UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	Chapter 11
WASHINGTON MUTUAL, INC., *et al.*	:	Case No. 08-12229 (MFW)
Debtors[1]	:	Jointly Administered
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	Adv. Pro. No. 09-50551 (MFW)
Plaintiff,	:	**Oral Argument Requested**
v.	:	
WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	
Defendant for all claims	:	
– and –	:	
FEDERAL DEPOSIT INSURANCE CORPORATION,	:	
Additional Defendant for Interpleader claim.	:	

OPENING BRIEF OF JPMORGAN CHASE BANK, N.A. IN SUPPORT OF ITS MOTION TO DISMISS DEBTORS' COUNTERCLAIMS

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June 18, 2009

[1] The Debtors in these Chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (i) Washington Mutual, Inc. (3725) and (ii) WMI Investment Corp. (5395). The Debtors continue to share the principal offices with the employees of JPMorgan Chase, located at 1301 Second Avenue, Seattle, Washington 98101.

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Plaintiff JPMorgan Chase Bank, N.A. ("JPMC") respectfully submits this memorandum of law in support of its motion to dismiss the counterclaims of defendants Washington Mutual, Inc. and WMI Investment Corp. (collectively, "WMI" or "Debtors") for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3). WMI's counterclaims are jurisdictionally barred by 12 U.S.C. § 1821(d)(13)(D). Alternatively, WMI's counterclaims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) as precluded by federal banking law.

NATURE AND STAGE OF THE PROCEEDING

Debtors' counterclaims are reconstituted versions of the claims they first asserted in the claims process imposed by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Pub. L. No. 101-73, 103 Stat. 183 (1989). FIRREA sets forth the exclusive process for resolving claims relating to assets of a failed depository institution or acts of that institution or of the Federal Deposit Insurance Corporation (the "FDIC" or "Corporation") as receiver for the failed institution. On December 30, 2008, Debtors asserted their claims in the FIRREA process. On January 23, 2009, the FDIC disallowed those claims. Unsatisfied with that result, Debtors passed over the opportunity for administrative review of the FDIC's disallowance, electing instead to sue the FDIC in the U.S. District Court for the District of Columbia, *Washington Mutual Inc.* v. *FDIC*, No. 1:09-CV-00533 (RMC) (D.D.C.) (the "D.C. Action"), which is one of the limited options permitted by FIRREA to challenge the FDIC's determinations.

Debtors have also tried to use these bankruptcy proceedings to advance their claims, notwithstanding FIRREA's exclusive procedures. In Debtors' Schedules of

Assets and Liabilities filed with this Court in connection with their September 26, 2008 Chapter 11 petitions, Debtors assert a purported ownership interest in many assets of Washington Mutual Bank ("WMB") seized by the FDIC and later sold to JPMC. In later filings, Debtors continued to assert an ownership interest in these same WMB assets, notwithstanding the intervening disallowance of their claims by the FDIC. And, to this day, Debtors have continued to assert an ownership interest in these assets in filings with this Court, notwithstanding their pending challenge to the FDIC's disallowance in the D.C. Action.

On March 24, 2009, in order to protect itself from Debtors' attempt to use these bankruptcy proceedings improperly to circumvent FIRREA and effectively divest JPMC of the assets it acquired from the FDIC, JPMC commenced this adversary proceeding against the Debtors. On May 29, 2009, Debtors answered the complaint in this action and asserted eighteen counterclaims. Most of the counterclaims reassert claims to WMB assets that the FDIC has already disallowed, and the others seek to challenge the government's seizure of WMB and acts taken by the FDIC as receiver of WMB, including the transaction between the FDIC and JPMC. All of the Debtors' counterclaims are barred by FIRREA and must be dismissed.

SUMMARY OF ARGUMENT

1. WMI was a savings and loan holding company that, as such, was responsible for ensuring the safety and soundness of its subsidiary, WMB. WMI failed in this regard. On September 25, 2008, the Office of Thrift Supervision ("OTS") determined that WMB was in an unsafe and unsound condition, and placed WMB into receivership, appointing the FDIC as receiver. As receiver, the FDIC succeeded to all

right, title, and interest in WMB and its assets that WMI had as stockholder of WMB. On the same day, the FDIC and JPMC entered into a Purchase and Assumption Agreement, Whole Bank ("P&A Agreement") that sold to JPMC "all right, title, and interest of the Receiver in and to all of the assets . . . of [WMB] whether or not reflected on the books of [WMB] as of Bank Closing." (A13, P&A Agreement ¶ 3.1.)[2] WMB's failure still stands as the single largest banking failure in the nation's history.

2. Congress has established a comprehensive regulatory scheme conferring on regulators broad powers to address failing financial institutions, protect depositors and taxpayers, and handle claims that arise as a result of the exercise of the powers vested in them by Congress. Debtors' counterclaims in this proceeding are an impermissible collateral attack on this regulatory scheme and must be dismissed for two independent reasons.

3. *First*, although WMI's counterclaims are ostensibly alleged against JPMC, each of these counterclaims directly concerns the actions taken by federal banking regulators in response to WMI's failure to safely and soundly operate WMB. Indeed, WMI's counterclaims are virtually identical to most of the claims it has already asserted

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[2] JPMC respectfully requests that the Court take judicial notice of the contents of the documents contained in the attached Appendix in Support of Plaintiff JPMorgan Chase Bank, N.A.'s Motion to Dismiss Debtors' Counterclaims, consisting of pleadings and related documents filed in the D.C. Action and the FDIC receivership process. *See Southmark Prime Plus, L.P.* v. *Falzone*, 776 F. Supp. 888, 892 (D. Del. 1991) (noting that pursuant to Federal Rule of Evidence 201(b)(2), "the Court can take judicial notice of the contents of court records from another jurisdiction," including the "briefs and petitions of the parties."). *See also United States ex rel. Geisler* v. *Walters*, 510 F.2d 887, 890 n.4 (3d Cir. 1975) (stating that the court "of course" takes judicial notice of the briefs and petitions in other actions); *Lopez* v. *Howard*, No. 06-2361, 2007 WL 708989, *1 (3d Cir. Mar. 9, 2007) (taking judicial notice of court records as to litigation events).

against the FDIC as receiver for WMB in the D.C. Action. All WMI has done is substitute JPMC in place of WMB and the FDIC. Each of the counterclaims falls squarely within the statutory FIRREA claims process, which applies to: (i) any "action seeking a determination of rights with respect to[] the assets of any depository institution for which the Corporation has been appointed receiver" and (ii) any "claim relating to any act or omission of such institution or the Corporation as receiver." 12 U.S.C. § 1821(d)(13)(D)(i)-(ii). Because Debtors' counterclaims are subject to FIRREA's exclusive claims process, this Court lacks subject matter jurisdiction to adjudicate them.

