Docket #9569 Date Filed: 2/6/2012

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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U.S. BANKRUPTCY COURT
DISTRICT OF DELAWARE

--x		**Chapter 11**
In re:	:	
	:	**Case No. 08-12229 (MFW)**
WASHINGTON MUTUAL, INC., et al.,	:	
	:	**Jointly Administered**
Debtors.	:	**Hearing Date: February 16, 2012, 9:30 a.m. (EST)**
	:	**Related Dkt. Nos. : 9178, 9179**
	:	
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OBJECTION TO THE SEVENTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS BY JAMES BERG

TO: THE HONORABLE MARY F. WALRATH,
UNITED STATES BANKRUPTCY JUDGE

I am James Berg, a Series R preferred shareholder of Washington Mutual Inc. ("**WMI**"), appearing *Pro Se*. With this objection, I hope to spur the parties to resolve the few remaining impediments so that a modified plan of reorganization may be quickly confirmed. In support of this objection, I respectfully represent as follows:

1. WMI and WMI Investment Corp. are debtors and debtors in possession (the "**Debtors**")[1] in these cases. On December 12, 2011, the Debtors filed their *Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [D.I. 9178] (as may be further amended or modified, the "**Plan**"), and the *Disclosure Statement for the Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, [D.I. 9179], (as amended, the "**Disclosure Statement**")[2].

PRELIMINARY STATEMENT

2. As we contemplate the Seventh Amended Plan, I believe that this case has finally

1 The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 1201 Third Avenue, Suite 3000, Seattle, Washington 98101.

2 Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Disclosure Statement or, if not defined in the Disclosure Statement, in the Plan.

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reached the point where most if not all parties are eager for a resolution of the issues before this Court. While significant progress has been made through mediation, I believe that there are still some outstanding issues which must be addressed so the Seventh Amended Plan may be confirmed. These issues include interest on the Disputed Accounts, the Debtors' release of the Federal Deposit Insurance Company in its corporate capacity ("**FDIC-Corporate**"), Equity's release of the Federal Deposit Insurance Company, as receiver for Washington Mutual Bank ("**FDIC-Receiver**"), Equity's release of JP Morgan Chase ("**JPMC**"), releases or exculpations to be provided to Joshua Hochberg (the "**Examiner**") and his professionals, and as-yet-unfiled litigation against the Office of Thrift Supervision ("**OTS**"), FDIC-Corporate, or certain agencies of the Federal Government.

3. After consideration of these issues, I offer what I believe is a realistic, viable solution that could resolve these outstanding issues to the extent possible while still retaining the Global Settlement Agreement which the Court, the Debtors, JPMC, and FDIC-Receiver value so highly. The goals of my proposal are to maximize the value of the estate, and provide for a timely, full recovery to all Creditors with the residual accruing to Equity's benefit. If implemented, I believe that my proposed solution would have the full support of all parties in interest in these cases, leading to approval of a plan in full compliance with the Bankruptcy Code.

4. Additionally, I request that shareholders be provided irrevocable protections in the corporate bylaws of the Reorganized Debtor to prevent their ownership in the Reorganized Debtor from being reduced or eliminated involuntarily through a reverse split or other means.

BACKGROUND

A. GENERAL OVERVIEW

5. Washington Mutual Bank, Henderson, Nevada ("**WMB**") was a federal savings bank chartered pursuant to the Home Owners' Loan Act, 12 U.S.C. §§ 1461-70. WMI was a savings and loan holding company that owned WMB, and indirectly owned WMB's subsidiaries, including

Washington Mutual Bank fsb ("**WMBfsb**") along with other banking and non-banking subsidiaries. WMI is incorporated in the State of Washington where it also maintains its offices.

6. On September 25, 2008, the Director of the OTS, by order number 2008-36, appointed FDIC-Receiver as receiver for WMB and advised that FDIC-Receiver was immediately taking possession of WMB. Immediately after its appointment as receiver, FDIC-Receiver, together with FDIC-Corporate, sold substantially all of the assets of WMB, including the stock of the subsidiary WMBfsb, to JPMorgan Chase Bank, National Association pursuant to that certain Purchase and Assumption Agreement, Whole Bank, dated as of September 25, 2008 (the "**P&A Agreement**").

7. On September 26, 2008, the Debtors each commenced a voluntary case pursuant to chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of Delaware (the "**Court**"). By order dated January 30, 2009, the Court established March 31, 2009 as the deadline for filing proofs of Claim against the Debtors' estate. Just prior to that bar date, numerous disputes arose between the Debtors, JPMC, and FDIC-Receiver. JPMC filed an adversary proceeding styled *JPMorgan Chase Bank, National Association et al v. Washington Mutual, Inc. et al,* (Case No. 09-50551, March 24, 2009) (the "JPMC Adversary") seeking a declaratory judgment that they own the Disputed Assets. In filing proof of claim #2140, FDIC-Receiver made, *inter alia*, protective claims against those same assets.

8. WMI responded to the JPMC Adversary proceeding with the *Debtors' Answer and Counterclaims in Response to the Complaint of JPMorgan Chase Bank, N.A.* on May 29, 2009. On April 27, 2009, the Debtors filed a turnover action, *Washington Mutual, Inc. et al v. JPMorgan Chase Bank, N.A. et al*, Case No. 09-50934, (the "**Turnover Action**") seeking summary judgment awarding $4 billion in deposits (the "**Deposit**") held in the Debtor's names at JPMC.

9. On October 6, 2010, the Debtors filed their Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code [D.I. 5548] (as amended, the "**Sixth**

Amended Plan") and a related disclosure statement [D.I. 5549] with the Bankruptcy Court. The Sixth Amended Plan was premised upon implementation of an Amended and Restated Settlement Agreement (as amended on December 7, 2010, the "**Amended Settlement Agreement**") which represented a compromise of a number of outstanding bankruptcy claims in this Court between the Debtors, JPMC, FDIC-Corporate, and FDIC-Receiver (these parties, along with the Creditor's Committee and the Settlement Noteholders, the "**Settling Parties**").

10. After hearing testimony and argument regarding confirmation of the Sixth Amended Plan, on January 7, 2011, the Bankruptcy Court issued an opinion (the "**Opinion**"), [D.I. 6528], pursuant to which, *inter alia*, this Court found the GSA to be fair and reasonable; however it denied confirmation citing impediments to confirmation including overly broad or impermissible releases (Opinion at 76, 81-2). Additionally, in light of Mr. Thoma's allegations of insider trading by the Settlement Noteholders, the Court stated that it was "reluctant to approve any releases of the Settlement Noteholders" (Opinion at 69), as required by the Amended Settlement Agreement and Sixth Amended Plan. The Equity Committee sought permission to conduct an investigation of these insider trading allegations; the Court granted the Equity Committee permission to do so, but significantly limited discovery.

11. On February 8, 2011, the Debtors filed with the Bankruptcy Court their Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (as amended, the "**Modified Plan**") and a related supplemental disclosure statement. The Settlement Agreement also has been amended and restated by the Second Amended and Restated Settlement Agreement dated as of February 7, 2011, to conform to certain revisions reflected in the Modified Plan, or otherwise required by the Opinion (as it has and my be further amended, modified or supplemented, the "**GSA**"). The GSA excludes the Settlement Noteholders who were previously parties to the Settlement Agreement. Otherwise, the GSA's material financial terms remain unchanged as in the Settlement Agreement.

12. After hearing testimony and argument regarding confirmation of the Modified Plan, on September 13, 2011, this Court issued an opinion (the "**September Opinion**"), [D.I. 8612], in which this Court reaffirmed the GSA as reasonable, but again denied confirmation, citing a number of"colorable" claims against the Settlement Noteholders. When the Debtors announced their intention to seek confirmation after making additional "tweaks" to the Modified Plan, this Court rejected their request, citing "too many issues" to allow confirmation to proceed. The Court then referred certain matters to mediation, including issues associated with the commencement of litigation against the Settlement Noteholders and any remaining impediments to confirmation of the Modified Plan. The Court excluded JPMC and FDIC-Receiver from mediation, in the "first instance", as it believed their presence would not be helpful.

13. On December 12, 2011, the Debtors announced that the Debtors, the Creditor's Committee, the Equity Committee and certain significant parties in the Debtors' chapter 11 proceedings had reached a comprehensive resolution which they believed resolved pending motions, appeals and potential impediments to confirmation. Accordingly, the Debtors filed the Seventh Amended Plan and a related Disclosure Statement for the Plan with this Court. Though the GSA is now "terminable" by any party (as announced by the Debtors), the Plan continues to be premised upon and incorporates the terms of the Second Amended Settlement Agreement.

14. By order, dated January 13, 2012 [D.I. 9414], this Court approved the Disclosure Statement and authorized solicitation of acceptances and rejections of the Seventh Amended Plan. February 9, 2012 was established as the deadline for parties to submit votes on the Seventh Amended Plan.

B. <u>THE DC ACTION</u>

15. Following the seizure and sale of substantially all of WMB's assets to JPMC, the FDIC-Receiver established December 30, 2008 as the deadline to file claims against the

Receivership as required by 12 U.S.C. § 1821(d).[3] The Debtors timely filed a proof of claim against WMB's Receivership (the "**Receivership Claim**")[4] to preserve the Debtors' rights requesting, *inter alia*, recognition of ownership interests in certain assets, and the avoidance and recovery of certain transfers that WMI made to WMB as preferential or fraudulent transfers.[5] In ¶¶ 6 – 7 of *Id.*, Summary of Claims section, the Debtors reserved all rights to amend or supplement their Receivership Proof of Claim, and *have asserted a* ***secured claim*** *against the Receivership* assets:

> "6. In connection with the events described above, and as more fully described herein, Claimants assert a liquidated claim against WMB in the aggregate approximate amount of $6,851,723,146 as of the Receivership Date (the "**Liquidated Claim**"). In addition to the Liquidated Claim, upon information and belief, Claimants assert the contingent and/or unliquidated claims described below. **Claimants reserve all rights to amend and/or supplement this Proof of Claim at any time** and in any respect and to assert any and all other claims of whatever kind or nature that they have, or may have, against WMB. The claims asserted are unsecured, unless otherwise noted, and except to the extent that WMB asserts claims against the Claimants. To the extent of any such claims asserted by WMB, **Claimants assert that the claims asserted hereunder are secured.**
>
> 7. **On the Receivership Date, many of the Claimants' books and records were seized by the FDIC and transferred to the custody of JPMorgan Chase. As a result, this Proof of Claim has been prepared using the information available to the Claimants, which was, in certain instances, only summary information set forth in the Claimants' books and records...."**

16. On January 23, 2009, the FDIC-Receiver disallowed the Debtors' claims in a one-page Notice of Disallowance of Claim.[6] The Debtors filed a complaint in the United States District Court for the District of Columbia (the "**DC Court**") on March 20, 2009, challenging the FDIC"s disallowance of their claims.[7] The Debtors pleaded five counts: (1) the Court's determination as to the validity of each claim in its Receivership Claim; (2) dissipation of WMB"s assets; (3) the taking

3 Compl. ¶ 10, *Washington Mutual, Inc. v. Federal Deposit Ins. Corp.*, Case No. 1:09-cv-533 (RMC) (D.D.C.) (the "WMI Action") (Mar. 20, 2009), Dkt. No. 1.

4 See Exhibit 2 of Mem. of Law in Support of FDIC Receiver"s Partial Mot. to Dismiss, *Washington Mutual, Inc. v. Federal Deposit Ins. Corp.*, Case No. 1:09-cv-533(RMC) (D.D.C (the "**WMI Action**") (June 11, 2009), Dkt. No. 25.

5 FDIC-Receiver"s Partial Mot. to Dismiss, Ex. 2, WMI Action (June 11, 2009), Dkt. No. 25.

6 Compl. at Ex. 2, WMI Action (Mar. 20, 2009), Dkt. No. 1.

7 Compl., WMI Action (Mar. 20, 2009), Dkt. No. 1.

of the Debtors' property without just compensation; (4) conversion; and (5) a declaration that the FDIC-Receiver"s disallowance is void.[8]

17. The FDIC Receiver filed a partial motion to dismiss and the FDIC in its corporate capacity filed a motion to dismiss the complaint in its entirety.[9] The FDIC-Receiver argued, *inter alia*, that certain claims should be dismissed against FDIC-Receiver under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction because the Debtors did not include those claims in the Receivership Claim.[10] The FDIC Receiver also asserted counterclaims against the Debtors and JPMC.[11] JPMC, in turn, responded with its own counterclaims and crossclaims.[12] All claims asserted by all parties contain allegations regarding the Disputed Accounts, including, *inter alia,* claims disputing the ownership of the funds in the Disputed Accounts.[13]

18. The Debtors moved to dismiss the FDIC's and JPMC's counterclaims or, in the alternative, to stay the proceedings pending resolution of the bankruptcy proceedings, including the adversary proceedings, in this Court.[14] The FDIC's and the Debtors' respective motions to dismiss were denied and the case was stayed "pending the outcome of the bankruptcy proceeding" in this Court.[15]

8 Compl. ¶¶ 78-97, WMI Action (Mar. 20, 2009), Dkt. No. 1.

9 FDIC Receiver"s Mot. to Dismiss, WMI Action (June 11, 2009), Dkt. No. 24; FDIC Corporate"s Mot. to Dismiss, WMI Action (June 15, 2009), Dkt. No. 27.

