

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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<i>In re</i>	:	Chapter 11
	:	
WASHINGTON MUTUAL, INC., <i>et al.</i> , <sup>1</sup>	:	Case No. 08-12229 (MFW)
	:	
Debtors.	:	Jointly Administered
	:	
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WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	Adversary Proceeding No. 09-50934(MFW)
	:	
Plaintiffs and Counterclaim Defendants,	:	
	:	
v.	:	
	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
	:	
Defendant and Counterclaimant.	:	
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JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
	:	
Cross-Claimant,	:	
	:	
v.	:	
	:	
FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Washington Mutual Bank, Henderson, Nevada,	:	
	:	
Cross-Claim Defendant.	:	
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<sup>1</sup> 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.

**ANSWER AND COUNTERCLAIMS / CROSS-CLAIM  
OF JPMORGAN CHASE BANK, NATIONAL ASSOCIATION**

Defendant JPMorgan Chase Bank, National Association (“JPMC”), by and through its undersigned counsel, for its Answer to the Complaint For Turnover of Estate Property of Washington Mutual, Inc. and WMI Investment Corp. (collectively, “WMI” or “Debtors”) dated April 27, 2009 (the “Complaint”), hereby responds as follows:

**NATURE OF ACTION**

1. To the extent any response is required, denies the allegations of paragraph 1, except denies knowledge or information sufficient to form a belief as to the truth of the allegations concerning Debtors’ statement of their own intentions.

2. Denies the allegations of paragraph 2, except admits that JPMC entered into a Purchase and Assumption Agreement (Whole Bank) Among Federal Deposit Insurance Corporation, Receiver of Washington Mutual Bank, Henderson, Nevada, Federal Deposit Insurance Corporation and JPMorgan Chase Bank, National Association dated as of September 25, 2008 (the “P&A Agreement”) pursuant to which JPMC acquired certain assets and liabilities of Washington Mutual Bank, Henderson Nevada (“WMB”), and respectfully refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

3. Denies the allegations of paragraph 3, except admits that Debtors have quoted a portion of the second recital contained in the P&A Agreement, and refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

4. Denies the allegations of paragraph 4, except denies knowledge or information sufficient to form a belief as to the truth of Debtors’ allegations concerning what Debtors contemplated.

5. Denies the allegations of paragraph 5.

6. Denies the allegations of paragraph 6.

7. Denies the allegations of paragraph 7, except admits that JPMC has asserted that it has valid rights of setoff and a valid security interest against funds claimed by Debtors to be deposit liabilities owed by JPMC.

8. Paragraph 8 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 8, except (i) admits that JPMC has asserted that it has valid rights of setoff and a valid security interest against funds claimed by Debtors to be deposit liabilities owed by JPMC and (ii) denies knowledge or information sufficient to form a belief as to the truth of debtors' allegations concerning their solvency.

9. Denies the allegations of paragraph 9, except admits that the Complaint purports to seek turnover and restitution.

### **JURISDICTION AND VENUE**

10. Paragraph 10 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 10, except admits that Debtors purport to bring this action under Federal Rule of Bankruptcy Procedure 7001 and II U.S.C. §§ 541 and 542.

11. Paragraph 11 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 11, except admits that Debtors purport to allege that this Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334(b).

12. Paragraph 12 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 12, except admits that Debtors purport to allege that venue is proper under 28 U.S.C. § 1409(b).

13. Paragraph 13 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 13, except admits that Debtors purport to allege that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E).

#### **THE PARTIES**

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 and respectfully refers the Court to Debtors' filings in this action for a complete and accurate statement of their content.

17. Admits the allegations of paragraph 17.

#### **FACTUAL BACKGROUND**

18. Denies the allegations of paragraph 18.

19. Denies the allegations of paragraph 19 and respectfully refers the Court to the referenced Exhibit for a complete and accurate statement of its content.

20. Denies the allegations of paragraph 20.

21. Denies the allegations of paragraph 21, except admits that Debtors purported to list certain accounts on their Schedules of Assets and Liabilities filed with the Bankruptcy Court.

22. Denies the allegations of paragraph 22, and respectfully refers the Court to the GL Administration Policy for a complete and accurate statement of the terms of that policy.

23. Denies the allegations of paragraph 23, except admits that the documents attached as Exhibit C are copies of documents sent by JPMC but avers that such documents were sent (i) subject to a full reservation of rights, (ii) pending judicial resolution, without prejudice to JPMC's position that the accounts referenced did not reflect deposit accounts and/or did not contain, in whole or in part, funds belonging to Debtors, and (iii) subject to Debtors' acknowledgment of JPMC's rights of setoff, recoupment and offset.

24. Denies the allegations of the first sentence of paragraph 24. The second sentence of paragraph 24 contains legal assertions as to which no response is required. To the extent a response is required, denies the allegations of the second sentence of paragraph 24 to the extent applicable to the accounts that form the basis of Debtors' Complaint.

25. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 25.

26. Denies the allegations of paragraph 26, except denies knowledge or information sufficient to form a belief as to the truth of Debtors' allegations concerning what WMI "determined."

27. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27, except admits that WMI engaged in improper conduct and did not properly create a deposit account at Washington Mutual Bank fsb ("WMB fsb").

28. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28, except admits that WMI improperly directed backdated entries on the books and records of WMB and avers that the misconduct of WMI caused the system to generate account statements that did not accurately reflect either the

character of the accounts at issue, the existence of valid and collectible account balances, or the proper ownership as between WMI, WMB and WMB fsb of any actual funds.

29. Denies the allegations of paragraph 29, except denies knowledge or information sufficient to form a belief as to what was intended by Debtors.

30. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30, except (i) respectfully refers the Court to the GL Administration Policy for a complete and accurate statement of its contents, (ii) respectfully refers the Court to Exhibit D for a complete and accurate statement of its contents, and (iii) avers that the efforts of WMI to create a deposit account liability at WMB fsb in the days prior to WMB's seizure by the regulators did not comply with internal policies or applicable law.

31. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31.

32. Denies the allegations of the third sentence of paragraph 32 and denies knowledge or information sufficient to form a belief as to the truth of the first and second sentences of paragraph 32.

33. Denies the allegations of paragraph 33, except (i) admits that JPMC acquired certain assets and assumed certain liabilities of WMB pursuant to the P&A Agreement and respectfully refers the Court to that Agreement for a complete and accurate statement of its terms, (ii) admits that the assets acquired by JPMC pursuant to the P&A Agreement included all of the stock of WMB fsb, and (iii) admits that Debtors purport to reference a press release issued by the FDIC and respectfully refer the Court to that release for a complete and accurate statement of its contents.