4. WMI's attempt to assert these claims against JPMC, the purchaser of WMB assets from the FDIC, does not avoid the jurisdictional limitations of FIRREA. FIRREA's jurisdictional bar expressly prohibits claims (outside the receivership process) relating to failed bank assets or an act of the FDIC against parties to whom the FDIC sells failed bank assets. The reason for this is obvious: "[P]ermit[ting] claimants to avoid [the] provisions of (d)(6) and (d)(13) by bringing claims against the assuming bank . . . would encourage the very litigation that FIRREA aimed to avoid." *Vill. of Oakwood* v. *State Bank & Trust Co.*, 539 F.3d 373, 386 (6th Cir. 2008) (alterations & omission in original) (quotation omitted).

5. *Second*, Debtors' counterclaims fail to state a claim in light of governing federal banking law. Congress has authorized various federal agencies to regulate the banking industry and promote public confidence in the soundness of the nation's financial institutions. Congress has specifically provided the OTS and the FDIC with broad powers to protect the nation's banking industry by "tak[ing] possession of [the] premises and holdings" of a failed banking subsidiary with "no compensation"

being paid to the institution's holding company. *Branch* v. *United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995). That is precisely what happened here. WMB was placed in receivership by the OTS and the FDIC. Thereafter, substantially all WMB's assets were sold to JPMC in a transaction determined by the FDIC to be the least costly to the deposit insurance fund of all possible methods for meeting the FDIC's insurance obligations. None of these events gives rise to a claim by Debtors for the compensation they seek here outside of the FIRREA claims process; indeed, the regulatory framework precludes it.

6. The billions of dollars WMI allegedly "downstreamed" to WMB, which Debtors are seeking to recover, are not recoverable in bankruptcy or elsewhere. For example, the $10.5 billion in capital contributions to WMB, which Debtors are trying to claw back, are permanent measures under federal banking law and are the price by which a bank holding company is permitted to continue to operate a federally insured depository institution. They cannot be "undone" even when a bank is placed into receivership because to do so would be to undermine the very foundation of the regulatory scheme and the system of federal deposit insurance that is at its core. WMI willingly chose to make such investments in WMB, a federally insured depository subsidiary, in order to address capital needs that had arisen under its stewardship. As a result, it was permitted to continue to operate WMB and try to make it a success. WMI knew, as a matter of law, that investments could be seized by federal regulators, along with all of the other assets of its banking subsidiary, if its efforts to turn WMB around were unsuccessful. Accordingly, WMI's counterclaims seeking the return of billions of

dollars in alleged investments, payments, and other alleged transfers of funds from WMI to or on behalf of WMB are precluded by federal banking law.[3]

FACTUAL BACKGROUND

A. The Failure and Receivership of WMB

Throughout 2008, the OTS developed mounting concerns over the safety and soundness of WMB, which had been under extreme and increasing liquidity pressure. (Debtors' Counterclaims (D.I. 23) ("Counterclaims" or "Cntrclm.") ¶¶ 2, 19, 23-25.) On September 25, 2008, the OTS determined that WMB was "in an unsafe and unsound condition," and closed WMB. (*See id.* ¶ 25 (citing OTS Order 2008-36 at 2).) That same day, OTS issued an order directing the FDIC to take possession of WMB in a receivership proceeding under 12 U.S.C. § 1821. (*Id.* ¶ 4.) Upon its appointment as receiver, the FDIC succeeded to WMB's parent company's rights, titles, powers, and privileges with respect to WMB or in WMB's assets. 12 U.S.C. § 1821(d)(2)(A).

B. The FDIC and JPMC Execute the P&A Agreement

Also on September 25, 2008, JPMC and the FDIC entered into the P&A Agreement. (*Id.*; *see* A1 – A44, P&A Agreement.) Pursuant to the P&A Agreement, the FDIC transferred to JPMC "all right, title, and interest of the Receiver in and to all of the assets . . . of [WMB] whether or not reflected on the books of [WMB] as of Bank Closing." (A13, P&A Agreement.) In addition to acquiring the assets from the FDIC, JPMC also assumed billions of dollars in former WMB liabilities, including more than

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[3] JPMC reserves all of its additional rights, remedies, and arguments with respect to this Court's jurisdiction over the counterclaims and disputes raised thereby, including, without limitation, arguments that the reference to this Court must be or should be withdrawn.

$140 billion in insured deposit liabilities, at no cost to the FDIC. In stark contrast to other bank failures, the FDIC's sale of the assets and liabilities of WMB stands as a hugely successful transaction for the government and the taxpayers because it involved no financial assistance from, or cost to, the FDIC's Deposit Insurance Fund.

This transaction between the FDIC and JPMC also did not involve WMI. JPMC has not purchased any of the disputed assets from WMI. The disputed assets were sold to JPMC by the FDIC. (Cntrclm. ¶¶ 4-5.)