10 FDIC Receiver"s Mem. of Law in Supp. of Partial Mot. to Dismiss at 10-11, WMI Action (June 11, 2009), Dkt. No. 25 (citing the jurisdictional bar under 12 U.S.C. § 1821(d)(13)(D) of FIRREA for failure to exhaust administrative remedies).

11 FDIC Receiver"s Answer and Countercl., WMI Action (June 11, 2009), Dkt. No. 26; FDIC Receiver"s First Am. Answer and Countercl., WMI Action (July 13, 2009), Dkt. No. 34.

12 JPMC"s Answer, Crosscl., and Countercl., WMI Action (Sept. 4, 2009), Dkt. No. 60.

13 FDIC Receiver's First Am. Answer and Countercl. ¶¶ 40-49, WMI Action (July 13, 2009), Dkt. No. 34; JPMC"s Answer, Crosscl., and Countercl. ¶¶ 29-32, 45-56, WMI Action (Sept. 4, 2009), Dkt. No. 60. JPMC and certain WMB Bankholders were allowed to intervene, but the motion to intervene by the Official Committee of Unsecured Creditors remains pending. Order Granting JPMC's Mot. to Intervene, WMI Action (Oct. 5, 2009), Dkt. No. 67; Order Granting Bankholders' Mot. to Intervene, WMI Action (Oct. 13, 2009), Dkt. No. 71; Committee of Unsecured Creditors" Mot. to Intervene, WMI Action (Oct. 16, 2009), Dkt. No. 73.

14 Debtors' Mot. to Dismiss FDIC"s Am. Countercl. and Mot. to Stay, WMI Action (July 27, 2009), Dkt. No. 45; Debtors' Mot. to Dismiss JPMC's Countercl., WMI Action (Oct. 26, 2009), Dkt. No. 79.

15 Order Denying FDIC's Mots. to Dismiss and Granting Debtors" Mot. to Stay at 6-7, WMI Action (Jan. 7, 2010), Dkt. No. 97. The Debtors' motion to dismiss JPMC's counterclaims was not included in the DC Court's Order. *Id.*

ARGUMENT

19. On August 9, 2011, I filed my post-confirmation filing (the "**Written Argument**") [D.I. 8407]. In that Written Argument, I had argued, *inter alia*, that JPMC had publicly admitted to at least $45 billion in gains from the Washington Mutual transaction. At the August 24, 2011 hearing, I attempted to include an SEC filing by JPMC in support of my argument. This Court ruled that it was "too late" for those documents to be included in the record for the confirmation hearings for the Modified Sixth Amended Plan. In footnote 19 of the September Opinion, this Court cited the Written Argument's docket number, stating that, "Some of the objections are based on alleged facts for which no evidence was presented at the confirmation hearings. Those objections must fail for lack of support in the record."

20. I would like to rectify my error at this time by providing additional supporting documentation so that the facts which formed the basis for my earlier argument may be considered in conjunction with the confirmation hearings for the Seventh Amended Plan. To that end, I reassert and reallege all of the facts, arguments, and conclusions in the Written Argument, with the exception of paragraph 10 which has been resolved to my satisfaction.

21. Due to additional research, I now need to supplement the accounting gains section of my Written Argument, paragraphs 39-43 to reflect SEC filings which have been published since the Opinion was rendered. Excerpts of JPMC's 2010 Annual Report (filed February 28, 2011) are included in [Appendix 1]. JPMC produced a "final summary computation of the purchase price and the allocation of the final total purchase price of $1.9 billion to the net assets acquired of Washington Mutual" (Appendix 1 at 166). In that breakdown, $39.186 billion of net assets were acquired. Adjustments were made, including a $30.998 billion write-down of the loan value (due to purchase accounting which allowed JPMC to write down the WMB loans by approximately 25%), and, curiously, an $8.216 billion *write-up* of WMB's allowance for loan losses, suggesting that once

JPMC had established the ownership of WMB's assets, they suddenly decided that WMB's loan loss reserves *were $8.2 billion more than needed.* These and other adjustment resulted in net assets acquired of $11.999 billion. JPMC then wrote down all of $8.076 billion in "Noncurrent, nonfinancial assets not held-for-sale, such as premises and equipment and other intangibles," resulting in their reporting of a $1.982 billion negative goodwill. Do not be fooled by the accounting gimmick used to report this lower amount, though. As reported by JPMC, their "negative goodwill before allocation to nonfinancial assets" was their reported $10.058 billion, since all of those "not held-for-sale" assets certainly have value to JPMC.

22. Negative goodwill only happens when the other party has sold an asset for less than fair market value, and is extremely rare. Companies simply do not sell themselves unless they believe that they are receiving fair market value or higher. In our example, though, we had FDIC-Corporate negotiating the sale of WMB's assets, instead of WMI or WMB who would have rejected the offer as far too low. As FDIC-Receiver has alleged in the DC Action, the FDIC's motivation to maximize the value of these WMB assets was the potential impact on the Deposit Insurance Fund. But that argument is wrong, as described in 12 U.S.C. § 1821(d)(13)(E)(i). *See infra*, ¶ 27.

23. But the benefit to JPMC doesn't stop at the $10.058 billion in negative goodwill. To understand the true benefit, we must also examine the Purchased credit-impaired ("**PCI**") loans as described in (Appendix 1 at 233). Relevant parts are included below:

> **"PCI loans were determined to be credit-impaired upon acquisition based on specific risk characteristics of the loan, including product type, loan-to-value ratios, FICO scores, and past-due status."**[16]
>
> "**PCI loans are initially recorded at fair value upon acquisition**. For each PCI loan, or pool of loans, the Firm is required to estimate the total cash flows (both principal and interest) expected to be collected over the remaining life of the loan or pool. These estimates incorporate assumptions regarding default rates, loss severities, the

16 PCI loans are not necessarily non-performing loans as one might expect. The merely reflect that the conditions under which the loan was made no longer apply. For example, if you obtained a loan when with a FICO credit score of 750, and it was 725 upon the seizure date (the date of JPMC's purchase), then your loan would be considered "credit-impaired". The significant cash flows generated by these loans validates this point.

amounts and timing of prepayments and other factors that reflect then-current market conditions.

The **excess of cash flows expected to be collected** over the carrying value of the underlying loans is referred to as the **accretable yield. This amount is not reported on the Firm's Consolidated Balance Sheets but is accreted into interest income** at a level rate of return **over the remaining estimated lives of the underlying pools of loans.** For variable-rate loans, expected future cash flows were initially based on the rate in effect at acquisition; expected future cash flows are recalculated as rates change over the lives of the loans."

"The PCI portfolio affects the Firm's results of operations primarily through: (i) contribution to net interest margin; (ii) expense related to defaults and servicing resulting from the liquidation of the loans; and (iii) any provision for loan losses. The PCI loans acquired in the Washington Mutual transaction were funded based on the interest rate characteristics of the loans. For example, variable-rate loans were funded with variable-rate liabilities and fixed-rate loans were funded with fixed-rate liabilities with a similar maturity profile. A net spread will be earned on the declining balance of the portfolio, which is estimated as of December 31, 2010, to have a remaining **weighted-average life of 7.0 years**."

24. Please refer to (Appendix 1 at 236). Note that in 2008, as of the acquisition date, JPMC valued the loans at $39.454 billion. This value, published only much later buried in JPMC's 2010 Annual Report was for those same loans which accounted for the $30.998 billion write down announced to the public. JPMC had moved them, at purchase, into this pool of PCI loans which is maintained separate from their normal balance sheet with income that is **" ...not reported on the Firm's Consolidated Balance Sheets but is accreted into interest income..."**

25. By using purchase accounting in this manner, JPMC is able hide tens of billions in benefits they have received from the Washington Mutual transaction in plain sight. The cash flows from these loans have been accreted into interest income in the following amounts: 2008: $1.292 billion; 2009: 4.363 billion; 2010: 3.232 billion; and through 3Q 2011[17]: $2.095 billion. These total to a benefit of $10.982 billion that has already accreted to JPMC's balance sheet. In addition, the ending balance (present value of yield yet to be accreted) is $18.452 billion as of 09/30/2011[18].

17 See JPMorgan Quarterly Report (10-Q) (for the period ending 9/30/2011, filed on 11/04/2011) at 154. [Appendix 2]
18 See Appendix 2

26. To obtain the total benefit already accrued to date in the Washington Mutual transaction (which do not include the $4 billion in TPS assets, the tax refunds, the Visa shares or other assets to be transferred under the GSA)[19], we must add the following:

Negative Goodwill:		$10.058 billion
Accreted Interest, 2008:		$ 1.292 billion
Accreted Interest, 2009:		$ 4.363 billion
Accreted Interest, 2010:		$ 3.232 billion
Accreted Interest, through 3Q 2011:		$ 2.095 billion
Accretable Balance, end of 3Q 2011:		$18.452 billion
plus:	TPS Assets:	$ 4.000 billion
	Tax Refunds:	$ 2.360 billion
	Anchor Litigation:	$ 0.368 billion
Accrued Benefit to JPMC: (if Plan is confirmed as-is)		**$46.220 billion**

I. VIABILITY OF CLAIMS IN THE DC COURT

A. Viability of Claims Against FDIC-Receiver

27. FDIC-Receiver has made a number of specious arguments in an attempt to convince the DC Court to dismiss WMI's claim with respect to FDIC-Receiver. Chief among those is their argument that there is no requirement to maximize the value of the WMB estate, and that they are only bound to follow the Least Cost methodology when they resolve an institution. In the section entitled Disposition of assets, 12 U.S.C. § 1821(d)(13)(E) provides in relevant part that "...the Corporation shall conduct its operations in a manner which –

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;"

28. Clearly Congress didn't intend to have the least cost rule negate the need to maximize the net present value return in the event of the seizure of a potentially solvent institution, or 12 U.S.C. § 1821(d)(13)(E)(i) would have been removed or modified. That plain language should be

19 See Written Argument, ¶¶ 45-51 for discussion of these topics.

applied literally. *See National Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 389 (3d Cir. 1994) (court was "obliged to give effect, if possible, to every word Congress used").

29. Additionally, as noted in *supra*, ¶ 15, WMI has asserted a liquidated claim in the amount of $6,851,723,146, with additional unliquidated claims. Also, WMI "**reserve[d] all rights to amend and/or supplement this Proof of Claim at any time** and in any respect." Further, since FDIC-Receiver asserted counterclaims in that action, WMI's claims are ***secured***.

30. This Court found (Opinion at 30) that the FDIC-Receiver may be entitled to the tax refunds in the event JPMC is found not to have a claim pursuant to P&A § 3.5:

> "Even if JPMC is precluded from claiming the tax refunds because it took TARP money or because it only bought WMB's assets and is not WMB's successor, the FDIC as Receiver argued that it had a claim to the portion of the tax refunds which is due to WMB under the Tax Sharing Agreement. JPMC (or the FDIC Receiver) for the vast majority of those tax refunds...."