34. Denies the allegations of paragraph 34, except admits that Debtors purport to quote from the P&A Agreement and respectfully refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

35. Denies the allegations of paragraph 35, except admits that Debtors purport to quote from the P&A Agreement and respectfully refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

36. Paragraph 36 contains legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 36 and respectfully refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

37. Denies the allegations of paragraph 37, except admits that WMB fsb became a wholly-owned subsidiary of JPMC and was subsequently merged into JPMC.

38. Denies the allegations of paragraph 38, except respectfully refers the Court to the referenced public statements for a complete and accurate statement of their contents.

39. Denies the allegations of paragraph 39, except denies knowledge or information sufficient to form a belief as to Debtors' contemplation and respectfully refers the Court to the Account Stipulation for a complete and accurate statement of its terms.

40. Denies the allegations of paragraph 40, except respectfully refers the Court to the Account Stipulation for a complete and accurate statement of its terms.

41. Denies the allegations of paragraph 41, except respectfully refers the Court to the referenced public statement for a complete and accurate statement of its contents.

42. Denies the allegations of paragraph 42.

43. Denies or denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 43, except admits that JPMC has declined to confirm

that some or all of the accounts that Debtors claim to be demand deposit accounts are demand deposit accounts or the property of Debtors.

44. Denies the allegations of paragraph 44, except admits that JPMC has refused to turn over certain accounts which Debtors claim belong to it and which claim JPMC disputes, in whole or in part, and avers that JPMC has commenced an interpleader to determine the character of such accounts and to resolve disputed claims with respect to ownership of any funds actually in such accounts.

45. Denies the allegations of paragraph 45, except admits that JPMC reached an agreement with Debtors to accrue interest to the extent the accounts are determined to be deposit accounts and contain funds that belong to Debtors.

46. Denies the allegations of paragraph 46, except admits that JPMC issues Account Statements to Debtors but only (i) subject to a full reservation of rights, (ii) pending judicial resolution of disputes relating to Debtors' claims of ownership and without prejudice to JPMC's position that the accounts referenced are not deposit accounts and/or do not contain, in whole or in part, funds belonging to Debtors, and (iii) subject to JPMC's rights of setoff, recoupment and offset.

47. Denies the allegations of paragraph 47, except admits that Debtors purport to quote from a proof of claim filed by JPMC and respectfully refers the Court to the proof of claim identified in the paragraph for a complete and accurate statement of the terms of its contents.

48. Paragraph 48 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 48.



49. Paragraph 49 contains legal assertions as to which no response is required.

To the extent a response is required, denies the allegations of paragraph 49 and respectfully refers the Court to the P&A Agreement for a complete and accurate statement of its terms.

50. Paragraph 50 consists of legal assertions as to which no response is

required. To the extent a response is required, denies the allegations of paragraph 50.

51. Paragraph 51 consists of legal assertions as to which no response is

required. To the extent a response is required, denies the allegations of paragraph 51.

52. Paragraph 52 consists of legal assertions as to which no response is

required. To the extent a response is required, denies the allegations of paragraph 52, except denies knowledge or information sufficient to form a belief as to the truth of Debtors' allegations concerning their solvency.

53. Paragraph 53 consists of legal assertions as to which no response is

required. To the extent a response is required, denies the allegations of paragraph 53.

54. Paragraph 54 consists of legal assertions as to which no response is

required. To the extent a response is required, denies the allegations of paragraph 54.

55. Paragraph 55 consists of legal assertions as to which no response is

required. To the extent a response is required, denies the allegations of paragraph 55.

**FIRST CLAIM FOR RELIEF**  
**Turnover Pursuant to 11 U.S.C. § 542**

56. JPMC incorporates its responses to paragraphs 1 through 55 as if fully set

forth herein.

57. Paragraph 57 consists of legal assertions as to which no response is

required. To the extent a response is required, denies the allegations of paragraph 57.

58. Denies the allegations of paragraph 58, but admits that Debtors do not presently have use of what they claim to be “the Deposits.”

59. Paragraph 59 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 59.

60. Paragraph 60 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 60.

61. Paragraph 61 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 61 except or denies knowledge sufficient to form a belief as to the truth of Debtors’ allegations concerning their solvency.

62. Paragraph 62 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 62.

63. Paragraph 63 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 63.

64. Paragraph 64 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 64.

65. Denies the allegations of paragraph 65, except admits that to the extent the accounts referenced in Debtors’ complaint are in fact deposit accounts and in fact contain actual funds, JPMC has possession and custody of them.

66. Denies or denies knowledge sufficient to form a belief as to the allegations of paragraph 66.

67. Paragraph 67 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 67.

**SECOND CLAIM FOR RELIEF**  
**Unjust Enrichment**

68. JPMC incorporates its responses to paragraphs 1 through 67 as if fully set forth herein.

69. Paragraph 69 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 69.

70. Paragraph 70 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 70.

71. Paragraph 71 consists of legal assertions as to which no response is required. To the extent a response is required, denies the allegations of paragraph 71.

72. Denies the allegations of paragraph 72 except admits that Debtors purport to seek an order as alleged in the paragraph.

73. Denies all of the allegations of the Complaint not specifically admitted above, including those set forth in the Reservation of Rights and Prayer for Relief.

**AFFIRMATIVE DEFENSES**

In further response to the Complaint, upon information and belief and subject to further investigation and discovery, JPMC alleges the following affirmative defenses without assuming any burden of proof that JPMC does not otherwise bear:

**First Affirmative Defense**

The Complaint fails to state a claim upon which relief can be granted.

**Second Affirmative Defense**

The Court lacks subject matter jurisdiction over Debtors' claims in this action.

### **Third Affirmative Defense**

Debtors lack standing to maintain some or all of the claims alleged in the Complaint.

### **Fourth Affirmative Defense**

Debtors' claims are barred, in whole or in part, by principles of *res judicata* and/or collateral estoppel.

### **Fifth Affirmative Defense**

To the extent subject matter jurisdiction over Debtors' claims in this action is not limited to the United States District Court for the District of Columbia, Debtors' claims are compulsory counterclaims that they were required to bring in the Adversary Proceeding entitled *JPMorgan Chase Bank, National Association v. Washington Mutual, Inc., et al.*

### **Sixth Affirmative Defense**

Debtors are barred from seeking or obtaining some or all of the relief sought in the Complaint by the doctrines of waiver and/or estoppel.

