the WMB Receivership upon seizure. So, based on a plain reading of this statute, the Emergency Economic Stabilization Act simply could not have been applied in the manner the examiner suggests.

63. Also, the examiner's interpretation is obviously incorrect on its' face since the public policy benefit was intended by Congress to encourage new mergers and acquisitions, not as an escape clause to protect JP Morgan and the FDIC because of a breach that they had already engineered and implemented. It was FDIC Corporate who knowingly assisted JP Morgan Chase to materially breach the terms of that contract with WMI. I would not be surprised to find that FDIC Corporate lobbied for the insertion of this provision, even selecting the precise wording designed to create this ambiguity that they could later exploit given WMI's bankruptcy filing one day after the FDIC seizure and sale. If the FDIC had anything to do with the enaction of this statute, then this would constitute yet another case of actual fraud by FDIC Corporate against WMI.

64. Coincidentally, the examiner's interpretation would also save the FDIC up to $500 million for the indemnity clause of the P&A if JPM were found liable to WMI for that breach. There cannot be any public policy benefit to the application of this law in this manner. In fact, it appears that the only beneficiaries would be the two largest opponents in this case: The FDIC, who would have been responsible for the first $500 million of damage to WMI, and JP Morgan, the unliquidated remainder.

XXI. Other Serious Examiner Errors and Invalid Assumptions

65. The examiner has assured this Court that he had conducted a thorough review of the claims being released under the GSA and that WMI was receiving appropriate consideration for the provision of releases. Despite this, there is no evidence to suggest that he considered the merits of the duplicative claims of FDIC Corporate, FDIC Receiver, or of JP Morgan Chase. Had he done so, he certainly could not have missed the fact that FDIC Corporate had no claim against WMI at all, yet had negotiated valuable releases from WMI under the GSA.

Had he spent any time analyzing JPM's financial statements, he should have recognized that JP Morgan was trying to hide over $41 billion in gains from public view. As an experienced fraud investigator, he should have immediately questioned the FDIC's actions in ordering the OTS to consummate the TPS Exchange Event on the very day of the seizure. They certainly knew of their plans to seize WaMu's assets, yet they ordered the capital contribution of an additional $4 billion in assets, ultimately to be delivered to JP Morgan Chase. Had an actual person rather than the corporate persons of JP Morgan and the FDIC committed this actual fraud to the tune of $4 billion, they'd have long ago been sitting in a prison cell.

66. The examiner assumed that the Settlement Noteholders, JPM, the FDIC and others were providing truthful answers in his unsworn interviews, despite their efforts to obfuscate and stymie discovery. He also assumed that the Settlement Noteholders were faithfully fulfilling their duties when they stepped into the Debtor's shoes in order to negotiate the GSA. With the benefit of hindsight and the passage of time, it now seems likely that they were instead negotiating for a quick end to litigation in order to avoid full compliance with the 2019 disclosure requested by JPM and ordered by this Court.

67. If the FDIC's broad new powers are to be applied ex post facto, having been signed into law over a week after the seizure and WMI's bankruptcy filing, then why hasn't the FDIC also used their other broad new powers to seize and liquidate the WMI holding company? The answer is obvious: those powers were never intended to be used in the manner the examiner contemplates as he twists and turns through his torturous routes intended to deprive equity of any meaningful recovery. I am forced to wonder if all of these errors were not due to ineptitude or an inability to process the mounds of information provided, but were instead yet another attempt to defraud equity in the hopes that we would just go away.

XXII. WMI's Net Operating Losses Are Being Used to Obtain the Tax Refunds

68. 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 asset that is solely property of WMI, while providing the majority of the gains achieved to JPM and the FDIC in a manner that is, or should be, either inequitable or contrary to bankruptcy law.

69. Based on the data provided in the MORs, WMI's use of this lookback in this manner has already used up $20.85 billion ($26.3 billion initial tax basis less $5.45 billion remaining) of the tax basis of WMB's stock. This tax basis could have been converted into an unrestricted NOL, so WMI's NOL is effectively being used to obtain a tax refund for WMB. To add insult to IRS injury, JP Morgan and the FDIC seek to claim the majority of that tax benefit for their own use, with no compensation provided for the use of WMI's unrestricted NOL. The 1999 Tax Sharing Agreement only allows a credit to WMB if WMB's Net Operating Losses are used. If WMI's NOLs are used to obtain the refund, then WMB is not due any credit under the Tax Sharing Agreement. Though the Debtors will argue that WMB's NOLs were used, they have admitted that for every dollar of WMB NOL used, one dollar of WMI NOL disappears as well, effectively using WMI's NOL to obtain the refund. The tax refund amounts to be paid under the GSA to both JPM and the FDIC should be disallowed in their entirety or in the alternative reduced to alleviate WMI's loss of unrestricted NOLs which are Estate property.