31. If WMI's Receiver claims are secured as they allege, WMI may still be able to recover the value of these tax refunds from FDIC-Receiver. Those refunds would become receivership assets which may be subject to WMI's other secured claims. The notion of WMI holding a secured claim against FDIC-Receiver is apparently not a frivolous one, as the Washington Mutual Bank Bondholders cited it as one of their reasons to intervene in the DC Action. They stated, "Bank Bondholders [...] substantial interests as among the largest creditors of the insolvent WMB Receivership Estate will unquestionably be impaired—indeed, potentially eliminated altogether—by a judgment in favor of Plaintiffs."[20]

B. Viability of Claims Against FDIC-Corporate

32. In the hasty seizure and sale, neither the OTS nor FDIC-Corporate issued a Prompt Corrective Action notice to WMB. However, 12 U.S.C. § 1831o(a)(2), under the heading "**Prompt corrective action required**" states, "Each appropriate Federal banking agency and the Corporation (acting in the Corporation's capacity as the insurer of depository institutions under this chapter)

20 Bank Bankholders' Mot. to Intervene, WMI Action (June 3, 2009), Dkt. No. 23-2 at 2

shall carry out the purpose of this section by taking prompt corrective action to resolve the problems of insured depository institutions." "Shall" is not permissive; it is mandatory. As the heading states, it was *required.* Again, Congressional intent is extremely clear, and this plain language should also be applied literally. The failure to send WMB a Prompt Corrective Action has left the FDIC potentially liable for constructive fraudulent transfer actions. And there were never any protections for claims based upon actual intent to hinder, defraud, or delay. *See* 12 U.S.C. §§ 1828(u)(1), (2).

33. Many of the FDIC's 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-Corporate must have been responsible. It was FDIC-Corporate who negotiated the terms of the P&A agreement, deciding to conduct a "whole bank" transaction, though they had a number of options available to under 12 U.S.C. § 1821. They should have formed a bridge bank to operate WMB until TARP had passed, and sold off its' parts in smaller regional pieces, or they could have simply waited for the market to stabilize so they would get more than a fire sale price. Instead, they intentionally chose the option which, due to WMB's size, would have the fewest capable bidders, with the largest potential bidder being JPMC, coincidentally, the only one who had done significant due diligence for their offer in April 2008, and who had been lobbying FDIC for seizure since March 2008. Their conduct is a flagrant violation of 12 U.S.C. § 1821(d)(13)(E)(iii).

34. Since a Prompt Corrective Action is required and none was issued, FDIC-Corporate may be held liable for the damages for fraudulent conveyances in addition to their potential liability for failure to maximize the net present value of WMB's estate. FDIC-Corporate has filed no claim against WMI, nor any counterclaim in the DC Action. Since they are providing no consideration to the WMI for the releases under the GSA of these and other valuable claims, FDIC-Corporate must not be provided a release. It is indeed fortunate for them that WMI's compensation will be limited to the liquidation value of WMB.

II. UNFILED TORT OR BREACH OF CONTRACT CLAIMS

35. There are a number of potential claims which I believe the estate may have against third parties, as well as certain parties who are signatories to the GSA. Some of these potential causes of action are against Government agencies with exclusive jurisdiction in other Courts. Those parties who did not file any proof of claim in this Court are not subject to this Court's jurisdiction. I bring these potential claims to this Court's attention as I understand the Debtors intend to preserve all third party claims, and I believe this Court should be aware of these potential estate assets so as not to inadvertently foreclose upon any potentially viable litigation going forward. In my Disclosure Statement objection, [D.I. 9339], I attempted without success to obtain more information about third party claims that the Debtor intended to pursue. Without clarity regarding the Debtors' intent, I believe the possibility exists that some of these potential claims may have been overlooked, so out of an abundance of caution, I bring them to this Court's attention at this time.. Also, the solution I propose in *supra*, ¶ 93 depends upon an understanding of these potential claims.

A. Relevant Statutes

36. Under Washington State law, RCW § 4.16.040(1), an action upon a contract in writing, or liability express or implied arising out of a written agreement, must be commenced within 6 years. For unwritten contracts or fraud, RCW § 4.16.080 provides, in relevant part:

> The following actions shall be commenced within three years:
>
> (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
> (3) Except as provided in RCW § 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
> (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

37. The FDIC-Receiver has similar protections:

Statute of limitations for actions brought by receiver: 12 U.S.C. § 1821(d)(14)(A):

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—
(I) the 6-year period beginning on the date the claim accrues; or
(II) the period applicable under State law; and
(ii) in the case of any tort claim (other than a claim which is subject to section 1441a (b)(14) of this title), the longer of—
(I) the 3-year period beginning on the date the claim accrues; or
(II) the period applicable under State law.

Determination of the date on which a claim accrues: 12 U.S.C. § 1821(d)(14)(B):

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Corporation as conservator or receiver; or
(ii) the date on which the cause of action accrues.

38. Though the FDIC-Corporate is a quasi-governmental private corporation and so may be an exception, it appears that lawuits against the OTS, the FHLB banks, the Federal Reserve Board, or other Governmental agencies should made in district court and may require, in certain circumstances, that the United States Government be named as a defendant. The Federal Tort Claims act, 28 U.S.C. § 1346(b)(1) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

39. Other areas of Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 also appear relevant. 28 U.S.C. § 2674, in relevant part, provides:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

40. Based upon a review of the applicable laws, it would appear that generally, claims against the taking of, or damage to property have a statute of limitations of 3 years, which may have lapsed for some of the potential actions. However, if they are based upon fraud, then the cause of action does not begin to accrue until that fraud is discovered. If based upon a written contract, then the longer Washington State statute of limitations would apply, increasing to 6 years the time required to file an action. Upon information and belief, the Debtors have negotiated tolling agreements with some or all of those whom they believe to be potential litigation targets. In cases of fraud, the claim does not accrue until the facts supporting an allegation are discovered, so it is likely that the statute of limitations has not yet lapsed.

41. Several of the facts which I used to form the basis of this objection came to my attention upon the filing of the *Appendix to the Brief in Support of the Motion of Plaintiffs for Summary Judgment* (Turnover Action, D.I. 0016, May 19, 2009), and additional puzzle pieces were obtained when JPMC filed their *Appendix in Support of Defendant JPMorgan Chase Bank, National Association's Opposition to Plaintiffs' Motion for Summary Judgment*, (Turnover Action, D.I. 0103, July 24, 2009). But the full picture did not become clear until the Doreen Logan Affidavit was included in a JPMC appendix, as referenced *infra,* ¶ 47. Following that, it took many additional months of research to attempt to independently verify the facts so that I would feel comfortable raising these Project Fillmore materials before this Court. I raised them for the first time in a letter to this Court, Docket # 5864, filed 11/8/2010, as I was shocked by the failure of the Examiner to address these issues substantively in his report released on 11/1/2010. Though that letter was docketed, my contribution was apparently ignored by the parties to this case. I further refined my research and attempted to raise Project Fillmore at the Supplemental Disclosure Statement hearing in March of 2011, but was not allowed to present those issues. I believe Project Fillmore raises issues that need to be considered by this Court with respect to FDIC releases.

42. I believed then (as I do now) that Project Fillmore is a critically important "smoking gun" in this case, so I did not drop the issue, but raised it again in my Objection to Confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors filed by James Berg [D.I. 7447, filed May 10, 2011]. I included (as Exhibits 1 -7) all of the presentation materials and supporting documentation I intended to present at the Supplemental Disclosure Statement hearing. At the July 2011 confirmation hearings, I discovered my problem: though my materials were being docketed, I was not aware of the appropriate Chambers Procedures necessary for this Court to actually consider them. In light of my failures to properly raise this potential fraud so that all of the parties were aware of a complete picture, I argue that any cause of action based upon this fraud could not accrue until my May 10, 2011 filing. Additional facts may yet be discovered.

B. Project Fillmore Background

(1) Washington Mutual Bank, FSB's June 30, 2008 Thrift Financial Report

43. WMBfsb was never in Receivership, since WMB's stock ownership of their 100 percent owned subsidiary WMBfsb was treated like any other asset sale. As shown in the June 30, 2008 Washington Mutual Bank FSB Thrift Financial Report ("**WMBfsb TFR**") [Appendix 3], WMBfsb had Total Equity Capital of $29,229,987[21], and a Tier 1 Risk-Based Capital ratio of 165.24 percent[22]. Eight percent is considered "Adequately Capitalized", and ten percent or higher is "Well Capitalized". WMBfsb was clearly exceptionally well capitalized and was well positioned to weather any conceivable downturn in the housing market. WMBfsb's Cash, Deposits, and Investment Securities totaled $7.16 billion[23]. These liquid assets were further bolstered by the transfer on September 19, 2008 of WMI's $3.67 billion deposit from WMB to their subsidiary bank WMBfsb. WMBfsb was used for, *inter alia*, holding WMB's investment portfolio, which had been very profitable, generating $17 billion in profits since 2004. Confirmation of this is provided in the

21 *See* WMBfsb TFR at 5

22 WMBfsb TFR at 17

23 WMBfsb TFR at 1

Appendix to the Brief in Support of the Motion of Plaintiffs for Summary Judgment (Turnover Action, Dkt. 0016, filed 05/19/2009), (the "**SJ Appendix**") filed by the Debtors.

(2) <u>WMBfsb's "Project Fillmore" Memorandum</u>

44. On August 14, 2008, in a Memo to the Board of Directors of Washington Mutual Bank fsb, entitled "Project Fillmore – Decapitalization of WMB fsb" (the "**Fillmore Memo**")[24], Mr. Peter Frellinger, Senior Vice President, stated:

> **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 WMBfsb by returning $20 billion of capital to its parent. The $20 billion will include the master note of approximately $7 billion, proceeds from the $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.
> 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 65 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.

24 *See* SJ Appendix, pages A-115 to A-116

(3) **Declaration of Nicholas Kissel**

45. Immediately following the transfer to WMBfsb, WMI's Deposit was loaned back to WMB through WMBfsb's Master Note arrangement, a move that Mr. Nicholas Kissel (an expert hired by JPMC to examine the Deposit transfer from WMB to WMBfsb) found illogical. Mr. Kissel stated in his declaration[25], "...this transaction appears unusual and the economic substance of the transaction is unclear and questionable..." He further stated:

> "Raising further questions about management's intent in attempting to effect this transaction, there is evidence that the intended effect of the transaction (to increase WMB fsb's master note receivable from WMB) was directly contrary to the near-term business objective of WMB fsb's senior management to significantly *reduce* the balance in this master note receivable account."

And continued in *Id.*, note 10:

> In a plan labeled Project Fillmore, WMB fsb proposed to the OTS in August 2008 to shrink its balance sheet by $20 billion. As described in Doreen Logan's affidavit on page A-15 and Exhibit N pages A-115-116, WMB fsb planned to shrink its master note receivable by $7 billion as part of Project Fillmore.

(4) **Notice or Application for Capital Distribution**

46. WMBfsb's Board of Directors acted very quickly on Mr. Frellinger's request, which resulted in a filing to the Office of Thrift Supervision the very next day. *See* SJ Appendix at A-117 to A-121. WMBfsb proposed a 3rd Quarter Common Dividend of $750 million, and proposed capital distributions totaling $20.0 billion in the 3rd and 4th Quarter of 2008 for a total of $20.75 billion[26]. 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. Under oath, Doreen Logan confirmed that the OTS had received this application. *See infra*. The OTS received the application on August 15, 2008, and assigned the number R5-2008-0248 to this WMBfsb capital distribution request.

25 *See* Turnover Action, (Dkt 0103, filed 7/24/2009 at B268 – B269); The Declaration of Nicholas Kissel begins on page B260.

26 *See* SJ Appendix, pages A-118

(5) The Doreen Logan Affidavit

47. The full extent of Project Fillmore was not apparent until JPMC included the Doreen Logan Affidavit in its filing of the *Appendix in Support of Defendant JPMorgan Chase Bank, National Association's Supplemental Opposition to Plaintiffs' Motion for Summary Judgment*, (Turnover Action, Dkt 0157, September 11, 2009) (the "**JPMC SJ Appendix**"). The relevant part of the Doreen Logan Affidavit is located at *Id.*, page B1052. I direct your attention to the upper left quadrant of B1052, starting on sub-page 110, line 24, and continuing until the upper right quadrant, sub-page 112, line 10. Doreen Logan testifies:

> **Q.** But you are aware of the – what you refer to as Project Fillmore, which would have involved the elimination of the fsb master note, the note by which WMB borrowed from fsb?
> **A. I wouldn't characterize Project Fillmore as that purpose. The Project Fillmore's purpose was to reduce the capital base of the fsb and part of that capital release would be to dividend the master note.**
> **Q.** To Pike Street?
> **A. Yes.**
> **Q.** That application had already gone into the regulators, correct?
> **A. The OTS, yes.**
> **Q.** So while that was pending, this was a transaction that was to have the effect, if it was effective, of increasing the outstanding amount of the master note by $3.67 billion?
> **A. Yes.**
> **Q.** And you didn't regard that as inconsistent?
> **A. It was a – it was a short-term problem that would be fixed when we had the capital release approved by the OTS.**
> **Q.** How did you know this was a short term – oh, I'm sorry the capital released?
> **A. Yes.**
> **Q.** Meaning you would have just dividended it back up?
> **A. Yes.**

48. 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, deposits, and investment securities as shown in WMBfsb's Jun 30 2008 Thrift Financial Report. This would have immediately eliminated the liquidity problems at WMB, while allowing WMBfsb to liquidate mortgage related assets at their leisure in the event WMI needed access to their $3.67 billion Deposit.