### **Seventh Affirmative Defense**

Debtors are barred from seeking or obtaining some or all of the relief sought in the Complaint as a result of their unclean hands.

### **Eighth Affirmative Defense**

Debtors are barred from seeking or obtaining some or all of the relief sought in the Complaint by the doctrine of *in pari delicto*.

**Ninth Affirmative Defense**

Debtors' claims are barred, in whole or in part, for failure to join one or more indispensable parties.

**Tenth Affirmative Defense**

Debtors' claims are barred, in whole or in part, by applicable banking rules, regulations and statutes.

**Eleventh Affirmative Defense**

JPMC is entitled to a setoff, recoupment and/or offset from any recovery to which Debtors may be found to be entitled.

**Twelfth Affirmative Defense**

Debtors are barred from some or all of the recovery they seek due to a failure of consideration.

**Thirteenth Affirmative Defense**

Debtors' claims are barred, in whole or in part, due to their fraud.

**Fourteenth Affirmative Defense**

Debtors' claims are barred, in whole or in part, because their conduct and/or the matters upon which their claims are based was or are illegal.

**Fifteenth Affirmative Defense**

Debtors' claims are barred, in whole or in part, because the transactions on which their claims are based were the product of duress.

**Sixteenth Affirmative Defense**

Debtors failed to exhaust their administrative remedies.

### **Seventeenth Affirmative Defense**

Debtors' claims are barred, in whole or in part, by the statute of frauds.

#### **JPMORGAN CHASE'S COUNTERCLAIMS / CROSS-CLAIM**

JPMC, for its counterclaims against Debtors, and its cross-claim against the FDIC, alleges upon knowledge as to itself and upon information and belief as to all other matters as follows:

#### **NATURE OF ACTION**

1. JPMC brings these counterclaims and cross-claims to protect itself from the ongoing efforts of WMI to claim as its own assets that do not belong to WMI and from WMI's transparent attempt to profit from its own misconduct in causing WMB's failure by trying to shift the cost of that failure to the federal government and JPMC as the purchaser of assets in good faith from the FDIC as Receiver for WMB under Title 12 of the United States Code. Certain of these counterclaims and cross-claims are among the claims that have already been asserted in an adversary proceeding entitled *JPMorgan Chase National Association v. Washington Mutual, Inc., et al.* (the "JPMC Adversary Proceeding").

2. JPMC is also asserting a claim for fraud relating to WMI's purported transfer of \$3.67 billion from WMB to WMB fsb in the days leading up to WMB's seizure by government regulators. This most extraordinary purported transfer was attempted by WMI with full knowledge that WMB was about to fail and would shortly be seized by regulators, and while WMB was experiencing massive outflows of deposits from unaffiliated depositors. The purported transaction was engineered by WMI without disclosure of relevant facts, without the informed and voluntary participation of WMB fsb, without the actual movement of any funds from WMB to WMB fsb, and for the purpose of putting WMI in a position to try to lay claim to

\$3.67 billion that it would not otherwise have had a clear right to upon WMB's failure. Indeed, the purported transfer of \$3.67 billion by WMI from WMB to WMB fsb was supposedly accompanied by the simultaneous, round trip, loan back from WMB fsb to WMB of precisely the same \$3.67 billion WMI purportedly transferred in the other direction. In other words, without disclosure of material facts to WMB fsb, and without any movement of funds to WMB fsb, WMI purported to (i) impose upon WMB fsb an unconditional \$3.67 billion obligation to WMI, (ii) require WMB fsb to loan \$3.67 billion to WMB when WMI knew WMB was not safe and sound and that no rational bank would ever make such an unsecured loan and that WMB was about to be placed in a receivership and would therefore unlike ever pay the loan back, and (iii) thereby effectively steal \$3.67 billion from WMB fsb. JPMC, as the successor to WMB fsb, is entitled to recover from WMI for this blatant fraud.

3. JPMC believes that disputes involving the matters that are the subject of Debtors' claims and these counterclaims and cross-claims must be resolved in the action commenced by Debtors in the United States District Court for the District of Columbia entitled *Washington Mutual, Inc., et al. v. Federal Deposit Insurance Corporation*, Case No.1:09-cv-00533 (the "D.C. Action"). In addition, JPMC has requested withdrawal of the reference to the bankruptcy court for this action. And JPMC believes that this turnover proceeding must be dismissed because, among other things, there is a dispute about the alleged assets that are the subject of Debtors' complaint, which makes turnover improper. However, without prejudice to those positions, JPMC seeks a resolution through these counterclaims and cross-claims to the extent the disputes that are the subject of this action are not resolved in the D.C. Action, as JPMC believes they should be, and to the extent this action is not dismissed, as JPMC also believes it should be.

4. Under the P&A Agreement, JPMC acquired the business and related assets of WMB, including ownership of all of WMB's direct and indirect subsidiaries, and all right, title and interest of the Receiver in those assets. As provided for in the P&A Agreement, JPMC purchased "all of the Receiver's right, title and interest" to these assets, pursuant to and in accordance with the Federal Deposit Insurance Act, as amended (the "FDI Act"). Among the assets acquired by JPMC under the P&A Agreement were certain assets that have been claimed by Debtors in this action and elsewhere. JPMC's right in the assets that the Debtors seek to recover from JPMC in this action were transferred to JPMC by the FDIC pursuant to the P&A Agreement.

5. On December 30, 2008, the Debtors submitted claims in the Receivership for, among other things, ownership of the assets that they seek to require JPMC to turn over to them in this action. On January 23, 2009, the FDIC, as Receiver, disallowed the Debtors' claims to those assets. The Debtors elected not to appeal the disallowance of their claims to ownership of these assets. Rather, on March 20, 2009, the Debtors filed the D.C. Action against the FDIC in the United States District Court for the District of Columbia, challenging the disallowance of their claims and also claiming ownership of, among other things, those assets. The Debtors have exercised their purported right to demand a trial by jury in the District Court Action.

6. The Court in the D.C. Action has not overturned the FDIC's disallowance of the Debtors' claims to the assets that the Debtors seek to recover from JPMC in this action. Debtors' claims to the assets have already been disallowed pursuant to the resolution procedures under Title 12. Consequently, unless and until the D.C. Court overturns that disallowance, the Debtors have no rights in the assets they seek to recover from JPMC in this action, and both the Debtors and this Court are bound to honor and respect the determination under Title 12.