C. WMI Asserts Claims Against the WMB Receivership Pursuant to Title 12

Pursuant to 12 U.S.C. § 1821(d), the FDIC established a claims process for the administrative review of "any claim against a depository institution for which the Corporation is receiver." 12 U.S.C. § 1821(d)(6)(A)(i). On December 30, 2008, WMI and certain of its subsidiaries availed themselves of that process by filing a proof of claim with the FDIC (A45 – A67), asserting claims to over a dozen categories of assets in the WMB receivership, including claims to recover:

- Over $177 million in loans allegedly extended by WMI to WMB, as well as over $22.6 million in receivables purportedly owed by WMB to WMI for expenses allegedly incurred by WMI on behalf of WMB (A48 – A50, WMI Proof of Claim to FDIC, ¶¶ 8-14);
- Federal, state and local taxes allegedly paid by WMI on behalf of WMB, as well as approximately $3 billion in anticipated tax refunds (A51 – A52, *id.* ¶¶ 15-19);
- Approximately $6.5 billion in capital contributions made by WMI to WMB between December 2007 and April 2008 (A52 – A53, *id.* ¶¶ 20-23);
- Approximately $4 billion worth of trust preferred securities that WMI alleges were wrongfully transferred from WMI to WMB (A53 – A56, *id.* ¶¶ 24-30);

- Approximately $152 million in alleged preferential transfers from WMI to, or on the behalf of, WMB (A56 – A57, *id.* ¶¶ 31-35);

- Unpaid obligations outstanding in connection with various vendor contracts that allegedly primarily benefit WMB (A58, *id.* ¶ 36);

- A generalized claim for the allegedly "improper" seizure and sale of unspecified "tangible and intangible assets" owned by WMI (A60, *id.* ¶¶ 40-42);

- Over $4 billion in purported funds maintained in disputed deposit accounts (A60 – A62, *id.* ¶¶ 43-46); and

- Unspecified amounts allegedly paid by WMI on account of various employee benefit and pension plans and insurance policies, as well as any other employee or employer related costs incurred by WMI on behalf of WMB (A63 – A64, *id.* ¶¶ 48-53).

Virtually all WMI's claims were based on its repeated assertion that WMI still maintained ownership interests and rights in WMB and in the particular categories of assets or obligations at issue, notwithstanding the seizure of these assets by OTS, the succession of the FDIC as receiver, or the subsequent sale of substantially all the assets by the FDIC to JPMC pursuant to the P&A Agreement.

On January 23, 2009, the FDIC, as receiver, disallowed all of WMI's claims. (A100, FDIC Notice of Disallowance of Claim.) Rather than administratively appeal this decision, on March 20, 2009, WMI filed a lawsuit against the FDIC in the U.S. District Court for the District of Columbia. *Washington Mutual Inc.* v. *FDIC*, No. 1:09-cv-0533 (RMC) (D.D.C.) (A68 – A106, D.C. Action Compl.) WMI specifically alleged that its action arose under the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811 *et seq.*, and that 12 U.S.C. § 1821(d)(6) provided both subject matter jurisdiction and proper venue. (A69, *id.* ¶¶ 5-6.) Section 1821(d) also imposes a jurisdictional bar

limiting jurisdiction over WMI's claims to the D.C. District Court where WMI elected to pursue its claims. 12 U.S.C. §§ 1821(d)(6), (d)(13)(D).

In its complaint in the D.C. Action, WMI re-asserts nearly verbatim each of the claims originally asserted in its December 30, 2008 proof of claim filed with the FDIC, once again claiming ownership of billions of dollars of assets seized by the receiver and demanding either their return or compensation. (*Compare* A45 – A67, FDIC Proof of Claim, *with* A68 – A95, D.C. Action Compl.) In addition, WMI also purports to assert new claims against the FDIC, such as a claim for conversion, a Fifth Amendment takings claim, and a claim for damages based on WMI's allegation that the FDIC sold WMB's assets to JPMC under the P&A Agreement for less than they were worth, despite having never previously asserted such claims against the FDIC in the receivership claims process. (A91 – A93, D.C. Action Compl. ¶¶ 81-95.)[4]

On March 30, 2009, JPMC moved to intervene as a defendant in WMI's D.C. Action in order to protect its interests in the assets put at issue in WMI's complaint. On April 30, 2009, the FDIC notified the District Court of its support of JPMC's motion to intervene as of right, stating its view that "many of the factual and legal issues raised by the complaint in this action may implicate JPMC's interests under the [P&A Agreement]." (A142, FDIC Resp. in Supp. of JPMC Mot. to Intervene.)

WMI opposed JPMC's intervention, specifically urging the D.C. court to heed the jurisdictional bar provision of FIRREA, 12 U.S.C. § 1821(d)(13)(D), drawing

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[4] On June 11, 2009, the FDIC moved to dismiss, *inter alia*, these newly asserted claims by WMI in the D.C. Action for lack of subject matter jurisdiction under 12 U.S.C. § 1821(d)(13)(D) for failure to exhaust FIRREA's exclusive claims process.

special attention to its directive that "no court shall have jurisdiction over . . . any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver." (A126, WMI Opp'n to JPMC Mot. to Intervene.) The District Court has not yet ruled on JPMC's motion to intervene. On June 3, 2009, several institutional holders of senior notes issued by WMB also moved to intervene as defendants in the D.C. Action.[5]

D. WMI's Bankruptcy and Counterclaims Against JPMC

Following OTS's seizure of WMB, WMI filed a voluntary petition for Chapter 11 bankruptcy on September 26, 2008. WMI has asserted ownership of billions of dollars in assets on its schedules of purported debtor property, notwithstanding that those same assets were the subject of the FDIC's disallowance of WMI's proof of claim and that WMI had asked the D.C. court to determine ownership of those same assets following the FDIC's disallowance of those claims.