C. Project Fillmore: Potential Impact of the $20.75 Billion Capital Distribution

49. Referring back to (SJ Appendix at A-121), we find that this transfer was intended to be in two stages. In the Intercompany Dividends to/from in columns Q3-2008 and Q4-2008, we find that WMBfsb had applied to distribute $13.95 billion by 9/30/2008, and an additional $6.8 billion by 12/31/2008. WMB was seized just 3 business days prior to that first distribution.

50. 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) (*See Id.*, at A-120). Ten percent or higher is considered to be well-capitalized, so there should have been no issue with OTS approval. Typically, regulatory approval would take about 60 days for such a request, but WMB had requested expedited processing so expected approval at any time (*See Id.,* at A-117), as is further confirmed in the Doreen Logan Affidavit, *supra,* ¶ 47,where she referred to it as a "short-term problem." Instead WMB was seized and sold for a pittance. While I realize issues surrounding the seizure fall outside this Court's jurisdiction, these issues become relevant here as it is in your Court that the Debtors, JP Morgan, and the FDIC seek your approval to dismiss the lawsuits against JPM and the FDIC.

51. 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 assets and the Master Note (including full ownership of WMI's $3.67 billion in cash) immediately, and that Pike Street Holdings was prepared to respond in a similar fashion. Regulatory approval of this Application for Capital Distribution R5-2008-0248 aka Project Fillmore would have provided a tremendous source of immediately available liquidity to WMB.

52. 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.

53. Mr. Kissel's confusion to the contrary, I think the transaction as contemplated was entirely logical, and was in fact a brilliant solution to WMB's liquidity problems. The failure was not with WMB or WMBfsb, but with the regulators who did not immediately approve WMBfsb's request. WMBfsb (who held WMB's investment portfolio) knew that WMB was under strain due to the looming housing crisis, and was trying to do their best to make sure WMB remained a healthy, viable institution. It was not in WMBfsb's best interest to greedily hold onto those assets or WMI's Deposit, as Mr. Kissel seems to suggest they should have, only to be seized and sold along with WMB other assets. The same obviously applies to Pike Street Holdings, as it is a direct subsidiary of WMB. As WMB's subsidiaries, both Pike Street Holdings and WMBfsb would likely lose their independence if WMB were seized (and as *did* happen with JPMC), so it was in their best interest to make sure WMB had the regulatory capital and liquidity needed to exceed the standards of a well-capitalized institution. Transferring WMI's $3.67 billion Deposit in the way they did, given WMBfsb's obvious expectation that approval of Project Fillmore was imminent (evidenced through the Doreen Logan Affidavit, and the addition of the Deposit to the Master Note), was the most logical way to provide immediate liquidity and capital to WMB. Since the Deposit liability was to remain at WMBfsb, WMI would have had the flexibility to provide additional contributions to WMB's capital if needed later (without needing additional regulatory approval) once WMBfsb was able to sell some of their less liquid holdings at other than fire sale prices.

D. <u>Potential Actual Fraud by OTS Related to Project Fillmore</u>

54. 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. OTS R5-2008-0248 (Project Fillmore) was a plan to distribute over $20 billion of these assets (including the $3.67 billion cash Deposit) from WMBfsb to its parent. The OTS failure to approve that request in a timely manner is evidence of actual fraudulent intent.

55. As primary regulator for WMB and WMBfsb, the Office of Thrift Supervision (the "**OTS**") certainly knew about WMBfsb's plan to upstream $20.75 billion in assets to Pike Street Holdings, Inc., since they were the ones who assigned it the number R5-2008-0248 on August 15, 2008. These funds were obviously intended for further distribution to WMB to provide additional liquidity and capital reserves. For all of those reasons, the OTS (or the U.S. Government in their place) is potentially liable. A claim may also be pursued for implied or express breach of written contract, which have a six year statute of limitations. WMB's agreement with the OTS to provide regulatory services, the Memorandum of Understanding signed on September 7, 2008 (which did not require WMB to raise additional capital), or some other written agreement could form the basis for a breach of contract claim in addition to any potential claim for fraudulent conduct.

56. As an analogy, imagine you have fallen on hard times as your husband's hours were cut back due to the economic slowdown. You have a savings account and your 401k managed by your bank. When the balance in your savings account becomes low, you make an application to disburse funds from your 401k and move them into your savings account. If your bank were to look at you doubtfully, and say, "No, sorry, the funds in your savings account are low, we can't do that", then sell your balances to another customer for pennies on the dollar, you would be livid, as it would be a clear violation of the law. The situation with WMB is identical, but on a much, much larger scale.

E. Potential Actual Fraud by FDIC-Corporate Related to Project Fillmore

57. As backup regulator, FDIC-Corporate knew, or should have known, about WMBfsb's plan to upstream $20.75 billion in assets to Pike Street Holdings, Inc., obviously intended for further distribution to WMB. I reassert and reallege all of the arguments in *supra*, ¶¶ 54-56 substituting

FDIC-Corporate for the OTS. For all of those reasons, FDIC-Corporate (or possibly the U.S. Government in their place if the Federal Tort Claims Act applies) is also potentially liable.

F. Potential Actual Fraud by FDIC-Corporate Related to Standstill Agreement

58. FDIC-Corporate negotiated a special indemnity for JPMC in the amount of $500 million in the event JPMC was found liable for breach of contract from their March 2008 due diligence agreement with WMI. That agreement had, inter alia, a standstill agreement which prevented JPMC from purchasing any of WMB's assets from anyone other than WMI. After FDIC-Corporate indemnified this potential breach, JPMC breached the agreement on September 25, 2008.

59. On October 3, 2008, the Emergency Economic Stabilization Act of 2008 (Public Law 110-343) (the "**EESA**") was signed into law. Eight days after WMB's seizure and sale breaching the standstill agreement, this legislation was signed into law. The FDIC was potentially liable for $500 million under their indemnity, with JPMC responsible for the unliquidated remainder. That EESA has been alleged to have stripped WMI of its' right to pursue damages under the standstill agreement. The Chairwoman of the FDIC at the time of the seizure was Sheila Bair. Earlier in her career, Ms. Bair served as Research Director, Deputy Counsel and Counsel to Kansas Republican Senate Majority Leader Robert Dole (1981 to 1988). Ms. Bair also pursued a seat in the U.S. Congress in 1990, but lost the nomination. She was known to be fiercely protective of her agency and the Deposit Insurance fund, and was clearly interested in politics and legislation.

60. Given Ms. Bair's background and general nature, I find it extremely suspicious that shortly after agreeing to an indemnity which could cost FDIC-Corporate $500 million, the EESA was signed into law, allegedly relieving her agency of that significant liability. While I have no proof at this time that she was involved, the circumstances warrant an investigation to determine whether a cause of action exists which the Reorganized Debtor could pursue. If she was involved in any way with the EESA's standstill legislation, I can think of no clearer case of actual intent to delay, defraud, or hinder than this would be.

G. Potential Breach of Contract by FHLB-SF

61. OTS West Region Director Darrel Dochow was responsible for OTS regulation of WMB and WMBfsb. Based upon a review of his heavily redacted WaMu Timeline [Appendix 4], a claim may exist against the Federal Home Loan Bank – San Francisco ("**FHLB-SF**") for breach of contract. On September 18, 2008, WMB had agreed to provide a blanket lien on all of WMB's assets, subject to their borrowing capacity from FHLB-SF not decreasing. Four days later, on September 22, 2008, FHLB-SF significantly cut WMB's capacity, causing regulators to revise WMB's liquidity estimates sharply downward. Please refer to the WaMu Timeline for details.

III. INADEQUATE COMPENSATION FOR RELEASES

A. JPMC Release Issues

(1) Interest On The Debtor's Deposit Accounts at JPMC

62. The passage of time has rendered the GSA with JPMC materially and unacceptably worse for the Debtors, and impermissibly better for JPMC, than the initial settlement considered by the Court in December of 2010. The settlement considered by the Court in December 2010 was to go effective by January 31, 2011 – a date integral to the fairness of the settlement. In fact, the settlement agreement initially negotiated in March 2010 was expected to go effective by the end of July 2010 with a drop dead date of August 31, 2010. Now, however, the GSA will likely not go effective before the end of February 2012 – nineteen months later.

63. Every day deprives the Debtors of access to more than the $4 billion in cash improperly held by JPMC. On the $3.67 billion balance in account number xxx4234, only $18 million[27] in interest has accrued from the Petition Date through December 31, 2011.[28] (an average of

27 Cumulative to Date interest on WMI's $3.67 billion Deposit account is $18,001,201 as of the Monthly Operating Report ("**MOR**") for December 2011, [D.I. 9478]. This amount is obtained by subtracting the initial balance of $3,667,943,173 (as of the November 2008 MOR) from the December 31 2011 balance of $3,685,944,374. See Table MOR-1, November 2008 MOR, [D.I. 1539], and Table MOR-1 of the December 2011 MOR. Though this is not the only deposit account at JPMC, it does include nearly 92 % of WMI's deposit balance at JPMC so is a good proxy for the remainder.

28 By contrast, JPMC's average rate of return on interest-earning assets was 5.36% for 2008, 4.04% for 2009, 3.83% for 2010, and 3.74%, 3.58%, and 3.40% for the first, second, and third quarters of 2011, suggesting that JPMC could have earned more than $475 million on those deposits since the Petition Date through September 30, 2011. *See*

15.1 basis points or 0.151 percent per annum)[29]. The Deposit did not begin accruing interest until the December 2008 MOR, and the rate has declined to 5.1[30] basis points (on an annualized basis) as of the November 2011 MOR [D.I. 9236]. And even this low amount may have been overstated. In the December 2011 Monthly Operating Report, accrued interest is reduced by $1,279,792.

64. Additionally, as shown in table MOR 1 in *Id*, the tax refund account at Bank of America returned $666,134 in December 2011, or 142 basis points per annum. This is *over 27 times* the rate Debtors reported JPMC to have paid in November 2011, and *over 9 times* the rate that JPMC has averaged up to December 31, 2011. Based upon this similarly large tax refund deposit account, I can only conclude that the 5.1 basis points is far below market rates. Absent the settlement, the Debtors would be entitled to collect prejudgment interest from JPMC in a far greater and ever increasing amount as interest compounds. Based on the State of Washington's 12 percent[31] (per annum) prejudgment interest rate, WMI should be due roughly *$1.64* billion in prejudgment interest from the Petition Date through February 2012.

65. The Debtors have been deprived of that value while incurring mounting costs from the ongoing bankruptcy cases, rendering the settlement materially less valuable for the Debtors today (and more valuable for JPMC) than it was when the Court first blessed the deal as fair. Accordingly, at this time, JPMC should provide additional value to compensate for the delays.

66. Undoubtedly JPMC will argue that they are not responsible for the delays, but it is clear that they are at least partially responsible, as demonstrated in the *Motion of JPMorgan Chase*

JPMorgan Chase & Co., 2008 Form 10-K, at 222; 2009 Form 10-K, at 246, 2010 Form 10-K, at 306, Form 10-Q (May 6, 2011) at 173, Form 10-Q (August 5, 2011) at 184, Form 10-Q (November 4, 2011) at 194. If the Modified Seventh Amended Plan goes effective in February 2012, JPMC will have earned another five months of interest.

29 The total return is [$18,001,201 / $3,667,942,173] X 100 X [12 / 39] = 0.151 percent, or 15.1 basis points (per annum).

30 [$155,443 interest / $3,686,979,056 opening balance] X 100 X 12 = 0.05059 percent (annualized). This is equivalent to 5.059 basis points per annum.

31 Twelve percent (per annum) is equivalent to 1200 basis points per annum. Washington State law would require over 237 times the rate JPMC was paying as of November 2011.