7. The assets that are the subject of the Debtors' disallowed claims are also among the assets set forth in the Debtors' Schedules and Statements of Financial Affairs filed with this Court on December 19, 2008, January 27, 2009 and February 24, 2009 (collectively, the "Schedules"). Notwithstanding the assertions in the Schedules and the D.C. Action, there are substantial questions as to ownership of the assets that are the subject of the Debtors' claims in this action. They are, in whole or in part, not property of the Debtors' estates under 11 U.S.C. §541, and they are, in whole or in part, property of JPMC, which acquired them in good faith and for value from the FDIC pursuant to the FDI Act.

8. In response to the Debtors' actions and in order to protect its economic interests in the assets the Debtors chose to put at issue in the District Court Action, on March 24, 2009, JPMC filed the JPMC Adversary Proceeding. In that action, JPMC seeks declaratory relief requesting adjudication in the D.C. Action of the ownership of assets put at issue by Debtors in that action or, in the alternative, requesting that the Bankruptcy Court grant relief as to JPMC's interests therein. On May 29, 2009, Debtors answered JPMC's Complaint in the JPMC Adversary Proceeding and asserted eighteen counterclaims, none of which included the claims Debtors assert in this Complaint even though these omitted claims are compulsory counterclaims.

9. In this action, JPMC seeks (a) a determination that title to the disputed accounts and any funds in those accounts be determined in the D.C. Action, and (b) to the extent that does not happen, pursuant to Title 12 and the P&A Agreement, (i) a declaration that, as the successor of the Receiver, it has or is entitled to full legal title to and the beneficial interest in some or all of the "disputed accounts" and any funds in them, (ii) adjudication of any and all conflicting claims to the so-called "disputed accounts" and any funds in them, and (iii)

adjudication of claims relating to other assets sold to JPMC pursuant to the P&A Agreement, resolution of which are necessary to determine, among other things, the extent of interrelated setoff claims.

### **PARTIES**

10. Counterclaimant JPMC is a national banking association organized under the laws of the United States of America with its principal place of business in Columbus, Ohio. JPMC is a wholly-owned subsidiary of JPMorgan Chase & Co., a corporation organized under the laws of the State of Delaware. JPMC is the “Assuming Bank” as that term is defined in the P&A Agreement and is the successor to and good faith purchaser for value from the Receiver under the P&A Agreement and under Title 12 of the United States Code.

11. Counterclaim Defendant WMI is a holding company incorporated in Washington with its principal place of business in Seattle, Washington and is one of the debtors and debtors-in-possession in these cases, having filed its voluntary petition for reorganization under chapter 11 of Title 11 of the United States Code on September 26, 2008 (the “Petition Date”) before the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

12. Counterclaim Defendant WMI Investment Corp. is a Delaware corporation with its principal place of business in Seattle, Washington and is the other debtor and debtor-in-possession in these cases. WMI and WMI Investment Corp. are referred to collectively as “WMI” or “Debtors”.

13. Cross-Claim Defendant FDIC is a federal corporation with its principal place of business in the District of Columbia. The FDIC is named as a defendant solely in connection with the interpleader claim and the claim for assets sold pursuant to the P&A Agreement in its capacity as Receiver of WMB.

## JURISDICTION

14. This Court has jurisdiction over these counterclaims and cross-claims pursuant to 28 U.S.C. §§ 2201 and 2202, 28 U.S.C. §§ 1334 and 1335, 28 U.S.C. § 157, and Bankruptcy Rules 7013, 7019 and 7020.

## STATEMENT OF FACTS

### **A. The Bank Failure and Acquisition.**

15. On September 18, 2008, the Office of Thrift Supervision (“OTS”) designated WMB as a “problem institution,” thus subjecting it to closer control and scrutiny by the federal regulatory authorities and on September 25, 2008, the OTS placed WMB in receivership because of significant concerns over the safety and soundness of the institution. To ensure continuity of operations, maximize public confidence and minimize cost to the public treasury, the FDIC ran an accelerated bidding process in accordance with statutorily mandated procedures under Title 12 that, subject to certain limited exceptions, resulted in the sale of all of the Receiver’s right, title and interest to or in WMB’s assets whether or not reflected on the books and records of WMB, to JPMC pursuant to the terms of the P&A Agreement.

16. At the time of the Receivership, WMB was the sixth-largest bank in the United States, with 2207 branches, more than 43,000 employees, and more than 13 million depositors with more than \$140 billion of deposit liabilities insured by the FDIC.

17. WMB also owned 100% of WMB fsb. WMB fsb or “the little bank” (as it has sometimes been called) had 26 offices to WMB’s 2,207 and less than \$5 billion in customer deposits insured by the FDIC to WMB’s more than \$140 billion.

18. The FDIC’s ability to promptly find a suitable acquirer of WMB’s banking operations had significant economic and policy ramifications. This was a bank failure of unprecedented magnitude that occurred in the midst of the most severe financial crisis in

decades. Had the FDIC been unable to sell the assets of WMB, 13 million depositors would have lost their bank and the confidence of consumers in the banking system generally would likely have been further undermined. The protection of the title conveyed by the FDIC to institutions like JPMC, who are encouraged to step into the breach and provide the stability and continuity necessary to avert a run on a failing bank and disruption of its services to the public, is critical to the ability of the regulators to manage bank failures under Title 12 and the government to administer an insurance fund that can maintain public confidence in the banking system.

19. That WMB stands as the largest bank failure in United States history stems in large part from the financial crisis and crisis of confidence that still grips the nation. In the ten days immediately prior to the Receivership, WMB experienced deposit outflows of more than \$16.7 billion, amounting to more than \$2 billion per banking business day, as its customers were apparently moving their assets so as to avoid the effects of what was increasingly perceived to be an inevitable bank failure. Incredibly, while that was occurring, WMI engaged in a series of inappropriate and ineffective book entries described below, in order to try to seize for itself assets that belonged to WMB.

20. JPMC had only two days after being briefed by the FDIC to submit a bid and then only twenty-four hours from the time that its bid was accepted by the FDIC until the time the acquisition closed to complete the single-largest acquisition of a failed institution in United States history. The circumstances which led to execution of the P&A Agreement meant that JPMC had limited opportunity to prepare for this unprecedented transaction.