In order to contest WMI's attempt to use the bankruptcy proceedings to divest JPMC of its assets acquired from the FDIC, on March 24, 2009, JPMC commenced this adversary proceeding against WMI, urging this Court to reject WMI's claims of any interest in the assets sold to JPMC by the FDIC. (Compl. (D.I. 1).) However, with respect to certain assets at issue in WMI's first-filed D.C. Action, JPMC has asked for the following relief: "a declaratory judgment finding that Debtors must

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[5] These same note holders were granted permission by this Court on May 20, 2009, to intervene in the purported turnover action commenced by WMI against JPMC on April 27, 2009. *See Washington Mutual Inc.* v. *JPMorgan Chase Bank, N.A.*, Adv. Pro. No. 09-50934 (Bankr. D. Del. May 20, 2009).

proceed with any claim to assert ownership of or interest in [the particular asset category] through the D.C. Action Debtors elected to commence."[6] (*E.g.*, *id.* ¶ 183.)

On May 29, 2009, WMI filed its Answer and Counterclaims in this adversary proceeding. All of WMI's eighteen counterclaims in this proceeding duplicate claims already asserted by WMI against the FDIC in the D.C. Action (A68 – A95, Compl.):

Adversary Proceeding Counterclaim	**District Court Claim**
Counterclaims 1-2: Avoidance and recovery of $6.5 billion in purported capital contributions. ¶¶ 13, 93-103.	D. Capital Contribution Claims: Recovery of $6.5 billion in purported capital contributions. ¶ 25.
Counterclaims 3-7: Avoidance and recovery of $4 billion in Trust Preferred Securities. ¶¶ 104-38.	E. Trust Preferred Securities Claims: Avoidance and recovery of the transfer of $4 billion in Trust Preferred Securities. ¶ 29.
Counterclaims 8-9: Avoidance and recovery of approximately $152 million in taxes paid on behalf of WMB and Preferential Transfers. ¶¶ 139-52.	C. Taxes: Compensation for taxes paid by WMI on behalf of WMB, including ownership of tax refunds. ¶¶ 20-24. F. Preference Claims: Avoidance and recovery of approximately $152 million in purported preferential transfers. ¶ 36.
Counterclaim 10: Avoidance of the entire P&A transaction, *inter alia*, for failure to receive reasonably equivalent value for the assets transferred to JPMC. ¶¶ 153-61.	Count II: Dissipation of WMB's Assets: Damages to WMI based on WMI's claim that WMB's assets would have been worth more in a straight liquidation than what the FDIC received for them under the P&A Agreement. ¶ 90.

[6] Likewise, on March 31, 2009, JPMC also filed several contingent proofs of claim that assert, in the first instance, that ownership of the assets put at issue by WMI in its D.C. Action should be resolved by the D.C. Action. In each such proof of claim, JPMC specifically stated: "JPMC[] believes that with respect to the assets at issue in the D.C. Action or the Adversary Proceeding, ownership will be determined by the District Court or the Bankruptcy Court in those actions, as applicable." (*See* JPMC Proofs of Claim, March 31, 2009.)

Adversary Proceeding Counterclaim	District Court Claim
Counterclaims 11-12: Disallowance of JPMC's proofs of claim "because property of the Debtors' estates is recoverable from JPMorgan Chase" and declaratory judgment that certain assets—including Tax Refunds, $3.7 Billion Book Entry Transfer, employee pension and benefit plans and life insurance policies—are property of the Debtors' estates and were not purchased under the terms of the P&A Agreement. ¶¶ 162-71.	C. Taxes: Compensation for taxes paid by WMI on behalf of WMB, including ownership of tax refunds. ¶¶ 20-24. J. Deposit Claim: Compensation for any lost value on six deposit accounts WMI maintained with WMB. ¶¶ 47-50. L. Employee/Employer Related Costs and Insurance Claims: Compensation for amounts paid or liability incurred by WMI on employee benefit plans for the benefit of WMB. ¶¶ 52-57.
Counterclaim 13: Recovery of $177 million in loans made by WMI to WMB ("Intercompany Loans"), $22.5 million in "Intercompany Receivables" amounts purportedly owed by WMB to WMI and smaller amounts on servicing agreement payments and pension plan contributions made by WMI on behalf of WMB. ¶¶ 172-74, 76-80.[7]	A. Intercompany Loans: Recovery on $177 million in promissory notes. ¶¶ 14-15. B. Intercompany Receivables: Recovery on $22.5 million in "Intercompany Receivables," and smaller amounts on servicing agreements, owing from WMB to WMI. ¶¶ 16-19.
Counterclaims 15-18: Recovery on Trademark, Patent, and Copyright Infringement. ¶¶ 178-212.[8]	I. Improper Asset Sales: Recovery of intangible assets improperly transferred from WMI. ¶ 45.

As summarized by WMI in its introduction to the counterclaims, its action *against JPMC* focuses on the allegedly "fraudulent and preferential transfers of potentially more than $10 billion in WMI assets *to WMB*," and WMI's principal theory that "WMI downstreamed billions of dollars without recompense and made significant preferential

[7] WMI's Counterclaim 14 asserts a claim for unjust enrichment and the imposition of a constructive trust and/or equitable lien with respect to a number of the same categories of property listed above, including capital contributions, trust securities, preferential transfers, and other disputed assets. (Cntrclm. ¶¶ 175-77.)

[8] With respect to each of WMI's purported infringement claims, WMI acknowledges that WMB possessed licenses to all of the intellectual property assets at issue at the time of the receivership. (Cntrclm. ¶¶ 82, 84-85, 87, 183, 196-97.)

transfers to WMB on account of antecedent debts." (Cntrclm. ¶¶ 1-2 (emphasis added).) These contentions also lay at the heart of all of WMI's claims against the FDIC in the pending D.C. Action.

ARGUMENT

I. WMI'S COUNTERCLAIMS MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

A. 12 U.S.C. § 1821(d)(13)(D) Imposes a Jurisdictional Bar that Divests this Court of Subject Matter Jurisdiction Over WMI's Counterclaims Against JPMC.