XXIII. An Additional $17.55 Billion in NOLs Could be Available to the Estate

70. In addition to the foregoing, the Debtors should explore the possibility of obtaining a private letter ruling from the Internal Revenue Service ("IRS") 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. The IRS is double-dipping, or even triple-dipping by using this nonsensical interpretation of the tax code. Assuming a 35 percent tax rate, every dollar of WMB NOLs used would result in a tax refund of approximately 35 cents to WMI. Yet WMI, with a 35 cent tax benefit paid from the IRS, is expected to reduce the cost basis of WMB by one dollar, or nearly three times the tax benefit received if the Debtors are to be believed.

71. A reasonable intepretation 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. I am not a tax professional, but I believe that my argument and interepretation is sound. It is my hope that the Debtor's tax professionals will pursue my arguments with the IRS, since it could increase the unrestricted NOLs available to the estate by $13.55 billion. {Assuming a 35 percent corporate tax rate, ($20.85 billion X (1.00 – 0.35)) = $13.55 billion}. Including the $6 billion in potentially unrestricted NOLs the Debtors already admit, there is the potential for an undisputed $19.55 billion in unrestricted NOLs.

72. Additionally, if the Debtors and JPM can convince this Court that the TPS' $4 billion in assets were a capital contribution due to an existing side letter agreement with the OTS, then they should also be able to convince the IRS that the same $4 billion should be treated as a capital contribution to WMB. This could result in an additional $4 billion unrestricted NOL as a result of the recent private letter ruling. So the Debtors unrestricted NOL could indeed increase to $23.55 billion should WMI wait to exit until early January 2012 so that there is no

proration of the unrestricted portion of the NOL. As an example, an exit at the end of August would reduce that $23.55 billion total NOL to an unrestricted $7.85 billion. Since the unrestricted portion approaches zero as we near the end of the year, the closer we get to the end of the year, the more compelling it becomes to wait until the next year to exit so that the full $23.55 billion is available to the reorganized company.

73. The Debtors have filed and withdrawn a Certification of Counsel stating that no one has objected to their request to abandon WMB stock (other than Tricadia who withdrew their objection). I would assume that the Debtors intend to wait until just prior to the effective date to abandon the WMB stock. Once that stock is abandoned, the IRS may be less inclined to consider the effect of the additional capital contributions which could otherwise increase WMB's stock basis. I would ask that the Debtors first address the private letter ruling request I have made in my Confirmation Objection, as early abandonment has the potential to affect an additional $13.55 billion in potentially unrestricted NOLs available to the reorganized company, plus the $4 billion additional due to the TPS asset capital contribution to WMB.

74. Upon exit, Reorganized WMI is slated to emerge as WMMRC, a mortgage reinsurance company, significantly limiting the opportuntities to fully utilize the NOLs. If WMI were to emerge as a holding company, rather than as the reinsurance company WMMRC, the resulting company would have much more flexibility in the use of its NOLs since it would be much more likely to meet the business continuity requirements of IRC § 382 needed to allow future capital expansion. This would also greatly increase the possibility that a "merger of equals" could later be arranged to fully utilize those $23.55 billion in NOLs without running afoul of the tax code.

CONCLUSIONS

75. The FDIC's failure to issue a Prompt Corrective Action notice is a critical component of WMI's suit against the FDIC in the DC Court, Your Honor, since WMI is allowed to pursue many avenues of recovery would have otherwise been barred by FIRREA. The FDIC has committed actual fraud by pressuring the OTS to order the exchange event, and may have consumated an additional fraud against WMI if they had any connection to the passage of the standstill provision in the Emergency Economic Stability Act of 2008. These are very serious, glaring errors and misconduct which the FDIC has not repeated in any of the subsequent bank seizures. FDIC Corporate is providing no consideration whatsoever under the GSA, and must not be provided a release under the GSA.

76. Aurelius has provided the key to the resolution of this entire matter. Given the pre-judgement interest rate of twelve percent per year in Washington State, JP Morgan now has 1.36 billion additional reasons to return WMI's deposit. That same twelve percent pre-judgement interest rate should also be applied to WMI's other Washington State Law claims. An example of these would be avoidance of the entire P&A transaction under RCW §§ 19.40.041, 19.40.051, 19.40.071, & 19.40.081 and other statutes.