21. The acquisition included, among other things, a nationwide credit card lending business, a multi-family and commercial real estate lending business, and nationwide mortgage banking activities. JPMC's acquisition avoided an interruption in WMB's banking

services. It assured that the 2,207 branches operated by WMB, as well as the 26 additional branches operated by WMB fsb, opened for business on September 26, 2008, protecting the interests of employees, customers, vendors, and communities who were dependent on WMB's banking operations. JPMC paid \$1.88 billion dollars to the FDIC for these and other assets, and assumed all deposits. This transaction involved no financial assistance from, or cost to, the FDIC's Deposit Insurance Fund. This stands in contrast to other recent bank failures such as the FDIC's sale of IndyMac Federal Bank FSB, which cost the FDIC approximately \$10.7 billion, despite IndyMac being a much smaller bank than WMB.

22. There is substantial evidence that, contrary to Debtors' unsupported assertions, at the time of the receivership and at all relevant times before the receivership, WMI, WMB, and WMBfsb were solvent. Indeed, the OTS found that "WMB met the well-capitalized standards *through the receivership date.*" (OTS Fact Sheet 9/25/2008 (emphasis added).)

23. The task of stabilizing, integrating and creating as smooth a transition as possible has been time-consuming and arduous. But its success has been vital to the banking system, the communities served by WMB and the general public interest.

#### **B. Combined Operations of Washington Mutual**

24. As a federal savings association committed to serving consumers and small businesses, WMB accepted deposits from the general public, originated, purchased, serviced and sold home loans, made credit card, home equity, multi-family and other commercial real estate loans, and to a lesser degree, engaged in certain commercial banking activities. WMB's substantial mortgage business was hit especially hard by increasing home and commercial mortgage delinquencies in late 2007 and 2008.

25. As the financial crisis took root toward the end of 2007, WMI focused its efforts on raising capital for WMB. In late 2007, WMI raised approximately \$3 billion in new capital through the issuance of a series of debt securities. In early 2008, WMI sought out merger partners and equity investors. A number of companies participated in the process (including JPMC, which submitted a bid to acquire WMI, but whose bid was rejected by WMI). In April 2008, in lieu of an acquisition or a merger, WMI negotiated a capital infusion of approximately \$7.2 billion from a group of investment funds led by Texas Pacific Group, a private equity firm, through an issuance of preferred stock, which included anti-dilution provisions that severely constricted the ability of WMI to raise additional capital.

26. All of the money raised by WMI provided additional capital to WMB. WMI formally contributed to WMB at least \$6.5 billion of the approximately \$10.2 billion in capital it had raised. As discussed below, certain book entries made between September 19 and September 24, 2008 reflect that an additional \$3.7 billion was apparently contributed as capital to WMB fsb, accounting for much of the remaining debt and equity capital raised by WMI during 2007 and 2008. While book entries were made, neither WMI nor WMB transferred cash or other good funds to WMB fsb corresponding to the book entries, whether as a contribution or otherwise.

27. Prior to the Receivership, WMI and WMB had identical and overlapping directors and held joint meetings of the Boards of Directors of both entities on a combined basis, resulting, in effect, in a single Board of Directors with identical directors that met on the same topics at the same time and collectively made decisions for both entities. WMI's officers and employees were also officers and directors of WMB and WMI and WMB shared a joint general ledger and other books and records, and centralized their decision making, treasury, cash

management, finance, governance, regulatory and executive functions in the same individuals. The overlap was so extensive that, as of the time of the Receivership and subsequent Petition Date, WMI claimed it had only a handful of employees remaining as the result of the Receivership.

28. Likewise, the assets and liabilities of the Debtors and their direct and indirect subsidiaries, including the Affiliated Banks, were connected and in many cases, commingled and intertwined. Prior to the Receivership, the Debtors and their direct and indirect subsidiaries operated a centralized and consolidated cash management system pursuant to which external receipts and payments were accounted for on a consolidated basis and internal receipts or payments were done in whole or in part by book or journal entry as “due to/from” accounts on the general ledger or other books of account.

29. At various times prior to the Receivership, WMI entered into agreements with third parties that titled assets or contractual rights in WMI’s name although WMB or a subsidiary of WMB paid for the asset or contractual right or was the entity liable on the payment or liability therefore. At various times prior to the Receivership, WMI also entered into intercompany arrangements with the Affiliated Banks with documentation different than the documentation that the Affiliated Banks would have obtained in an arm’s-length transaction with an unaffiliated party.

30. In 2007 and 2008, WMI undertook a series of projects and other acts, at least some of which appear to have moved assets away from WMB or its subsidiaries to WMI or another of WMI’s subsidiaries. This included transfers undertaken during August and September 2008 as part of WMI’s self-titled “WMI Cash Optimization Program”, for the apparent benefit of WMI.

31. To the extent that that any person has or may assert claims against JPMC that resulted from these transactions, JPMC is entitled to be indemnified and held harmless by WMI since all pre-petition transactions were consummated at the behest and direction of WMI and for its benefit.

**C. The Intercompany Amounts and Accounts**

**(i) The “On-Us” Accounting Entries**

32. On the Petition Date, WMI claimed that JPMC was liable to pay a total purported deposit liability to WMI and its non-WMB subsidiaries, originally claimed in the amount of \$5 billion. In their complaint in this action, Debtors assert claims in six accounts (the “Disputed Accounts”) in the total amount of \$4,038,509,283 (the “Intercompany Amounts”). According to WMI, the Intercompany Amounts represent deposits maintained by WMI at the Affiliated Banks.

33. JPMC disputes Debtors’ characterization of the Disputed Accounts and its claimed entitlement to the Intercompany Amounts. With respect to the Disputed Account alleged to have been created by WMI at WMB fsb on the eve of WMB’s receivership, JPMC further specifically disputes that such an account was properly created or that good funds – alleged by Debtors to be approximately \$3.67 billion – were ever delivered to WMB fsb.

34. As set forth in the P&A Agreement, JPMC purchased “all of the Receiver’s right, title and interest,” in the Intercompany Amounts, pursuant to and in accordance with the FDI Act. On December 30, 2008, the Debtors nonetheless submitted a claim to the Receiver asserting, among other things, ownership of the Intercompany Amounts. On January 23, 2009, the Debtors’ claims were disallowed by the Receiver. On March 20, 2009, the Debtors commenced the D.C. Action with respect to the disallowance of their claims, assert that the



Intercompany Amounts are deposit accounts at JPMC, and claim damages relating to the Intercompany Amounts.

35. The Receiver's disallowance of the Debtors' claims to the Intercompany Amounts has not been vacated or overturned by the Court in the D.C. Action.