The jurisdictional bar imposed by FIRREA, 12 U.S.C. § 1821(d)(13)(D), limits the courts that have subject matter jurisdiction to adjudicate claims that arise from an FDIC receivership. *Nat'l Union Fire Ins. Co.* v. *City Sav., F.S.B.*, 28 F.3d 376, 388 (3d Cir. 1994). Section 1821(d)(13)(D) of Title 12 provides in full:

> (D) Limitation on Judicial Review
> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> > (i) any claim or action for payment from, or any action seeking a determination of right with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
> >
> > (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1821(d)(13)(D). This statute unambiguously states that claims involving a failed bank are heard exclusively through a specified process and by the select courts specified in Title 12 of the U.S. Code. *See FDIC* v. *Shain, Schaffer & Rafanello*, 944 F.2d 129, 132 (3d Cir. 1991) ("FIRREA's claims procedure in section 1821(d) is exclusive. Congress expressly withdrew jurisdiction from all courts over any claim to a

failed bank's assets that are made outside the procedure set forth in section 1821."); *Vill. of Oakwood* v. *State Bank & Trust Co.*, 519 F. Supp. 2d 730, 735 (N.D. Ohio 2007) ("[T]he process outlined in § 1821(d)(6) is the only means of review available to claimants..."); *FDIC* v. *Updike Bros.*, 814 F. Supp. 1035, 1039 (D. Wyo. 1993) (dismissing counterclaims for lack of subject matter jurisdiction and observing that "this critical jurisdictional requirement has been actively enforced by our sister circuits." (citing decisions from the First, Second, Third, Fifth, and D.C. Circuits)).

Section 1821(d) goes on to "'set[] forth a detailed series of rules under which *all claims involving an insolvent institution* are received and handled.'" *Vill. of Oakwood*, 519 F. Supp. 2d at 735 (quoting *Brady Dev. Co.* v. *Resolution Trust Corp.*, 14 F.3d 998, 1002 (4th Cir. 1994) (emphasis added)); 12 U.S.C. §§ 1821(d)(3)-(7). In accordance with this process, in the first instance, all claims concerning the WMB receivership had to first be filed with the FDIC, which could allow or disallow the claims. In the event of a disallowance, the claimant may opt to have that decision administratively reviewed by the FDIC, or it may assert those disallowed claims—and only those disallowed claims—in either the U.S. District Court for the District of Columbia or the district in which the failed bank's principal place of business is located. 12 U.S.C. § 1821(d)(6)(A). "In light of the unambiguous language mandating the exhaustion requirement and in light of Congress' express fear that the costs of litigation would exacerbate an already catastrophic situation, it is patently clear that the jurisdictional bar of section 1821(d)(13)(D) reaches all claims seeking payment from the assets of the affected institution, all claims seeking satisfaction from those assets, and all claims relating to any act or omission of either the institution or the receiver regardless of

whether the action is framed as a claim, counterclaim, or affirmative defense." *Updike Bros.*, 814 F. Supp. at 1040; *Nat'l Union Fire Ins. Co.*, 28 F.3d at 388; *Vill.of Oakwood*, 539 F.3d at 385-86.

B. WMI's Counterclaims Are Subject to FIRREA's Exclusive Claims Process.

Debtors bear the burden of establishing subject matter jurisdiction, the lack of which is fatal to their counterclaims. *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Here, because Title 12 imposes an exclusive process that bars this Court from adjudicating Debtors' counterclaims, those counterclaims must be dismissed for lack of subject matter jurisdiction.

1. The Plain Language of 12 U.S.C. § 1821(d)(13)(D) Bars WMI's Counterclaims.

Here, all WMI's counterclaims fall squarely within the two broad categories of claims that Congress expressly sought to bring within FIRREA's exclusive claims resolution process. *First*, each of WMI's eighteen counterclaims "seek[s] a determination of rights with respect to[] the assets of [a] depository institution for which the Corporation has been appointed receiver," namely the assets of WMB. 12 U.S.C. § 1821(d)(13)(D)(i). The basic theory underlying all of WMI's counterclaims against JPMC is that the WMB assets seized by the OTS and sold by the FDIC allegedly included billions of dollars in funds "downstreamed" directly to WMB by WMI, payments and other indirect transfers by WMI purportedly for the benefit of WMB, and numerous other forms of tangible and intangible property, including licenses to intellectual property, in which WMI purportedly maintains various rights. *Second*, all the counterclaims are directed at assets placed in an FDIC receivership by the OTS and then

sold by the receiver, and therefore necessarily relate to an "act or omission . . . of the Corporation as receiver." 12 U.S.C. § 1821(d)(13)(D)(ii).

As numerous courts in this Circuit and other jurisdictions have routinely held, claims such as these relating to a failed bank and/or the receivership may not be adjudicated outside the confines of the statutory process in light of Title 12's broad jurisdictional bar. *See, e.g.*, *Nat'l Union Fire Ins. Co.*, 28 F.3d at 388-89 ("The [FIRREA] jurisdictional bar goes further and, in addition to barring 'any claim . . . for payment," it contains a bar against 'any action seeking a determination of rights with respect to [] the assets of any depository institution for which the Corporation has been appointed receiver.") (citations omitted); *Shain, Schaffer & Rafanello*, 944 F.2d at 136 ("We[, the Third Circuit,] have specifically held that the jurisdictional bar of 12 U.S.C. 1821(d)(13)(D) extends to actions seeking a determination of rights with respect to a failed bank's assets."); *Burroughs* v. *Colony First Fed. Sav. & Loan Ass'n*, 858 F. Supp. 58, 61 (W.D. Pa. 1994) ("[T]he jurisdictional section [of FIRREA's administrative procedures] is clear: courts have no jurisdiction over, *inter alia*, claims or actions seeking payment or a determination of rights with respect to the assets of an [receiver]-controlled failed depository institution or any claim relating to any act or omission of such institution."); *see also Vill. of Oakwood*, 539 F.3d at 387 (noting that "this court has explained that § 1821(d)(13)(D) precludes a court from *acquiring* jurisdiction *after* the receiver is appointed," (quotation omitted), and upholding district court's rejection of depositors' claims in light of jurisdictional bar); *FDIC* v. *Bristol Home Mortgage Lending, LLC*, No. 08-81536-CIV, 2009 WL 1531858, at *2 (S.D. Fla. June 1, 2009) (dismissing counterclaims where "the general rule of § 1821(d)(13)(D), which deprives

federal courts of subject matter jurisdiction over such claims[,] applie[d]"); *Updike Bros.*, 814 F. Supp. at 1040 ("[W]e find that the various counterclaims and affirmative defenses asserted by the defendants in this case are 'claims' subject to the exhaustion requirement mandated by FIRREA because they seek a determination of rights with respect to the assets of [the failed bank] and they relate to acts of both the [failed bank] and of the receiver."). Consequently, this Court lacks jurisdiction to entertain WMI's counterclaims, which must be dismissed.