77. I believe I have provided the basis today for my argument that WMI's claims should be valued at least somewhere in the $45 billion range, whether they be achieved by pursuit of fraudulent transfer litigation, an unjust enrichment claim, or another legal theory offered by the Debtors. It is clear that the elements of Fraudulent Transfer have already been met: Both WMI and WMB were rendered insolvent by the seizure; WMB's valuable assets were stripped from WMI, but no equivalent value was provided to WMI. FIRREA does not protect the

FDIC in either of its' capacities from fraudulent transfer claims since a Prompt Corrective Action notice was never sent to WMI. JP Morgan, as the subsequent transferee and ultimate beneficiary of the seizure, is also fully exposed to similar fraudulent transfer claims seeking recovery of the value of the WMB assets.

78. To make the math simple, I'll be very conservative by assuming that the WMI and JP Morgan claims net to $40 billion in WMI's favor since this amount is approximately ten times WMI's deposit. Faced with the potential of a fraudulent transfer award not just for $40 billion, but an additional $13.6 billion in pre-judgement interest continuing to accrue at $400 million per month, JP Morgan's board will surely act in their own self-interest and quickly step forward to finally negotiate a resolution that everyone can be unhappy with. After all, in a truly hard fought, arms length negotiated settlement nobody gets everything they want except for the final resolution that all seek.

79. If Your Honor seeks GSA approval by an Article III Court, it is likely to come under heavy scrutiny as this may be the largest cross-jurisdictional case to be decided following the Supreme Court's ruling in Stern, setting a precedent for all future cases to follow. Due to recent events such as the Stern ruling, the Anico Reversal and this analysis of consideration (or lack thereof) provided by parties to be released under the GSA, we are finally at the point where a truly "Global" GSA can be reached and these matters finally resolved. JP Morgan has already profited immensely from the seizure and sale, and will continue to profit every day of every year for the forseeable future. It is only equitable that they should be the ones who fund the majority of the resolution of these cases whether by providing WMI with cash, stock, debt, a combination of the above, or some other valuable consideration.

80. Mr. Hochberg assured us all that the estate was receiving appropriate, equivalent value in consideration for WMI's releases to JP Morgan and the FDIC. If he analyzed those as he claimed, how could he have missed the gains that JP Morgan has already publicly admitted, totalling at least forty one billion dollars? How could he so easily dismiss the fact that a plain reading of Section 3.5 of the P&A agreement specifically excluded the sale of any claims (including tax claims) against WMB's sole stockholder, WMI? How could the examiner not realize the GSA is to transfer more than $3.6 billion in additional disputed assets to JP Morgan for a mere $50 million in consideration? How could Mr. Hochberg have determined FDIC Corporate releases were appropriate when they were providing no consideration at all?

REQUESTS FOR RELIEF

I humbly request the following:

1. Confirmation of the Sixth Amended Modified Plan of Reorganization be denied;
2. The Settlement Noteholders each receive appropriate punishment for their unethical behavior throughout this case in violation of their fiduciary duty to the Estate;
3. This Court revisit the "fair and reasonable" determination of the GSA, in light of the changes caused by the Supreme Court's Stern Ruling and the Anico Reversal decision;
4. FDIC Corporate be denied releases since they are providing no consideration;
5. JP Morgan be denied releases due to inadequate consideration;
6. That releases and exculpations for Mr. Hochberg and his firm McKenna Long & Aldridge, LLP be denied, and that both the examiner and his firm be added to the litigation targets being analyzed by the Debtors' Special Counsel Klee Tuchin;
7. That the Debtors memorialize a settlement agreement with FDIC Receiver and the WMB Bondholders on substantially similar terms to those under the GSA;
8. That this Court award WMI its' $4 billion deposit, plus pre-judgement interest at the maximum allowable rate, submitting proposed findings of fact to an Article III Court for approval if appropriate; and
9. Any other remedy that this Court deems fair and equitable.

Dated August 7, 2011

Sincerely,

James Berg, Pro Se
429 4th Street South #5
Moorhead MN 56560

Appendix A

JP Morgan Bid Cover Letter

(via FOIA Request)

September 24, 2008

FDIC
Federal Deposit Insurance Corporation
550 17th St. NW Washington DC, 20429
Legal Division

[redacted]

NOV 25 2008

RE: FDIC FOIA Log No. [redacted]

Dear [redacted]:

This is in further and final response to your electronic mail message of October 17, 2008, in which you requested, pursuant to the Freedom of Information Act, 5 U.S.C. §552 ("FOIA"), a copy of the facsimile cover sheet, dated September 24, 2008, and the accompanying cover letter, sent by JPMorgan Chase & Co. to the FDIC in connection with their bid for a purchase and assumption transaction relating to Washington Mutual Bank, Henderson NV.

In my letter of November 6, 2008, I advised you that the FDIC had completed its records search, and had located the information that you requested. My letter further advised you that, in accordance with Executive Order 12,600, the FDIC was required to provide the submitter of that information (JPMorgan Chase & Co.) with the opportunity to comment upon and object to our proposed disclosure in advance of our disclosure of this information to you. That process now has been completed.