36. With the exception of signature cards for several of the smaller Accounts, JPMC has not located and believes there do not exist pre-petition any deposit account agreements, signature cards or any other documentation for the Accounts as deposit accounts. Notwithstanding that fact and while it continued to investigate whether such documents existed somewhere, JPMC was prepared to treat the Accounts as if they were deposit accounts so long as all rights of all parties, including JPMC's rights, were acknowledged and approved by order of this Court. Toward that end, on or about October 15, 2008, JPMC and the Debtors entered into a proposed stipulation (the "Account Stipulation") with respect to the Accounts that was filed with the Court for approval. The Account Stipulation was ultimately withdrawn following objections filed by certain creditors of the Receivership and the FDIC and was never entered by the Court.

37. Pursuant to the Account Stipulation, and before it was withdrawn, JPMC and the Debtors executed customary deposit account agreements regarding the Accounts on or about October 21, 2008 that provided, among other things, customary rights of setoff, recoupment and banker's liens to secure JPMC's rights to recover claims JPMC may have against the Debtors or their subsidiaries and affiliates from the funds on deposit in the Accounts.

38. After the execution of those documents but prior to December 19, 2008, JPMC acceded to a request of the Debtors to agree to the accrual of interest on the Intercompany Amounts as a sign of good faith in the event that it were ultimately determined that any of the Intercompany Amounts were in fact deposit accounts, without prejudice to its rights. Similarly,

JPMC agreed to the Debtors' further request that as a sign of "goodwill" it agree to release \$292 million of the Intercompany Amounts attributable to the Accounts of the non-debtor subsidiaries of WMI, without prejudice to its rights.

39. JPMC agreed to those requests from the Debtors in good faith, without prejudice to its rights, and on the understanding that the parties were working diligently to resolve open questions and issues with respect to the Intercompany Amounts. It did so in reliance on the Debtors' execution of account documentation for the Accounts that protected the interests of JPMC, and on the understanding that the Debtors would respect those rights. However, on or about December 19, 2008, after obtaining from JPMC the benefit of these concessions, the Debtors advised JPMC that the execution of those deposit account agreements on October 21, 2008, was only in anticipation of the proposed Account Stipulation and, since that stipulation had never been approved, the execution and delivery of the agreements was in error, unauthorized and considered by the Debtors to be null, void and without legal effect.

40. The execution and effectiveness of the account documentation executed by the Debtors on October 21, 2008 was a key factor in JPMC's decision to agree to the request that it accrue interest on the Intercompany Amounts and to the release of \$292 million to the Debtors and their non-debtor affiliates. While JPMC does not dispute that the Account Stipulation was never so ordered, to the extent that such documentation is ineffective, it should be ineffective for all parties and for all purposes, including the effectiveness of any post-petition book entries reflecting any portion of the Intercompany Amounts or Accounts as deposit liabilities and the release of any funds to the Debtors or their non-Debtor affiliates.

41. Although JPMC still has not discovered any pre-petition deposit account agreements, signature cards or other documentation for the Accounts that would have been

required of depositors that were not affiliates in order to treat the Accounts as deposit accounts (except for the signature cards on a few accounts as described above), it is nonetheless clear that if these are deposit accounts—not capital contributions—they were and are subject to the standard terms and conditions specified in the Master Business Account Disclosures and Regulations (the “MBA Policy”) of the Affiliated Banks.

42. The Disputed Accounts were associated with the DDA numbers provided by WMI. Most were so-called “On–Us Accounts”, the internal nomenclature for intercompany receivables that were understood to represent deposit accounts at the Affiliated Banks. Thus, the balances in these Accounts as of any point in time, unlike third party deposit accounts, were maintained both at the depository institution and as intercompany book entries on the general ledger of WMI and the Affiliated Banks that were its subsidiaries.

43. The decision on how to characterize an intercompany transaction was made by a single centralized Treasury group for WMI and all of its affiliates. That Treasury group was under the direct supervision of Robert Williams, currently the Chief Executive Officer of WMI.

44. To the extent the Intercompany Amounts and the Disputed Accounts reflect capital contributions, they are the property of JPMC under the terms of the P&A Agreement. To the extent they are deposit liabilities, they must be governed by standard terms and conditions governing unaffiliated deposit accounts, as a result of which they become subject to any liens, claims and interests that JPMC may have, and are also subject to setoff, recoupment or other offset.

**(ii) Deposit Liabilities**

45. Putting aside whether any account (much less an account belonging to WMI and containing \$3.67 billion) was ever created at WMB fsb, to the extent the Intercompany Amounts in the Disputed Accounts are not capital contributions and are in fact deposit liabilities of WMB or WMB fsb assumed by JPMC under the P&A Agreement, WMI and its subsidiaries, like every other Affiliated Bank depositor (expressly or otherwise), are bound by the standard terms and conditions for deposits at the Affiliated Banks.

46. The Accounts were utilized to settle intercompany obligations, including obligations arising from the payment and allocation of expenses among WMI and all of its subsidiaries, with intercompany allocations, payments and settlements on a periodic, usually monthly, basis. The balances on the Accounts were reflected on “On-Us Elevation Reports” generated on a monthly basis and on paper “Washington Mutual Internal Checking Detail” statements mailed to an employee of WMB on a monthly basis.

47. These Accounts were established by WMI or one of its non-bank subsidiaries at the Affiliated Banks pursuant to WMI’s Internal Corporate Demand Deposit Account Establishment and Usage Policy (the “On-Us Policy”). According to that policy, WMB had the right to use the Intercompany Amounts for, among other things, processing and clearing transactions between WMB and WMI or their respective subsidiaries, customers, vendors, or investors, again raising the question of whether the Intercompany Amounts represented a continuing deposit liability or should be characterized as a general reserve, a capital contribution or a form of intercompany advance to the Affiliated Banks. The On-Us Policy was silent regarding the rules and terms governing the acceptance by the Affiliated Banks of amounts under

the On-Us Policy as deposit accounts and services related to such accounts maintained at the Affiliated Banks.

48. WMI and the Affiliated Banks maintained a detailed, forty-page policy, the MBA Policy, that operated as a contract setting forth the terms and conditions governing all deposit accounts established at the Affiliated Banks and reflected the processes used to comply with applicable banking rules and regulations. The MBA Policy contained, among other things, a self-executing clause that made the terms of the policy binding upon all depositors, even those who did not expressly give permission, through consent implied by the opening and continued use of the deposit account.

49. The MBA Policy and its terms and conditions apply to and govern any accounts that are in fact deposit accounts at the Affiliated Banks, including the Accounts to the extent any are deposit accounts. WMI, as the sole shareholder and parent of the Affiliated Banks, is charged with knowledge and acceptance of the MBA Policy for any deposit account it maintained at the Affiliated Banks.