2. WMI May Not Avoid FIRREA's Jurisdictional Bar by Asserting Its Claims Against the Receivership as Purported Counterclaims Against JPMC.

FIRREA's jurisdictional bar is such that it necessarily precludes claims brought not just against the FDIC or a failed bank, but, as here, also against third-party purchasers of a failed bank's assets from the FDIC. In *Village of Oakwood* v. *State Bank & Trust Co.*, the plaintiffs—like WMI here—sought to circumvent Title 12's jurisdictional bar by asserting their claims against the third party that purchased assets of the failed bank from the FDIC. *Vill. of Oakwood*, 539 F.3d at 386. The Sixth Circuit rejected this end run and held that the jurisdictional bar applied just as it would have had the plaintiffs asserted their claims directly against the FDIC. *Id.*

The *Oakwood* court determined first that the plain language of Section 1821(d)(13)(D) barred plaintiffs' claims because "all of their claims against [the assuming bank] are directly related to acts or omissions of the FDIC as receiver of [the failed bank]." *Id.* at 386. The Sixth Circuit further observed that the underlying policy behind the jurisdictional bar applied equally to claims against the assuming bank that

would be barred if asserted directly against the FDIC: "[P]ermit[ting] claimants to avoid [the] provisions of (d)(6) and (d)(13) by bringing claims against the assuming bank . . . would encourage the very litigation that FIRREA aimed to avoid." *Id.* at 386 (alterations & omission in original) (quotation omitted); *see also Vill. of Oakwood*, 519 F. Supp. 2d at 738 ("The resulting regime would thwart FIRREA's purpose and permit creditors to evade the comprehensive administrative claims procedures envisioned by the statute." (quotation omitted)). Moreover, permitting suits against purchasers of failed bank assets outside FIRREA's claims process "would also create an obstacle to the FDIC's quick and successful resolution of failed banks; an assuming bank would rarely be inclined to enter a P&A agreement with the FDIC knowing that it could be taking on unidentified liabilities of undefined dimensions that could arise at some uncertain date in the future." *Vill. of Oakwood*, 519 F. Supp. 2d at 738.

For the same reasons, FIRREA's bar applies to WMI's counterclaims in this case. Each counterclaim involves a claim to assets of the failed institution and/or a challenge to the conduct of the FDIC as receiver. Each such claim is barred by 12 U.S.C. § 1821(d)(13)(D) against the FDIC and, equally, against JPMC as purchaser of WMB assets from the FDIC.

3. WMI's D.C. Action Underscores That Its Counterclaims Are Subject to FIRREA's Jurisdictional Bar.

WMI's D.C. Action against the FDIC confirms that FIRREA's exclusive claims process and jurisdictional bar must result in dismissal of WMI's counterclaims. As shown above, comparing the two, it is clear that WMI's counterclaims are little more

than the same claims already asserted by WMI against the FDIC in its D.C. District Court complaint, but now asserted against JPMC in this action. *See supra* chart at pages 11-12.

Even WMI knows that these claims belong in FIRREA's claims process. Before appearing in this action, WMI previously asserted the substance of each counterclaim as part of the receivership proof of claim process. Following the FDIC's disallowance of those claims on January 23, 2009, WMI commenced the D.C. Action, once again alleging these same claims against the FDIC (and nominally against WMB). In its complaint, WMI expressly invoked 12 U.S.C. § 1821 as a basis for the District Court's subject matter jurisdiction in the District of Columbia. When JPMC moved to intervene in that action, WMI itself invoked FIRREA's jurisdictional bar in opposition to JPMC's efforts. Having repeatedly acknowledged by its actions the applicability of FIRREA's exclusive claims process, and even having gone so far as to invoke FIRREA's jurisdictional bar for its own benefit, WMI cannot reasonably contest that that same jurisdictional bar applies to and requires dismissal of its counterclaims in this action.

4. Dismissal of WMI's Counterclaims as Jurisdictionally Barred by 12 U.S.C. § 1821(d)(13)(D) Is Consistent with Congressional Intent.

While dismissal of WMI's counterclaims is required based on the plain language of Section 1821(d)(13)(D), *see Vill. of Oakwood*, 539 F.3d at 386; *see also Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (quotation

omitted)), consideration of Congress' purposes in enacting FIRREA provides further support for that conclusion.

"Congress enacted FIRREA in 1989 as a response to massive losses which were occurring in the nation's thrift industry and its deposit insurance fund" as a result of the savings and loan crisis of the 1980's. *Updike Bros.*, 814 F. Supp. at 1038 (citing H.R. REP. NO. 101-54(I) (1989), *reprinted in* 1989 U.S.C.C.A.N. 86). That "crisis prompted Congress to enact broad revisions in federal banking law to enhance certain powers of the FDIC and to eliminate impediments to the efficient resolution of failed financial institutions." *Shain, Schaffer & Rafanello*, 944 F.2d at 131. Among other things, Congress "eliminated several obstacles to the efficient administration of failed [banks]," *id.*, and "created [in FIRREA] a comprehensive administrative procedure for adjudicating claims asserted against a failed depository institution," *Praxis Props, Inc.* v. *Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, 62-63 (3d Cir. 1991). *See also Updike Bros.*, 814 F. Supp. at 1038 ("Congress enacted a scheme whereby the FDIC was empowered to administer a streamlined claims procedure designed to dispose of the bulk of claims against failed financial institutions expeditiously and fairly.").