Bank, National Association to Compel the Washington Mutual, Inc. Noteholders Group to Comply with Federal Rule of Bankruptcy Procedure 2019, [D.I. 1444, filed August 6, 2009]. In response to a large increase in the reported face amount of securities held by the WMI Noteholders Group[32], JPMC filed that motion seeking to obtain information which could be used as leverage over the Settlement Noteholders. In paragraph 6 of the *JPMorgan Chase Bank, N.A.'s Response to the Washington Mutual Noteholders Group's Objection to the Motion to Comply With Federal Rule of Bankruptcy Procedure 2019*, [D.I. 1535, filed August 21, 2009], JPMC further argued, "The significance of Rule 2019 disclosure requirement is highlighted here by the fact that the Washington Mutual Noteholders Group is apparently buying and selling large quantities of WMI notes, and may be changing their positions in those securities based upon events in this case.[33]" With the 20/20 clarity of hindsight, this statement appears to have been an implied threat that without a mutually agreed upon settlement, JPMC would seek to investigate the Settlement Noteholders for potential insider trading. This was a potent threat from an adversary, such as JPMC, with a profit motive and the funds needed to litigate indefinitely. This Court's determination that those subject to Rule 2019 could provide ranges of data, rather than more detailed reporting required under the law, allowed JPMC to continue to use that leverage against the Settlement Noteholders, resulting in the GSA.

67. While the Court previously concluded that the Global Settlement Agreement was reasonable and could be approved under the standards of Bankruptcy Rule 9019, the Court should consider the effect of the significant delays affecting these cases. JPMC's use of this leverage against the Settlement Noteholders (by an implied threat to investigate their activities)

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32 *See Id*, ¶¶ 2 – 4.

33 I believe I have inadvertently stumbled on JPMC's factual basis for this allegation. When Doreen Logan was deposed on August 26, 2009, JPMC required a confidentiality agreement, and asserted at the beginning that the information in that deposition constituted Material, Non-Public Information. See JPMC SJ Appendix at B1026. The confidentiality period was to have been for 30 days, but JPMC filed the Doreen Logan affadavit on September 11, 2009, well short of the 30 day deadline. Immediately after it became public, but before the market had time to digest the information, a buying spree ensued in all classes of WMI Notes and Equities causing a significant spike in prices. The impact of the Doreen Logan Affidavit was only discovered by retail shareholders because we were diligently searching for some sort of news that would account for that spike in share prices.

has reached an entirely foreseeable outcome: many additional months of delay while the Equity Committee and others investigate those potential insider trading allegations. JPMC clearly benefited greatly when the exercise of that leverage caused the Settlement Noteholders and the Debtors to agree to the extremely one-sided terms of the GSA. But that delay has had detrimental consequences to the Debtors' estates and concomitant benefits to JPMC. They pay a *de minimus* rate to WMI while raking in the interest rate spread.

68. As the Court noted in its Opinion, there is a "strong likelihood of success" on the merits of the Debtors' claims to the roughly $4 billion in the Disputed Deposited Accounts. (Opinion at 26.) As a result, not only would the Debtors be entitled to the return of those funds, but they would also be entitled to recover prejudgment interest from JPMC. *See, e.g., Black Diamond Mining Co. v. Hazard Coal Sales, LLC (In re Black Diamond Mining Co.)*, Adv. Pro. No. 08-7005, 2009 Bankr. LEXIS 4639, at *22 (Bankr. E.D. Ky. June 11, 2009) (awarding of prejudgment interest at applicable state rate in turnover action); *Grauman v. Smith (In re U.S. Physicians, Inc.)*, Adv. Pro. No. 00-138, 2001 U.S. Dist. LEXIS 9707, at *22 (E.D. Pa. July 12, 2001) (same).

69. However, the GSA releases JPMC from any claims for prejudgment interest, which, outside of any settlement, would continue to accrue until a judgment is entered against JPMC. Under Washington State law (the law of the State in which WMI is incorporated and has its principal place of business), judgments for liquidated amounts owed by a defendant accrue prejudgment interest at 12% per annum. Rev. Code. Wash. § 19.52.010; *see also Smith v. Olympic Bank*, 693 P.2d 92, 96 (Wash. 1985) (awarding prejudgment interest at 12% per annum where bank failed to turn over a liquidated amount); *Unigard Sec. Ins. Co. v. Kansa Gen. Ins. Co.*, Case No. 90-1693, 1992 U.S. Dist. LEXIS 20677, at *26 (W.D. Wash. Nov. 9, 1992) (awarding prejudgment interest at 12% per annum where amount owed was liquidated); *Jenner v. De Los Santos Constr., Inc.*, Case No. 07-0550, 2008 U.S. Dist. LEXIS 90080, at * 3 (W.D. Wash. Aug. 27, 2008) (same).

70. Accordingly, assuming that Washington State law applies, JPMC's prejudgment

interest liability has accrued at approximately $40 million per month. That equates to roughly *$1.64 billion* since the Petition Date through February 2012. Those are amounts to which the Debtors would be entitled were the Court to grant judgment in favor of the Debtors – a prospect that the Court already considered to be a "strong likelihood." (Opinion at 26.) Yet the Debtors' claims to those amounts are completely released under the GSA. Meanwhile, JPMC has continued to enjoy the benefit of, and has earned an interest spread on, the $4 billion in the Disputed Accounts.

71. The "immediate" cash benefits of the global settlement trumpeted by the Debtors in December 2010 and July 2011 no longer exist. Due to the passage of time, recoveries have eroded to the point where subordinated class recoveries are nearly exhausted. The additional delay that the GSA intends to avoid will soon cause recoveries to reach a stable state where recoveries will for the most part remain unchanged no matter how long the delay, since the more senior classes will in effect be moving money from one pocket to the other as additional interest accrues. When compounding of Washington State's 12 percent prejudgment interest is considered, it is obvious that the estate is at or has nearly reached the point where prejudgment interest would equal or exceed the main benefit: namely, the tax refund amounts to be paid to WMI as consideration for the GSA.

72. As a result, the GSA is no longer fair and equitable to the Debtors' estates. JPMC must provide additional consideration to the Debtors' estates to compensate for the delays which they initiated, and from which they have benefited greatly. Absent such additional value, the GSA must not be approved and the Seventh Amended Plan cannot be confirmed.

73. To the extent that the Debtors may have agreed to the low interest rate being paid on the deposits, a gross negligence or other similar claim may exist against the Debtors or its' professionals in the approximate amount of $40 million in lost interest per month from the date of an agreement, if one is found to exist, until the effective date. ($4 billion deposit x 12% less accrued interest shown on JPMC's Deposit statements)

(2) <u>JPMC's Inadequate Compensation For Releases</u>

74. It would appear that the Debtors are proposing an extreme remedy of releases for JPMC, even in the event of gross negligence or willful misconduct by JPMC or their related persons. Section 41.6 of the Plan provides for releases from Equity: "...**the release** [...] **shall not extend to acts of gross negligence or willful misconduct** of any Released Parties (**other than with respect to the JPMC Entities and their respective Related Persons**)..." **Their use of the Doreen Logan Affidavit to entrap the Settlement Noteholders (See *Supra*, note 33 for discussion) so that the GSA could be negotiated very likely constitutes some of that willful misconduct.**

75. Additionally, the definition of Related Persons is much too broad. With an entity the size of JPMC, a release is being provided to nearly half this planet. If my neighbor, for example, happened to own JPMC stock, I'd be providing a release to him, even for his willful misconduct. Upon information and belief, none of these Related Persons have provided any "substantial contribution" to the estate. § 1.182 of the Plan defines Related Persons as:

> **Related Persons:** With respect to any Entity, its predecessors, successors and assigns (whether by operation of law or otherwise) and their respective present Affiliates and each of their respective current and former members, partners, equity holders, officers, directors, employees, managers, shareholders (other than holders of Equity Interests of WMI), partners, financial advisors, attorneys, accountants, investment bankers, consultants, agents and professionals (including, without limitation, any and all professionals retained by WMI or the Creditors' Committee in the Chapter 11 Cases either (a) pursuant to an order of the Bankruptcy Court other than ordinary course professionals or (b) as set forth on Schedule 3.1(a) to the Global Settlement Agreement), or other representatives, nominees or investment managers, each acting in such capacity, and any Entity claiming by or through any of them (including their respective officers, directors, managers, shareholders, partners, employees, members and professionals), but, under all circumstances, excluding the "Excluded Parties," as such term is defined in the Global Settlement Agreement.

76. In order to receive a distribution, the Equity must release JPMC and their related persons, including for gross negligence or willful misconduct. The Plan proposes to provide Equity with 95% of a company, that will have $75 million in cash, and $10 million in runoff notes. The remaining value of the company is stripped out of the Reorganized Debtor (the "**RD**") for the

benefit of the Creditors via the runoff notes. So we've got a company with 200 million shares outstanding, and an approximate $85 million in cash value, making each RD common share worth $0.425. Preferred stock are to get 70% of 95% of that $85 million, or $56.525 million. Most preferred stock by dollar value has a $1000 liquidation preference, so I'll use that for my calculations. There are $7.5 billion of liquidation preference of preferred stock. So $56.525 million X [1000 / 7,500,000,000] is $7.54 per $1000 of face, or roughly 3/4 of one percent for preferred stock in exchange for the releases. Similar calculations yield a payout of $0.013 per common share. This is clearly inadequate consideration, particularly for gross negligence or willful misconduct. If this amount were offered to any of the Creditors, they'd sneer, and say, "See you in court."

78. But when you consider that all of that return is coming from parties other than JPMC, you realize that you are being goaded into providing a release for no consideration at all. Since the GSA was first negotiated, the economic terms have not changed one iota. On January 7, 2011 his Court expressed doubt that preferred stock would receive a distribution, "... the Liquidating Trust is receiving certain assets, including potential lawsuits, which it will liquidate. It may not be known for years whether all creditors will be paid in full so that preferred shareholders will be entitled to a distribution. Consequently, shareholders cannot vote intelligently on whether to give a release. If the preferred shareholders are not getting any distribution under the Plan, there is no consideration for the releases of third parties." (Opinion at 84-85.) Without consideration being provided, those releases were found to be impermissible.

79. In the Seventh Amended Plan, any consideration being provided to Equity is coming from the Creditors, whose attempts to deprive Equity of their rightful recovery have delayed these cases for well over a year, causing hundreds of millions of dollars to flow into their own pockets in the form of post-petition interest. And in a liquidation, the results would likely be similar, since those Creditors would still have the insider trading allegations hanging over their head, so they'd still be looking to buy their way out of it.

B. FDIC-Receiver's Inadequate Compensation For Releases

80. For the reasons in Supra 75-78, FDIC-Receiver's consideration is also inadequate.

C. FDIC-Corporate is Providing No Compensation For Releases

81. FDIC-Corporate and FDIC-Receiver are legally distinct entities, and FDIC-Corporate has no claim against the estate. They share the first four letters of their name, but no identity of interest with any of the parties. See (Written Argument, ¶¶ 15-26).

IV. ISSUES RELATED TO AAOC

A. Partial Vacatur of the September Opinion

82. This Court took a bold first step in its September Opinion, one which leads down a path toward transparency and a more level playing field for all investors. Now the Court is being asked by the Debtors to vacate significant portions of its' September Opinion. Obviously the primary benefit of this proposed vacatur would accrue to AAOC, who could continue on with "business as usual" as though nothing had happened. While this Court believes that the precedential effect of her decision is not substantial, I believe that this Court is significantly underestimating the potential impact of the decision on the market. Vacatur benefits not only the Settlement Noteholders, but all hedge funds who thrive by taking advantage of secrecy and information asymmetry. Vacatur would ensure that that advantage remains, whether legal or otherwise, to the detriment of the undeniable public interest in maintaining free and fair markets.

83. Discarding 30 pages of the September Opinion would also effectively "raise the bar" for any non-releasing parties going forward, since they would be unable to cite those relevant areas of your September Opinion in support of their own litigation, so would have to work that much harder to support their position. Further, this public benefit is being stripped from these non-releasing parties for no consideration, in the form of a back-door mandatory partial release to AAOC. This Court has previously held that it does not have the power to grant a non-consentual third party release of a non-debtor (Opinion at 76).

84. This Court has previously refused to grant releases to those operating in a fiduciary capacity to the estate. This Court (Opinion at 67-8) found,

> The releases being granted to the Committee and its members are also not appropriate. It is acceptable to provide exculpations for such parties for the role they played in the bankruptcy process, and the Court will approve appropriate ones in this case. See, e.g., *In re PWS Holding Corp.,* 228 F.3d 34 224, 246 (3d Cir. 2000) (holding that exculpation clause in plan which provided that committee members and estate professionals had no liability to creditors or shareholders for their actions in the case except for willful misconduct or gross negligence merely conformed to the standard applicable to such fiduciaries and, therefore, did not violate any provision of the Code).[34]

85. On January 7, 2011, (Opinion at 69), this Court determined,

> **The Settlement Noteholders** were not acting in this case in any fiduciary capacity; their **actions were taken solely on their own behalf**, not others. The Settlement Noteholders hold interests in various levels of debt and the result of the negotiations was to get them a full recovery in all but the lowest level of debt. That is insufficient to warrant a release by the Debtors."