50. Any claim that WMI is entitled to terms more favorable to it than the terms imposed on third-party depositors under the MBA Policy would violate applicable federal law and regulations and be untenable. The provision of services, including deposit services, to WMI by its Affiliated Banks, under relevant banking laws and regulations, were required to have been conducted on terms and conditions no less favorable to the bank than would have been undertaken in a comparable transaction with an unaffiliated third party. Thus, these accounts, to the extent they reflect deposits, were required by law to be maintained on terms no less favorable to the Affiliated Banks than those clearly set forth in the MBA Policy.

51. The MBA Policy expressly grants the Affiliated Banks a right to offset any and all claims against all deposit account liabilities and reflects WMI's legal obligations to its banking affiliates. Specifically, the MBA Policy provides, "you agree we have the right to offset any account or asset of yours then held by us, by our sister bank, or any subsidiary of ours or our sister bank." Said differently, to the extent the Accounts and the Intercompany Amounts contained therein are deposit liabilities of the Affiliated Banks, the MBA Policy created a broad contractual right of setoff against the Accounts and the Intercompany Amounts for the benefit of the Affiliated Banks and their subsidiaries and reflected WMI's legal obligations.

52. Accordingly, to the extent that any of the Accounts or Intercompany Amounts are found by the Court to constitute deposit liabilities of JPMC as assignee of the Receiver, they are deposit liabilities subject to and created under the MBA Policy, and JPMC has a security interest in, lien rights against and rights of set-off and recoupment against the Intercompany Amounts as deposit liabilities under the MBA Policy and standard deposit account agreement terms and conditions applicable to all third-party depositors and as in effect at the time that the Affiliated Banks and their parent entered into the transactions creating and maintaining the Accounts.

**(iii) JPMC Also Has an Express Security Interest in at Least One**

**Account**

53. In addition, WMI entered into at least one specific security agreement with WMB (the "Security Agreement") whereby WMB received a security interest in and lien upon at least one of the Accounts in return for providing value to WMI. According to its terms, the Security Agreement "shall be binding upon [WMI] and its successors and assigns, and shall inure to the benefit of, and may be enforced by [WMB] and its successors, transferees, and

assigns.” This express security interest creates a lien to secure any and all intercompany obligations. JPMC is the successor, transferee or assignee of the Security Agreement and entitled to enforce its terms against WMI at least as to Intercompany Amounts associated with Account No. 177-8911206. A true and correct copy of the Security Agreement is attached as Exhibit A.

**(iv) The September \$3.67 Billion Book Entry Transfer**

54. Between September 19, 2008 and September 24, 2008, in the days immediately preceding the impending takeover of WMB by its regulators, WMI directed book entries purporting to transfer approximately \$3.67 billion (the “\$3.67 Billion Book Entry Transfer”) from WMB to WMB fsb. The entries direct the purported transfer from the triple 070-10450-009909 “On-Us” Account No. 17900001650667, which is reflected in the internal On-Us Elevation Report and the Internal Checking Detail as an account at WMB, to what WMI now claims was a deposit account at WMB fsb identified as triple 070-10441-0009909 “On-Us” Account No. 44100000064234.

55. The general ledger entries for this transaction indicate that the entries were posted on September 24, 2008 with a “retro” date to September 19, 2008 and describe the \$3.67 Billion Book Entry Transfer as “WMI contributes to FSB.” WMI has asserted that the transaction was intended to be a transfer of funds from a WMI deposit account at WMB to a WMI deposit account at WMB fsb. JPMC disputes this characterization.

56. What is clear is at least the following: (i) no cash or other funds were actually moved to or received by WMB fsb in connection with the purported \$3.67 billion transfer; (ii) simultaneously with the purported transfer, the same supposed \$3.67 billion was

simultaneously loaned back to WMB; (iii) no account was properly established at WMB fsb; and (iv) it appears that no officer of WMB fsb authorized this highly suspect transaction.

57. JPMC also disputes the assertion that the purported funds in the Accounts belonged to WMI. As described herein, the funds have been identified as capital belonging to WMB, as well as tax amounts owned by WMB and now JPMC. In addition, in the weeks leading up to the receivership nearly a billion dollars in purported funds were transformed from an unsecured general ledger debt that was not supported by good funds or collateral—and had accumulated over several years until WMI began to deliberately and improperly siphon off cash from its subsidiaries—into purported deposit funds. This transformation was undertaken at the command of WMI, and is a substantial portion of the \$3.67 Billion Book Entry Transfer.

58. The Debtor's agreement to the terms of the Account Stipulation and the deposit agreements that provide JPMC on behalf of itself and its affiliates and subsidiaries with broad post-petition lien rights and rights of setoff and recoupment resulted in the entry, without prejudice, of the \$3.67 Billion Book Entry Transfer as a deposit liability on the books and records of JPMC. Having executed the standard deposit agreements with JPMC necessary to have this account reflected as a deposit at JPMC, and having understood that this was without prejudice to JPMC's rights, WMI should be estopped from taking the position that these account agreements were a mistake and not binding on it or from enjoying the benefit of having the Disputed Accounts reflected as deposit liabilities free of the lien and setoff rights created by those very same agreements. To the extent that any post-petition book entry is considered as relevant to the status of the purported deposit, any such resulting deposit should similarly be considered subject to the depository institution's rights, including post-petition contractual and statutory rights of setoff, that accompany the post-petition deposit.



59. WMB fsb would never have accepted a deposit liability from an unaffiliated third party without first receiving good funds, or at least not a deposit liability of the magnitude its parent now asserts was created on or about September 19, 2008 at a time when WMI alleges WMB was insolvent. The \$3.67 Billion Book Entry Transfer represented approximately 44% of the total deposits at WMB fsb, an increase of nearly 80% in total deposit liabilities. And, simultaneously with the purported transfer, the same “funds” were immediately loaned back to WMB. In no way was this an ordinary course transaction. And in no way was this transaction properly authorized, at least by WMB fsb.

60. Likewise, to the extent that the purported deposit funds were created by the manipulation of intercompany general ledger entries, master notes, and other intercompany book entries, the rights, interests and obligations of parties in and to the purported funds can only be determined in accordance with a full accounting for the related intercompany transactions. Accordingly, to the extent that the \$3.67 Billion Book Entry was originally created through intercompany transfers that were unauthorized, from sources not owned by WMI, or unaccompanied by the actual movement of funds, there could not have been a deposit liability at WMB.