In order to promote the efficient resolution of a failed bank—and thus more quickly restore consumer confidence while minimizing the costs to taxpayers—Congress specifically sought to limit litigation that could be brought in connection with a bank failure. "One of the important goals of FIRREA is to enable the receiver to efficiently determine creditors' claims and preserve assets of the failed institution without being burdened by complex and costly litigation." *Nat'l Union Fire Ins. Co.* v. *City Sav., F.S.B.*, 28 F.3d 376, 388 (3d Cir. 1994).

The jurisdictional bar of Section 1821(d)(13)(D) is a key element of Congress' plan to promote efficiency. As one court has explained:

> Congress' concerns with efficiency did not stop with the claims procedures themselves. Congress also expedited the prompt resolution of lawsuits involving failed institutions by directing that the lawsuits be filed in only two locations: the institution's principal place of business or the District of Columbia. 12 U.S.C. § 1821(d)(6)(A). Without this forum clause, the FDIC would be forced to defend actions at various locations throughout the country, with the attendant disruption of the Bank's records [and] personnel, and the defendant's task would become further complicated.

Hudson United Bank v. *Chase Manhattan Bank of Conn., N.A.*, 832 F. Supp. 881, 887 (D.N.J. 1993) (alteration in original) (quotation omitted).

The fact that the failure of WMB—the nation's single largest bank failure—resulted in not a single lost day of banking nor a dollar of taxpayer money being spent to compensate depositors stands as a testament to the FDIC's swift action pursuant to the broad power granted to it by that statute. *See supra* page 6. Failure to apply the jurisdictional bar and dismiss WMI's counterclaims here would not only run afoul of the plain language of Section 1821(d)(13)(D), but also serve to chill future purchases of failed bank assets and thus frustrate Congress' most important goals in passing FIRREA.

II. ALTERNATIVELY, WMI'S COUNTERCLAIMS MUST BE DISMISSED AS BARRED BY AND INCONSISTENT WITH FEDERAL BANKING LAW.

WMI's counterclaims constitute a direct attack on the ability of federal regulators to protect the nation's banking industry by closing failing depository institutions. WMB's failure stands as the largest bank failure in the nation's history. Rather than accept responsibility for failing to ensure the safety and soundness of its

subsidiary, the thrust of WMI's counterclaims is that, because it "downstreamed [to WMB] billions of dollars without recompense," (Cntrclm. ¶ 2), it is now entitled to be fully compensated for all its transfers to or on behalf of its failed bank. This contention—essentially an argument that the federal government and taxpayers should pay WMI for WMB's failure—is facially absurd and, not surprisingly, meritless as a matter of law.

"Banking is a highly regulated industry, and an individual engaged in that industry is deemed to understand that if his bank becomes insolvent or is operated in violation of laws or regulations, the federal government may 'take possession of its premises and holdings,' and *no compensation for that government action will be due*." *Branch*, 69 F.3d at 1575 (emphasis added) (quoting *Cal. Hous. Sec., Inc.* v. *United States*, 959 F.2d 955, 958 (Fed. Cir. 1992)). Therefore, "[w]hat neither [WMI] nor [WMB] could have expected was to be compensated for a regulatory possession by OTS and the [receiver] of its property if that possession were to occur following a determination that [WMB's] financial situation mandated federal conservatorship or receivership." *Cal. Hous. Sec.*, 959 F.2d at 959; *see also Golden Pac. Bancorp.* v. *United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994) (reasoning that plaintiffs "could not have reasonably expected that the government would fail to enforce the applicable statutes and regulations." (quotation omitted)).[9]

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[9] The only recovery that WMI can expect would be payment on a claim properly presented and resolved under FIRREA's comprehensive claims process. Under the detailed priorities mandated by the Federal Deposit Insurance Act, shareholders such as WMI have the lowest possible priority and receive no recovery whatsoever until all other liabilities and obligations of the failed bank are satisfied. 12 U.S.C. § 1821(d)(11)(A).

The first fourteen of WMI's counterclaims are variations on a demand that it be made whole for the failure and seizure of WMB. These claims are improper, whether asserted against the FDIC or against JPMC as a purchaser of assets from the FDIC[10]: Counterclaims 1 and 2 seek the recovery of capital contributions to WMB; Counterclaims 3, 4, 5, 6 and 7 seek the recovery of $4 billion in Trust Preferred Securities contributed to WMB by agreement between WMI and the OTS; Counterclaims 8 and 9 seek to recover transfers to WMB; Counterclaim 10 seeks to avoid the entire P&A transaction because, *inter alia*, WMI did not receive reasonably equivalent value for the assets sold pursuant to the P&A Agreement; Counterclaims 11 and 12 seek disallowance of JPMC's proofs of claim because, in part, the assets at issue are allegedly "recoverable from JPMorgan Chase;" Counterclaim 13 seeks to recover purported loans made to WMB and receivables owed by WMB; and Counterclaim 14 seeks recovery under various equitable theories with respect to a number of the same categories of property addressed in the other counterclaims. WMI's remaining claims (Counterclaims 15, 16, 17 and 18) differ slightly in that they are purportedly claims of infringement by JPMC of various forms of intellectual property. WMI, however, concedes that WMB

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[10] WMI's efforts to claw back assets "contributed" to WMB is, effectively, an argument that the U.S. Government—and, ultimately, U.S. taxpayers—should pay holding companies some purported fair value for assets seized as a result of a receivership. Although the claims are styled as against JPMC, these claims implicate the indemnification provisions of the P&A Agreement that, among other things, indemnify JPMC and hold it harmless against any and all costs, losses, liabilities and expenses arising from a broad range of claims, including claims by "the Failed Bank's parent company . . . ." (A30, P&A Agreement, § 12.1(a)(9)). Alternatively, if these claims were to be recognized, the FDIC would be required to replace the equity or receive a commensurately reduced price, thereby passing the cost to the deposit insurance fund and, ultimately, the taxpayers.

possessed licenses to this intellectual property, making these claims an attack on the powers expressly granted by Congress to the FDIC as receiver to transfer any asset of a failed bank without any approval or consent. 12 U.S.C. § 1821(d)(2)(G)(II).