86. However, on September 13, 2011, (September Opinion at 69), this Court stated,

> The Court finds that the Equity Committee has stated a colorable claim that the Settlement Noteholders became temporary insiders of the Debtors when the Debtors gave them confidential information and allowed them to participate in negotiations with JPMC for the shared goal of reaching a settlement that would form the basis of a consensual plan of reorganization.

87. Assuming, *arguendo*, that had litigation gone forward and AAOC were found to have been insiders of the Debtors with commensurate fiduciary duties to Creditors and Shareholders alike, AAOC would not have been released of all liability, but would instead receive exculpations. It is my understanding that under the Bankruptcy Code, exculpations are not allowed to provide protections against willful misconduct or gross negligence. The insider trading allegations may fall into either or both of these categories.

88. AAOC seems adamant that this vacatur provision must be included to obtain their support for the Plan. Presumably this provision is being included because AAOC believes that a

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34 Originally the Plan exculpation clause did not comply with the applicable standards of the Code because it did not exclude willful misconduct or gross negligence of the Committee and estate professionals. That was corrected, however, in the October 29 modification of the Plan. (Ex. D-3 at § 43.8.)

significant percentage of Equity holders would prefer to decline releases so they can litigate on their own. The obvious implication is that AAOC believes that they are not providing sufficient consideration to obtain voluntary support for this Plan. Given the size of their potential liability and the very significant risks posed to their firms with respect to the insider trading allegations, it is entirely possible that many Equity holders feel shortchanged. While AAOC could easily make up for their own shortfall by offering additional incentive from their billions of dollars in profits in this case, they instead ask the Court to do their dirty work.

B. Payment of AAOC's Fees and Expenses

89. Section 41.18 of the Seventh Amended Plan, entitled "Payment of Fees and Expenses of Certain Creditors," provides for a whole litany of attorney's fees to be paid to a variety of Creditor groups. These Creditor Group "**Section 41.18 Professionals project that they will request an aggregate total of at least $37.3 million** on account of fees for services rendered..."

90. While AAOC and the other Creditors are giving $75 million to the Reorganized Debtor with one hand, they are proposing to take with the other hand $37.3 million. This means that there would have to be an additional $37.3 million in litigation recovery before Equity sees a dime from the liquidating trust interests. This is nearly half of what the Creditors as a whole are giving up, and if I had enough data to run the numbers, I suspect I would find that AAOC's total consideration to Equity is only a few million dollars. I object to the payment of any of the fees or expenses for AAOC or any of its professionals, including their counsel White & Case and Fried Frank given their prior conduct which resulted in this Court determining that "colorable" insider trading claims may exist against these entities. To the extent this is determined not to be a confirmation issue, I reserve all rights to raise or supplement this issue at a more appropriate time.

V. Exculpations To Be Provided To The Examiner And His Professionals

91. In my Written Argument, [D.I. 8407; filed 8/9/2011] following the most recent confirmation hearings, I further expressed my views regarding these third party causes of action.

Paragraphs 55-67 discuss my views in detail, and provide what I believe are compelling grounds to include Joshua Hochberg, (the "**Examiner**") along with his firm McKenna, Long, and Aldridge ("MLA") and the Examiner's other professionals as additional third party litigation targets. I repeat, reassert and reallege all of those arguments. *See Id*, ¶¶ 55 – 67.

92. 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, as further detailed in *supra* ¶¶ 26, totaling $46.22 billion dollars? How could he so easily dismiss the fact that a plain reading of Section 3.5 of the P&A agreement specifically excludes the sale of any pre-petition claims (including tax claims) against WMB's sole stockholder, WMI? How could the Examiner not realize the GSA is to transfer more than $6.7 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?

VI. Proposed Term Sheet

93. I propose that the FDIC-Receiver retain the Reorganized Debtor on a contingency basis by to manage, explore, and prosecute any remaining causes of action WMB may have against any Government agency, including without limitation the Office of Thrift Supervision, the Federal Reserve Board, and the Federal Home Loan Bank of San Francisco. The litigation would be conducted in the name of FDIC-Receiver, for the benefit of the WMB estate. To compensate the Reorganized Debtor for the risk they are undertaking, FDIC-Receiver would agree to split any net proceeds (after fees and expenses) 50:50 with the Reorganized Debtor. The Federal Tort Claims Act, if it is determined to apply, may limit the proposed split to 75:25 for a judgment or 80:20 in the event of a settlement. I will leave this determination up to the Debtors and the FDIC-Receiver, as this is beyond my pay grade. *See* 28 U.S.C. § 2678.

94. Non-conflicted counsel (or FDIC-Receiver could waive any conflict) would have to

be retained to prosecute any colorable claims. If a waiver may be obtained, I suggest the retention of Quinn Emanuel. They do excellent work, and are already familiar with the case so it should be more cost effective to hire them. I propose that FDIC-Receiver should also waive any bond that may be required to retain the Reorganized Debtors to manage this litigation. After all, they are unlikely to prosecute any of the actions I propose on their own. Evidence of this is the fact that no litigation against FDIC-Corporate has been filed to date, despite potentially viable claims due to their pre-seizure conduct. Some of these potential claims have a 3 year statute of limitations which may have already passed, and FDIC-Receiver appears to have breached their fiduciary duty to the WMB estate on September 25, 2011 by allowing that lapse.

A. Proposed Solution is in the Best Interest of the Debtors Estate

95. There are a number of benefits to the estate: Among these are:

(1) Assuming a successful outcome to the litigation, the Reorganized Debtor will be compensated for its outlay for attorneys fees and costs;

(2) Due to the FDIC-Receiver's expedited scheduling for hearings and appeals, litigation could be completed in 2 to 3 years that might otherwise take a decade or more;

(3) The Reorganized Debtor would obtain 50 percent of any net recovery, much quicker than if we were to litigate independently. Once the WMB bondholders are paid in full, the remaining litigation recoveries would flow 100 percent to the Reorganized Debtor; and

(4) Assuming no ownership change, the Receivership could be kept open, allowing the Reorganized Debtor to utilize the $17.7 billion of Net Operating Losses at the Washington Mutual Bank level. In that event, the FDIC-Receiver and the Reorganized Debtor should negotiate an appropriate agreement to set out the terms for the selection of the Receivership closing date, so that the NOLs could be used. **Note: Existing common stock must be kept intact so that there is no ownership change under IRC § 382(l)5.**

(5) Dramatically streamlined litigation in the DC Court.

B. Proposed Solution is in the Best Interest of the FDIC-Receiver

96. The FDIC-Receiver benefits by:

(1) Receives 50 percent of any net recovery against OTS or other agencies. Fifty percent of something is better than 100 percent of nothing;

(2) No Cost to FDIC-Receiver if unsuccessful, since the Reorganized Debtor assumes that risk. The only costs would be those of keeping the Receivership open, and those should be minimal in light of the potential recovery;

(3) Reduced potential for a breach of fiduciary duty claim against FDIC-Receiver; and

(4) Releases would be provided by all of the Debtor's stakeholders.

C. Proposed Solution is in the Best Interest of the FDIC-Corporate

97. The FDIC-Receiver benefits by:

(1) Pursuit of an any case against the FHLB banks, Office of Thrift Supervision, another agency (or the Government on their behalf) could reduce FDIC-Corporate's potential liability for failure to maximize the Net Present Value of the WMB estate.

(2) Dramatically streamlined litigation in the DC Court.

D. Proposed Solution is in the Best Interest of the JPMorgan Chase

98. JPMC should support this proposal, because:

(1) It gives them an "out", allowing a face-saving settlement without any appearance of wrongdoing. This is particularly important to them given the Lehman, Madoff, and MF Global litigation they are currently mired in;

(2) The ANICO litigation (based upon WMB bondholder losses) is pending and may be remanded back to Texas State Court. A recovery against any Government agency on WMB's behalf would reduce JPMC's eventual liability if found responsible in the ANICO litigation;

(3) JPMC gives up assets to which they would have weak claims against if litigated:

namely the tax refunds (which were precluded from sale under P&A 3.5) and the prejudgment interest which would be due under Washington State law;

(4) Releases to JPMC would be provided by all of the Debtor's stakeholders; many more would provide releases under the solution I propose vs. the present Plan.

VII. Irrevocable Protections Needed

99. AAOC, acting in consort with the Debtors, has attempted on several occasions to wrest ownership of the Reorganized Debtor from Equity. Their previous intention (as evidenced by the $2 million threshold of PIERS holdings to elect common stock in the Sixth Amended Plan) was for the Reorganized Debtor to be a privately held corporation so that they could run the business in secret as is the norm for hedge funds, and I fear that that still may be their intention. My concern is that once they gain control of the Reorganized Debtor (following the first election of the Board of Directors since they will hold a significant position of reorganized common stock) they may attempt to involuntarily reduce the number of stockholders by conducting a large reverse split, with a small payment made to those who would then own fractional shares. This would serve to strip the smaller holders of their ownership without the holder's consent, at prices that would not reflect the full future value of the company. I request that shareholders be provided irrevocable protections in the corporate bylaws of the Reorganized Debtor to prevent their ownership in the Reorganized Debtor from being reduced or eliminated involuntarily through a reverse split or other means.

VIII. Conclusions

100. JPMC can easily afford a reasonable settlement in either cash or stock, given their earnings of $12 billion in 2009, a record $17 billion in 2010, and an even higher record $19 billion in 2011. As noted in *supra* ¶¶ 26, JPMC will receive $46.22 billion dollars in negative goodwill, accreted or accretable interest, and GSA assets due to the Washington Mutual Transaction. The payment I propose is far lower than the result which I believe likely if we were allowed to litigate, and is funded for the most part by our money which we would be entitled to anyway, if litigated to

conclusion. JPMC would still be receiving tens of billions in value, and my proposal, viewed from JPMC's perspective, is "more than fair."

101. My proposal intends for the Reorganized Debtor to provide counsel and litigation management services so that FDIC-Receiver may litigate against the OTS, the Federal Reserve Board, the Federal Home Loan Banks, any other Government Agency, or the U.S. Government itself for any viable Washington Mutual Bank claim going forward (e.g. for actual fraud, breach of contract, etc). I do not have the benefit of the extensive law library or research staff the Debtors have, so it is possible that there could be a flaw that I have not found which could prevent my proposal from being implemented as fully as I suggest. In that event, I argue that it should be implemented to the fullest extent possible, with any reasonable modifications made to make it feasible.

102. In order to obtain releases and allow the Reorganized debtor to pursue this litigation against these other potential third party litigation targets, I proposed that JPMC should voluntarily relenquish the $2.36 billion in tax refunds, and an additional $1.64 billion (totalling $4.0 billion) to compensate for the prejudgment interest which could be awarded under Washington State law. This amount, while far less than is warranted by the facts of this case should it proceed to trial, might be enough to sway the last remaining holdouts to support the Plan.

103. I believe the support of preferred stockholders and the TPS Group could be obtained by making a small cash payout to preferred stock (e.g. ten to twenty percent of liquidation preference), while allowing enough left over to prosecute the remaining litigation to provide the remainder of Equity's recovery. It would also provide needed funds so the reorganized Debtor could make acquisitions or to grow organically and to use the . In that way, it would benefit all stakeholders of the Reorganized Debtor, whether they be preferred holders, common stockholders, LTW holders, or Creditors who have elected the Reorganized Debtor's common stock.

104. In any event, FDIC-Corporate must not be released by the Debtors unless and until

they provide appropriate consideration for that release. Absent such a release, sufficient funds must be provided so that the Litigation Trust Advisory Board will have the resources necessary to fully litigate the DC Action with repect to FDIC-Corporate only, as FDIC-Receiver would be released. In this manner, a recovery could be obtained for all of WMI's stakeholders.

IX. Reservation of Rights

105. I expressly reserve the right to supplement this objection for any reason, and to join in the objections of other parties, regardless of whether those grounds are addressed herein.