The information that you requested is being released to you in part. I have enclosed a copy of the redacted version of the facsimile cover sheet, dated September 24, 2008, and the accompanying cover letter (3 pages). The information that has been withheld is exempt from disclosure pursuant to FOIA Exemption 4 5 U.S.C. §§ 552 (b)(4). FOIA Exemption 4 permits the withholding of trade secrets, and commercial or financial information that has been obtained from a person and is privileged or confidential.

Some of the disclosed information may not be fully legible. This office exercised reasonable care to provide you with the best copies available.

Because some of the requested information has been withheld, this letter constitutes formal notification that your request has been granted in part and denied in part. You have the right to appeal this determination to the FDIC's General Counsel within 30 business days following receipt of this letter. You also may appeal any partial no records response. If you decide to appeal, please submit your appeal in writing to the General Counsel. Your appeal should be addressed to the FOIA/PA Group, Legal Division, FDIC, 550 17th Street, NW, Washington, D.C. 20429. Please refer to the log number and include any additional information that you would like the General Counsel to consider.

If you have any questions, you may contact Senior FOIA Specialist Jerry Sussman of my staff at (202) 898-6904.

Thank you for your interest in the FDIC.

Sincerely,

Fredrick L. Fisch
Supervisory Counsel
FOIA/Privacy Act Group

Enclosure

FDIC FOIA Log No. 08 - [redacted]

ENCLOSURE TO LETTER TO REQUESTER

PARTIAL
b(4)

Date:	September 24, 2008
To:	Ken Blincow Manager, Franchise Marketing Division of Resolutions & Receiverships
Destination Fax:	703 465 4324
From:	Brian A. Bessey
Telephone:	212 270 5553
Comments:	Re: B08-30 Please find the following documents on the pages that follow: Bid Form Certified Board Resolutions Secretary's Certificate re: Authorized Officers Purchaser Eligibility Certification Cover letter to follow. Signed originals of these document will be sent for delivery tomorrow to the following address Ken Blincow Manager, Franchise Marketing Division of Resolutions and Receiverships Federal Deposit Insurance Corporation 1601 Bryan Street Dallas, Texas 75201

Redacted Version

JPMORGAN CHASE & CO.

Ken Blincow,
Manager, Franchise Marketing,
Division of Resolutions and Receiverships,
Federal Deposit Insurance Corporation.
1601 Bryan Street,
Dallas, Texas 75201.

Dear Mr. Blincow:

Enclosed on behalf of JPMorgan Chase Bank, National Association ("Chase Bank") please find, pursuant to your instructions, a bid package for a purchase and assumption transaction relating to Washington Mutual Bank, Henderson NV (the "lead thrift"). We are very pleased to have the opportunity to work with you and your colleagues on this matter.

For your information, we highlight the following clarifying points reflected in our bid:

- [redacted]

- We understand that you may be considering revisions to the indemnification provisions in Section 12.1. [redacted]

- With respect to the REIT preferred securities and the conditional exchange permitted by the terms thereof, the Office of the Thrift Supervision will direct the exchange and the holding company immediately will contribute the trust preferred securities it receives upon exchange to the bank.

The OCC has asked us to specify that in connection with the transaction, we plan to immediately transfer the acquired credit card business (including the associated assets and liabilities) to Chase Bank USA, NA ("Chase Delaware") in order to realize operational efficiencies by having all of the credit card accounts of the firm in the same financial architecture. We also plan to immediately merge the subsidiary thrift into Chase Bank to consolidate the business in one legal entity and realize operational and

277 Park Avenue New York, NY 10172
Telephone: 212 270 5253 • Facsimile: 212 270 0659
brian.a.bessey@jpmchase.com

JPMORGAN CHASE & CO.

system efficiencies. In connection with that, we are filing Bank Merger Act applications with the Office of the Comptroller of the Currency with respect to (1) Chase Bank acquiring the assets and assuming the liabilities of the lead thrift; (2) Chase Bank merging with the subsidiary thrift; and (3) Chase Bank transferring the credit card assets and liabilities to Chase Delaware.

We have discussed many of these issues with your colleagues in the context of the form of the proposed purchase and assumption agreement. However, because of the importance of these assumptions to our proposal, and uncertainty as to the final form of the agreement, we felt it important to draw these assumptions to your attention.

Very truly yours,

Brian A. Bessey

Enclosures

cc:

277 Park Avenue New York, NY 10172
Telephone: 212 270 5553 • Facsimile: 212 270 0659
brian.a.bessey@jpmchase.com