Here, the OTS determined that WMB was "in an unsafe and unsound condition," closed WMB, and appointed the FDIC receiver for WMB, consistent with the express authority granted to OTS by Congress. 12 U.S.C. § 1464(d)(2)(A). All of WMI's counterclaims either seek to unwind transfers made to WMB pursuant to regulatory oversight by the OTS or to second-guess decisions of the FDIC as receiver in administering and disposing of the assets of WMB after seizure. WMI is ultimately responsible for the failure of WMB, its seizure, and the damage its actions caused to its investors and creditors. WMI may not now demand to be compensated for this seizure and sale of the assets of its failed subsidiary by government regulators "because these actions promoted the public interest in a sound banking system and because they did not interfere with the investment-backed expectations of [WMB] or of its corporate parent, [WMI]."[11] *Cal. Hous. Sec.*, 959 F.2d at 957 (citing *Am. Cont'l Corp.* v. *United States*, 22

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[11] WMI's counterclaims ignore the fact that the actions taken by the OTS and the FDIC demanded quick and decisive action. Resolution of a failed bank requires that a multi-billion-dollar transaction be negotiated and consummated in a matter of days to ensure that, as WMI's own allegations demonstrate, the ripple effects of a bank's closure do not threaten the stability of other institutions. (Cntrclm. ¶ 20 (alleging "WMB experienced significant loss of deposits in the wake of" the failure of IndyMac Bank).) Transactions under FIRREA such as the P&A Agreement must be executed without the weeks' and months' worth of due diligence that would typically occur in deals of this size. *See Brady Dev. Co.*, 14 F.3d at 1002-03 ("[FIRREA's] purpose was to 'provide funds from public and private sources to deal expeditiously' with faltering and failed savings and loans in order to rebuild their financial foundations.") (quoting Pub. L. No. 101-73, 103 Stat. 183, § 101). Permitting WMI's counterclaims to proceed outside the exclusive process set up by Congress to assess such claims within this exceptional context threatens the FDIC's and other regulators' ability to attract willing purchasers of

Cl. Ct. 692 (1991)). Accordingly, all of WMI's counterclaims should be dismissed in their entirety pursuant to Federal Rule of Civil Procedure 12(b)(6). *Camero* v. *Kostos*, 253 F. Supp. 331, 338 (D.N.J. 1966).

Along the same lines, WMI's Counterclaims 1 and 2 seeking recovery of over $6.5 billion in capital invested in WMB are specifically antithetical to the federal regulatory scheme that governs the treatment of such capital. In 1999, Congress amended Title 12 of the U.S. Code to add Section 1828(u), which specifically prohibits "claim[s] against any Federal banking agency (including in its capacity as conservator or receiver) for the return of assets of an affiliate or controlling shareholder of the insured depository institution transferred to, or for the benefit of, an insured depository institution by such affiliate or controlling shareholder of the insured depository institution, or a claim against such Federal banking agency for monetary damages or other legal or equitable relief in connection with such transfer . . . ." 12 U.S.C. § 1828(u)(1). As the provision's text and legislative history make clear, Congress' specific intention in enacting Section 1828(u) was "protecting the Federal banking agencies and the deposit insurance funds from claims . . . for the return of capital infusions" in a depository institution brought by the institution's holding company. H.R. REP. NO. 106-434, at 183 (1999) (Conf. Rep.), *reprinted in* 1999 U.S.C.C.A.N. 245, 276. As demonstrated *supra* page 17, WMI cannot avoid Section 1828(u)'s bar by merely asserting its claims against

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failed bank assets or to receive value for those assets, given the potential risks posed by claimants such as WMI attempting to end-run FIRREA. *Cf. Vill. of Oakwood*, 519 F. Supp. 2d at 738 ("[A]n assuming bank would rarely be inclined to enter a P&A agreement with the FDIC knowing that it could be taking on unidentified liabilities of undefined dimensions that could arise at some uncertain date in the future.").

JPMC, the third-party purchaser of WMB's assets from the FDIC. *See Vill. of Oakwood*, 539 F.3d at 386. Thus, WMI's Counterclaims 1 and 2 seeking compensation for its unsuccessful capital investments in WMB are not only meritless as a matter of common sense, but also specifically barred by controlling federal law.[12] This provides an independent basis for dismissal of Counterclaims 1 and 2 pursuant to Federal Rule of Civil Procedure 12(b)(6).

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[12] WMI's Counterclaims 1 and 3 seeking to avoid certain purported fraudulent transfers also fail because WMI received reasonably equivalent value for those investments in WMB as a matter of law. *See* 11 U.S.C. § 548(a)(1); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 535 (1994) (constructively fraudulent transfer claims require demonstration that "reasonably equivalent value" was not received for property transferred); *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 210-11 (3d Cir. 2006) (same). Here, WMI's pleading acknowledges that its capital contributions and transfer of trust securities were pursuant to its regulatory obligations as a savings and loan holding company to bolster the financial health of its wholly owned banking subsidiary. (Cntrclm. ¶¶ 13-25, 32-42.) Because these investments enabled WMI to satisfy its obligations to OTS and the requirements of federal banking law, they provided a sufficient "indirect benefit" to WMI to be deemed, as a matter of law, to have been for reasonably equivalent value as providing sufficient "indirect benefit" to the investor at the time of the investment. *See Mellon Bank, N.A.* v. *Metro Commc'ns, Inc.*, 945 F.2d 635, 646-48 (3d Cir. 1991).

CONCLUSION

For the foregoing reasons, JPMC respectfully submits that WMI's counterclaims should be dismissed for lack of subject matter jurisdiction. Alternatively, WMI's counterclaims should be dismissed as precluded by federal banking law.

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