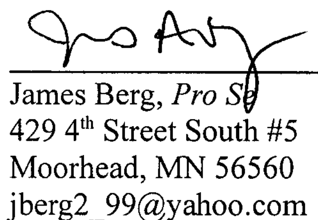
WHEREFORE, It is my hope that the Debtors will not conduct another round of contested confirmation hearings with an uncertain outcome. I believe that my proposed term sheet could spur discussions between all of the parties, resulting in a "third instance" of mediation which will allow a further modified plan to be proposed and quickly confirmed. In the event this does not happen, though, I humbly request the following:

1. FDIC Corporate be denied releases both from the Debtors and Equity
2. FDIC Receiver be denied releases from Equity
3. JPMC be denied releases from Equity

In the event a plan is not confirmed, additionally:

4. Order WMI's deposit to be returned, along with prejudgment interest at the maximum allowable rate.

Dated: February 3, 2011



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Appendix 1

Management's report on internal control over financial reporting

Management of JPMorgan Chase & Co. ("JPMorgan Chase" or the "Firm") is responsible for establishing and maintaining adequate internal control over financial reporting. Internal control over financial reporting is a process designed by, or under the supervision of, the Firm's principal executive and principal financial officers, or persons performing similar functions, and effected by JPMorgan Chase's Board of Directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with accounting principles generally accepted in the United States of America.

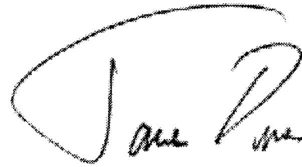
JPMorgan Chase's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records, that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the Firm's assets; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the Firm are being made only in accordance with authorizations of JPMorgan Chase's management and directors; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the Firm's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

Management has completed an assessment of the effectiveness of the Firm's internal control over financial reporting as of December 31, 2010. In making the assessment, management used the framework in "Internal Control – Integrated Framework" promulgated by the Committee of Sponsoring Organizations of the Treadway Commission, commonly referred to as the "COSO" criteria.

Based upon the assessment performed, management concluded that as of December 31, 2010, JPMorgan Chase's internal control over financial reporting was effective based upon the COSO criteria. Additionally, based upon management's assessment, the Firm determined that there were no material weaknesses in its internal control over financial reporting as of December 31, 2010.

The effectiveness of the Firm's internal control over financial reporting as of December 31, 2010, has been audited by PricewaterhouseCoopers LLP, an independent registered public accounting firm, as stated in their report which appears herein.



James Dimon
Chairman and Chief Executive Officer

Douglas L. Braunstein
Executive Vice President and Chief Financial Officer

February 28, 2011

JPMC Annual Report
Consolidated Financial
Statements and Notes
(2010)

Note 2 – Business changes and developments

Decrease in common stock dividend

On February 23, 2009, the Board of Directors reduced the Firm's quarterly common stock dividend from $0.38 to $0.05 per share, effective with the dividend paid on April 30, 2009, to shareholders of record on April 6, 2009.

Acquisition of the banking operations of Washington Mutual Bank

On September 25, 2008, JPMorgan Chase acquired the banking operations of Washington Mutual Bank ("Washington Mutual") from the FDIC for $1.9 billion. The acquisition expanded JPMorgan Chase's consumer branch network into several states, including California, Florida Washington, Georgia, Idaho, Nevada and Oregon and created the third largest branch network in the U.S. The acquisition also extended the reach of the Firm's business banking, commercial banking, credit card, consumer lending and wealth management businesses.

The acquisition was accounted for under the purchase method of accounting, which requires that the assets and liabilities of Washington Mutual be initially reported at fair value.

In 2008, the $1.9 billion purchase price was preliminarily allocated to the Washington Mutual assets acquired and liabilities assumed, which resulted in negative goodwill. In accordance with U.S. GAAP for business combinations that was in effect at the time of the acquisition, noncurrent nonfinancial assets acquired in the Washington Mutual transaction that were not held-for-sale, such as the premises and equipment and other intangibles, were written down against the negative goodwill. The negative goodwill that remained after writing down the nonfinancial assets was recognized as an extraordinary gain of $1.9 billion at December 31, 2008. The final total extraordinary gain that resulted from the Washington Mutual transaction was $2.0 billion.

The final summary computation of the purchase price and the allocation of the final total purchase price of $1.9 billion to the net assets acquired of Washington Mutual – based on their respective fair values as of September 25, 2008, and the resulting final negative goodwill of $2.0 billion are presented below.

September 25, 2008 (in millions)		
Purchase price		
Purchase price		$ 1,938
Direct acquisition costs		3
Total purchase price		1,941
Net assets acquired:		
Washington Mutual's net assets before fair value adjustments	$ 39,186	
Washington Mutual's goodwill and other intangible assets	(7,566)	
Subtotal	31,620	
Adjustments to reflect assets acquired at fair value:		
Securities	(16)	
Trading assets	(591)	
Loans	(30,998)	
Allowance for loan losses	8,216	
Premises and equipment	680	
Accrued interest and accounts receivable	(243)	
Other assets	4,010	
Adjustments to reflect liabilities assumed at fair value:		
Deposits	(686)	
Other borrowed funds	68	
Accounts payable, accrued expense and other liabilities	(1,124)	
Long-term debt	1,063	
Fair value of net assets acquired		11,999
Negative goodwill before allocation to nonfinancial assets		(10,058)
Negative goodwill allocated to nonfinancial assets[(a)]		8,076
Negative goodwill resulting from the acquisition[(b)]		$ (1,982)

(a) The acquisition was accounted for as a purchase business combination, which requires the assets (including identifiable intangible assets) and liabilities (including executory contracts and other commitments) of an acquired business to be recorded at their respective fair values as of the effective date of the acquisition and consolidated with those of JPMorgan Chase. The fair value of the net assets of Washington Mutual's banking operations exceeded the $1.9 billion purchase price, resulting in negative goodwill. Noncurrent, nonfinancial assets not held-for-sale, such as premises and equipment and other intangibles, were written down against the negative goodwill. The negative goodwill that remained after writing down transaction-related core deposit intangibles of approximately $4.9 billion and premises and equipment of approximately $3.2 billion was recognized as an extraordinary gain of $2.0 billion.

(b) The extraordinary gain was recorded net of tax expense in Corporate/Private Equity.

Purchased credit-impaired ("PCI") loans

PCI loans were determined to be credit-impaired upon acquisition based on specific risk characteristics of the loan, including product type, loan-to-value ratios, FICO scores, and past-due status. Upon acquisition, credit-impaired loans acquired in the same fiscal quarter may be aggregated into one or more pools, provided that the loans have common risk characteristics. A pool is then accounted for as a single asset with a single composite interest rate and an aggregate expectation of cash flows. With respect to the Washington Mutual transaction, all of the consumer loans were aggregated into pools of loans with common risk characteristics.

PCI loans are initially recorded at fair value upon acquisition. For each PCI loan, or pool of loans, the Firm is required to estimate the total cash flows (both principal and interest) expected to be collected over the remaining life of the loan or pool. These estimates incorporate assumptions regarding default rates, loss severities, the amounts and timing of prepayments and other factors that reflect then-current market conditions.

The excess of cash flows expected to be collected over the carrying value of the underlying loans is referred to as the accretable yield. This amount is not reported on the Firm's Consolidated Balance Sheets but is accreted into interest income at a level rate of return over the remaining estimated lives of the underlying pools of loans. For variable-rate loans, expected future cash flows were initially based on the rate in effect at acquisition; expected future cash flows are recalculated as rates change over the lives of the loans.

On a quarterly basis, the Firm updates the amount of loan principal and interest cash flows expected to be collected. Probable decreases in expected loan principal cash flows trigger the recognition of impairment, which is then measured as the present value of the expected principal loss plus any related foregone interest cash flows, discounted at the pool's effective interest rate. Impairments are recognized through the provision and allowance for loan losses. Probable and significant increases in expected cash flows (e.g., decreased principal credit losses, the net benefit of modifications) would first reverse any previously recorded allowance for loan losses with any remaining increases recognized prospectively as a yield adjustment over the remaining estimated lives of the underlying loans. The impacts of (i) prepayments, (ii) changes in variable interest rates, and (iii) any other changes in the timing of expected cash flows are recognized prospectively as adjustments to interest income. Disposals of loans – which may include sales of loans, receipt of payments in full by the borrower, or foreclosure – result in removal of the loan from the PCI portfolio.

If the timing and/or amounts of expected cash flows on PCI loans were determined not to be reasonably estimable, no interest would be accreted and the loans would be reported as nonaccrual loans; however, since the timing and amounts of expected cash flows for the Firm's PCI consumer loans are reasonably estimable, interest is being accreted and the loans are being reported as performing loans.

Charge-offs are not recorded on PCI loans until actual losses exceed the estimated losses that were recorded as purchase accounting adjustments at acquisition date. To date, no charge-offs have been recorded for these consumer loans.

The PCI portfolio affects the Firm's results of operations primarily through: (i) contribution to net interest margin; (ii) expense related to defaults and servicing resulting from the liquidation of the loans; and (iii) any provision for loan losses. The PCI loans acquired in the Washington Mutual transaction were funded based on the interest rate characteristics of the loans. For example, variable-rate loans were funded with variable-rate liabilities and fixed-rate loans were funded with fixed-rate liabilities with a similar maturity profile. A net spread will be earned on the declining balance of the portfolio, which is estimated as of December 31, 2010, to have a remaining weighted-average life of 7.0 years.

The Firm continues to modify certain PCI loans. The impact of these modifications is incorporated into the Firm's quarterly assessment of whether a probable and significant change in expected cash flows has occurred, and the loans continue to be accounted for and reported as PCI loans. The impact of modifications on expected cash flows is estimated using the Firm's experience with previously modified loans and other relevant data. Additionally, the Firm monitors the performance of modifications and updates and/or refines assumptions as experience and changes in circumstances or data warrant.

The table below sets forth the accretable yield activity for the Firm's PCI consumer loans for the years ended December 31, 2010, 2009 and 2008.

Year ended December 31, (in millions, except ratios)	Total PCI 2010	2009	2008
Balance, January 1	**$ 25,544**	$ 32,619	$ —
Washington Mutual acquisition	**—**	—	39,454
Accretion into interest income	**(3,232)**	(4,363)	(1,292)
Changes in interest rates on variable rate loans	**(819)**	(4,849)	(5,543)
Other changes in expected cash flows[(a)]	**(2,396)**	2,137	—
Balance, December 31	**$ 19,097**	$ 25,544	$ 32,619
Accretable yield percentage	**4.35%**	5.14%	5.81%

(a) Other changes in expected cash flows may vary from period to period as the Firm continues to refine its cash flow model and periodically updates model assumptions. For the years ended December 31, 2010 and 2009, other changes in expected cash flows were principally driven by changes in prepayment assumptions, as well as reclassification to the nonaccretable difference. Such changes are expected to have an insignificant impact on the accretable yield percentage.

The factors that most significantly affect estimates of gross cash flows expected to be collected, and accordingly the accretable yield balance, include: (i) changes in the benchmark interest rate indices for variable rate products such as option ARM and home equity loans; and (ii) changes in prepayment assumptions.

To date, the decrease in the accretable yield percentage has been primarily related to a decrease in interest rates on variable-rate loans and, to a lesser extent, extended loan liquidation periods. Certain events, such as extended loan liquidation periods, affect the timing of expected cash flows but not the amount of cash expected to be received (i.e., the accretable yield balance). Extended loan liquidation periods reduce the accretable yield percentage because the same accretable yield balance is recognized against a higher-than-expected loan balance over a longer-than-expected period of time.

Appendix 2

10-Q 1 corpq32011.htm FORM 10-Q

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

FORM 10-Q

QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d)
OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended September 30, 2011 **Commission file number 1-5805**

JPMORGAN CHASE & CO.

(Exact name of registrant as specified in its charter)

Delaware	**13-2624428**
(State or other jurisdiction of incorporation or organization)	**(I.R.S. Employer Identification No.)**
270 Park Avenue, New York, New York	**10017**
(Address of principal executive offices)	**(Zip Code)**

(212) 270-6000
(Registrant's telephone number, including area code)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

T **Yes** O **No**

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files).

T **Yes** O **No**

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer T **Accelerated filer** O .

Non-accelerated filer (Do not check if a smaller reporting company) O **Smaller reporting company** O .

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act).

O **Yes** T **No**

Approximately 20% of the PCI home equity portfolio are senior lien loans; the remaining balance are junior lien HELOANs or HELOCs. The following table represents delinquency statistics for junior lien home equity loans based on unpaid principal balance as of September 30, 2011, and December 31, 2010.

September 30, 2011 (in millions, except ratios)	Delinquencies 30–89 days past due	90–149 days past due	150+ days past due	Total loans	Total 30+ day delinquency rate
HELOCs:[(a)]					
Within the revolving period[(b)]	**$ 525**	**$ 293**	**$ 506**	**$ 18,885**	**7.01%**
Within the required amortization period[(c)]	**14**	**6**	**2**	**337**	**6.53**
HELOANs	**56**	**33**	**47**	**1,389**	**9.79**
Total	**$ 595**	**$ 332**	**$ 555**	**$ 20,611**	**7.19%**

December 31, 2010 (in millions, except ratios)	Delinquencies 30–89 days past due	90–149 days past due	150+ days past due	Total loans	Total 30+ day delinquency rate
HELOCs:[(a)]					
Within the revolving period[(b)]	$ 601	$ 404	$ 428	$ 21,172	6.77%
Within the required amortization period[(c)]	1	—	1	37	5.41
HELOANs	79	49	46	1,573	11.06
Total	$ 681	$ 453	$ 475	$ 22,782	7.06%

(a) *In general, HELOCs are open-ended, revolving loans for a 10-year period, after which time the HELOC converts to a loan with a 20-year amortization period.*
(b) *Substantially all undrawn HELOCs within the revolving period have been closed.*
(c) *Predominantly all of these loans have been modified to provide a more affordable payment to the borrower.*

The table below sets forth the accretable yield activity for the Firm's PCI consumer loans for the three and nine months ended September 30, 2011 and 2010, and represents the Firm's estimate of gross interest income expected to be earned over the remaining life of the PCI loan portfolios. This table excludes the cost to fund the PCI portfolios, and therefore does not represent net interest income expected to be earned on these portfolios.

	Total PCI			
	Three months ended September 30,		Nine months ended September 30,	
(in millions, except rates)	**2011**	2010	**2011**	2010
Beginning balance	**$ 18,083**	$ 19,621	**$ 19,097**	$ 25,544
Accretion into interest income	**(685)**	(772)	**(2,095)**	(2,445)
Changes in interest rates on variable-rate loans	**(159)**	(57)	**(372)**	(784)
Other changes in expected cash flows[(a)]	**1,213**	2,864	**1,822**	(659)
Balance at September 30	**$ 18,452**	$ 21,656	**$ 18,452**	$ 21,656
Accretable yield percentage	**4.31%**	4.20%	**4.32%**	4.33%

(a) *Other changes in expected cash flows may vary from period to period as the Firm continues to refine its cash flow model and periodically updates model assumptions. For the three months ended September 30, 2011, other changes in expected cash flows were predominately driven by the impact of modifications. For the nine months ended September 30, 2011, other changes in expected cash flows were largely driven by the impact of modifications, but also related to changes in prepayment assumptions. For the three months ended September 30, 2010, other changes in expected cash flows were principally driven by changes in prepayment assumptions and modeling refinements related to modified loans. For the nine months ended September 30, 2010, other changes in expected cash flows were principally driven by changes in prepayment assumptions, as well as reclassification to the nonaccretable difference. Changes to prepayment assumptions change the expected remaining life of the portfolio, which drives changes in expected future interest cash collections. Such changes do not have a significant impact on the accretable yield percentage.*

The factors that most significantly affect estimates of gross cash flows expected to be collected, and accordingly the accretable yield balance, include: (i) changes in the benchmark interest rate indices for variable-rate products such as option ARM and home equity loans; and (ii) changes in prepayment assumptions.

Since the date of acquisition, the decrease in the accretable yield percentage has been primarily related to a decrease in interest rates on variable-rate loans and, to a lesser extent, extended loan liquidation periods. Certain events, such as extended loan liquidation periods, affect the timing of expected cash flows but not the amount of cash expected to be received (i.e., the accretable yield balance). Extended loan liquidation periods reduce the accretable yield percentage because the same accretable yield balance is recognized against a higher-than-expected loan balance over a longer-than-expected period of time.

Appendix 3

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

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 %

Appendix 4

WAMU BANK
SUPERVISORY TIMELINE
(2000 / 2001 / 2002 / 2003 / 2004 / 2005 / 2006 / 2007 / 2008)

Redacted

Return

WaMu Timeline

Redacted

7/25/08	FRB informed WR Director that they would be sending an examiner from their Credit monitoring department to monitor liquidity and related credit/collateral.

Redacted

Redacted

Return

Redacted

9/7/08	WMI/WMB MOU signed by directors, Alan Fishman approved as CEO by directors, and Kerry Killinger resigns as CEO.

Redacted

9/10/08	During FHLB SF presentation at WR managers meeting, it was discussed whether a blanket lien on WMB's assets would give FHLB managers more assurance to continue lending to the Bank. They indicated that it would and in the following week, this was accomplished.

Redacted

Redacted

9/11/08	Today's liquidity meeting noted: •Anecdotal information from the branches today suggests that deposit withdrawals remain higher than normal; most withdrawals were in increments greater than $50,000. •Post-IndyMac plans have been reinitiated in the branches, which include: emphasis on FDIC insurance education; waiver of penalties if customers restructure deposits to increase insurance coverage (with multiple account owners, etc); waiver of penalties if customers bring back official checks at a later date and redeposit the funds; distribution of flyers outside of downtown Seattle branches advertising the current 5% CD special •An 8 month CD special at 4.25% will replace the current 5% 13 month special beginning on Saturday •The negative headlines have not directly impacted other funding sources so far •Fishman, Rotella, Casey and McMurray are meeting with S&P today. The meeting was scheduled for next week, but was rescheduled because of this week's events. •Management is considering a third quarter pre-earnings announcement next week to attempt to calm the market. They are discussing this with S&P. They expect an earnings announcement to cause Fitch to downgrade the <u>holding company</u> credit rating to BBB-. The bank rating is expected to stay unchanged (BBB), although the outlook will likely change to "Negative." This will be a change from prior practice by Fitch, which has generally given the bank and the HC the same credit rating.

Redacted

9/15/08	
	Branches in the Midwest and west reported continued higher than normal activity after the market closed today because of increased press and network news coverage of Lehman, AIG, etc.

Redacted

Return

Redacted

Date	Event
9/18/08	
	WMB reports high traffic in branches and continuing branch closings and reported available liquidity at $33.3 billion.
	WMB updated DC Management on Liquidity: Funding Plans - the trajectory of deposit outflows looks like it will be IndyMac ($9.5B) + 70%, or a total outflow $16-$17B over three weeks (including what has already happened). They are borrowing $8.5B from FHLBs over the next two weeks. FHLB SF now has a blanket lien and has assured WMB that they will not have any additional cuts in capacity. WMB will also be getting $2B in proceeds from discount note maturities and sales. Repo market is shut down. Repo collateral is being shifted to SEA FHLB. • Treasury Manager thinks that liquidity at the end of the quarter will be $13B, or $3B in excess cash and $10B in FHLB capacity. • M&A - Casey, Fishman, and a rep from Goldman gave an update on M&A activity. JP Morgan is expected to complete due diligence by today or tomorrow. Citi is expected to complete due diligence tomorrow. Also one other party (missed the name) is looking into acquiring a minority interest. Goldman thinks a deal could be done by Sunday.
	OTS downgrades WMB's composite rating to "4" (343442).
9/19/08	**Redacted**
	Liquidity projected at $29.8 billion by WMB.
	FDIC corresponds that Advances still available from the FHLBs and the situation is not dire.
	FHLB –SF reports that their accountants, PWC requires them to follow FAS 157 fair value accounting for the collateral of problem banks and that WAMU was a problem bank. That means they look to observable sales of option arms and they found some at fire sale prices of 35 cents on the dollar that they will have to use. On that basis they are out of collateral and gave advances yesterday only because of the blanket lien. FHLB of SF told management this late last night. FHLB of SF told OTS that they might be able to lend $1 to $2 billion more if it was a bridge to getting a deal done. OTS management encouraged FHLBs to continue lending.

9/22/08 **Redacted**

Return

Redacted

	WMB projected ending available liquidity to be $28.0 billion; however, they estimated $9.4 in FRB availability or $2.0 billion more that estimated by the FRB. FDIC projected $20.8 billion in liquidity because they reduced the amount ($8.5 billion) reportedly available from FHLB-SF to $1.0 billion.

9/23/08	
	Redacted
	Latest FRB projection indicates that WaMu liquidity would reach "0" by 10/9/08 assuming approximately $2.0 billion runoff per day.
	WaMu projects available liquidity at $23.6 billion

Redacted

9/24/08	
	FDIC reports to OTS that while deposit outflows are declining they are not stabilized and that FHLB-SF is "day to day" with respect to future advances.
	Redacted
9/25/08	Daily Liquidity report provided to WR and DC senior management. Available liquidity projected at $13.1 billion (subject to FHLB continuing to fund).

Redacted

Return

	The FRB of San Francisco moves the bank into the secondary credit category.
	Redacted
	At FDIC's Request, OTS examiners directed WMI management to dissolve Preferred Funding REIT (a special purpose entity), forfeit all rights to the approximately $9.0 in loan collateral, and assign the collateral loans to WMB for inclusion in the receivership transaction.

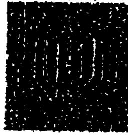
Redacted

Return

Supplemental Documents

for

Court's Convenience

 WaMu®

MEMORANDUM

DATE: August 14, 2008

TO: Board of Directors of Washington Mutual Bank fsb

FROM: Peter Freilinger, 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

#143508

WM: Confidential Limited Access

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 65 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.

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 fsb
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 fsb
Capital Distribution - Income Limitation
8/15/2008

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			$ 20,779.3
Income Limitation:			
Net income for 2006 & 2007	$ 1,969.0		
2006 and 2007 capital distributions	(2,692.0)		
2006 and 2007 retained net income		(723.0)	
Estimated net income through year-to-date December 31, 2008		606.9	
Total			$ (116.1)
Deficit			$ (20,895.4)

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 9/30/08	Projected 12/31/08
Regulatory Assets	$ 39,024	$ 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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09/15/2008 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	9,369
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%

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09/16/2008 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	8,630,377	8,767,087
Earnings	257,615	71,448	171,970	106,011	128,526	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)	(199,979)	0	0	0	0	0
Other Capital Movement	92,562	(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 to/from	0	0	(13,950,000)	(6,800,000)	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	8,357,989	8,486,516	8,630,377	8,767,087	8,898,222
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	14	14	14	14	14	14	14
Tangible Equity	29,946,752	30,010,948	16,132,918	9,338,929	9,467,456	9,611,317	9,748,027	9,879,162
Regulatory Capital Adjmnts	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	9,338,929	9,467,456	9,611,317	9,748,027	9,879,162
Qualifying Loan Loss Reserves	85,612	65,032	64,791	64,791	64,791	64,791	64,791	64,791
Other Adjustments	(36,189)	(34,728)	(34,728)	(34,728)	(34,728)	(34,728)	(34,728)	(34,728)
Total Risk Based Capital	29,996,175	30,041,252	16,162,981	9,368,992	9,497,518	9,641,379	9,778,090	9,909,225
Total GAAP Assets (Ending)	43,637,613	45,326,861	36,727,235	34,128,798	32,529,383	30,967,767	29,410,399	28,045,797
Total Adjusted GAAP Assets	44,300,506	46,046,007	37,448,381	34,849,944	33,250,529	31,688,913	30,131,545	28,767,944
Pretax SFAS 115	(1,150,668)	(1,254,236)	(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	46,580,968	38,302,480	35,704,043	34,104,628	32,543,012	30,985,645	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	39,023,626	36,425,189	34,825,775	33,264,159	31,706,791	30,343,189
Risk-based Assets	18,944,675	18,140,959	20,213,228	18,876,617	18,014,018	17,150,495	16,243,042	16,439,933
RWA/Total Assets	43.4%	40.0%	55.0%	55.3%	55.4%	55.4%	55.2%	55.1%
Regulatory Capital Ratios:								
Leverage (>6.00%)	65.89%	63.48%	41.34%	25.64%	27.19%	28.89%	30.74%	32.56%
Total Capital/Risk-based (>11.00%)	158.34%	165.60%	79.98%	49.63%	52.72%	56.22%	60.20%	64.18%
Tier 1 Capital/Risk-based assets	157.88%	165.24%	79.64%	49.29%	52.36%	55.84%	59.80%	63.76%

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

FILED
2012 FEB -6 AM 11:51
CLERK
BANKRUPTCY COURT
DISTRICT OF DELAWARE

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

CERTIFICATE OF SERVICE

On this 3rd day of February 2012, I, James A. Berg, served a true and correct copy of the *Objection to the Seventh Amended Joint Plan of Affiliated Debtors by James Berg* upon the parties and in the manner listed below:

Via first-class mail

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Via first-class mail and e-mail

(e-mail copies for information purposes, as they do not include the appendices.)

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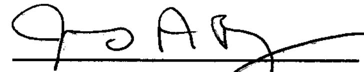

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