61. Regardless of the fact that WMI and its affiliates may have operated a centralized cash management system for efficiency as members of the same corporate family, intercompany transfers, unaccompanied by actual movement of funds, cannot create obligations and liabilities as third parties when the corporate ownership link is broken. Because no cash or other funds were actually transferred by WMI to WMB fsb, the \$3.67 Billion Book Entry Transfer could not have created a deposit liability of WMB fsb to WMI without receipt of good funds. To the extent the \$3.7 Billion Book Entry Transfer is nonetheless deemed to create such a

liability, JPMC is entitled to a complete offset for WMI's failure to deliver good funds representing that \$3.67 billion deposit.

62. The \$3.7 Billion Book Entry Transfer was not a deposit account and WMI should be estopped from making any claims to the contrary.

63. Alternatively, to the extent any third party has or may have a claim against WMB fsb and/or JPMC with respect to or as a result of the \$3.7 Billion Book Entry Transfer, JPMC is entitled to be indemnified by WMI for any liability it may incur and is entitled to recover the amount by which it is or may be liable to any such third party from the Intercompany Amounts.

**(v) The Tax Refunds and other Funds in the Accounts**

64. A substantial portion of the Intercompany Amounts were, at the time of the Receivership and the Petition Date, in fact the property of the Affiliated Banks, representing tax payments made by the Affiliated Banks either as (i) accelerated payments of amounts previously claimed by WMI against the Affiliated Banks purportedly for taxes paid in prior years by WMI on behalf of the Affiliated Banks; or (ii) amounts transferred to WMI in payment of estimated or actual 2008 taxes.

65. In addition, after the Petition Date, at least approximately \$234 million of tax refunds due to WMB — the rights to which were purchased by JPMC as assets of WMB (the "Tax Refunds Received") — were paid to WMI. An amount equal to at least this \$234 million of the Tax Refunds Received are included in the balance of the Intercompany Amounts and the Accounts and should be paid over to JPMC as the lawful owner of those funds.

66. The Tax Refunds Received should not have been, and at various times were not in fact, recorded in any way as a deposit liability. The Tax Refunds Received were and are property of JPMC purchased under the P&A Agreement.

**(vi) Section 9.5 of the P&A Agreement**

67. To the extent any of the Accounts are deposit liabilities assumed by JPMC, pursuant to Section 9.5 of the P&A Agreement, “[a]t any time, the [FDIC] may, in its discretion, determine that all or any portion of any deposit balance assumed by [JPMC] pursuant to this Agreement does not constitute a “Deposit” . . . and may direct [JPMC] to withhold payment of all or any portion of any such deposit. Upon such direction, [JPMC] agrees to hold such deposit and not make payment of such deposit balance to or on behalf of the depositor, or to itself, whether by way of transfer, set-off, or otherwise. [JPMC] shall be obligated to reimburse the [FDIC], . . . for the amount of any deposit balance or portion thereof paid by [JPMC] in contravention of any previous direction to withhold payment of such deposit balance or return such deposit balance, the payment of which was withheld pursuant to this Section.”

68. The FDIC has not, to date, notified JPMC that all or any portion of the Intercompany Amounts or Disputed Accounts are or are not Deposit Liabilities within the meaning of the P&A Agreement. Nor has the FDIC directed JPMC to withhold payment on all or any portion of the Disputed Accounts. JPMC requests that, to the extent this Court orders JPMC to pay any portion of the Intercompany Amounts or Accounts to the Debtors or into the registry of this Court, that the Court do so by way of interpleader under Rule 7022, releasing JPMC from any liability for such amounts to any person and preserving the rights of all parties and all possible claimants with respect to those funds (including JPMC ). Specifically, JPMC requests a finding that it only has to pay or credit the Accounts or the Intercompany Amounts

once and that this Court's determination regarding ownership, character and rights in or to the Intercompany Amounts or the Accounts is final so that JPMC has no further liability in any capacity for the Intercompany Amounts or Accounts except as may be determined by this Court in this proceeding.

**RELIEF REQUESTED BY JPMC**

**Count One  
(Against WMI only)  
(Declaratory Judgment: Intercompany Amounts in Disputed Accounts)**

69. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

70. In this action and in connection with these Chapter 11 cases, WMI has asserted that the Intercompany Amounts in the Disputed Accounts are its property.

71. WMI previously asserted a claim to such Intercompany Amounts in the Receivership and its claims were disallowed by the Receiver. WMI is currently challenging the disallowance of its claims in the D.C. Action.

72. Absent a determination by the Court in the D.C. Action that the disallowance of WMI's claims to the Intercompany Amounts was improper, WMI is bound by the disallowance of its claims in the Receivership and has no right to continue to claim the Disputed Amounts as its property as against JPMC or anyone else.

73. There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

74. JPMC requests a declaratory judgment finding that (i) Debtors are bound by the disallowance of their claim to the Intercompany Amounts and have no right to assert such

a claim against JPMC to the same assets, and (ii) any challenge by Debtors to the disallowance of their claim to the Intercompany Amounts must proceed in the D.C. Action.

**Count Two**  
**(Against WMI only)**  
**(Declaratory Judgment: \$3.7 Billion Book Entry Transfer)**

75. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

76. WMI has asserted that the \$3.7 Billion Book Entry Transfer creates a deposit liability owed to it by WMB fsb, now JPMC. JPMC disputes that there is a valid deposit liability due to Debtors as the result of the \$3.7 Billion Book Entry Transfer or otherwise.

77. There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

78. JPMC requests a declaratory judgment finding that Debtors must proceed with any claim to assert ownership of or interest in the \$3.7 Billion Book Entry Transfer through the D.C. Action they elected to commence. In the alternative, JPMC requests a declaratory judgment determining that there is no valid deposit liability due to Debtors as a result of the \$3.7 Billion Book Entry Transfer.

**Count Three**  
**(Against WMI only)**  
**(Declaratory Judgment: Setoff, Recoupment, and Other Equitable Limitations)**

79. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

80. To the extent that JPMC has any liabilities to Debtors, including deposit account liabilities, it is entitled to: (i) recoup and/or setoff all such amounts under the MBA Policy and/or any other applicable terms and conditions governing those liabilities or deposit

accounts; (ii) imposition of a constructive trust for the amount of all such liabilities over any funds of Debtors it possesses; and (iii) enforce any security interest determined to apply to the funds of the Debtors. Debtors dispute that JPMC has these rights.

81. The amounts owed to JPMC include, but are not limited to, approximately \$234 million in tax refunds deposited in the Accounts and due to WMB, which the Debtors have claimed as their own, the intercompany receivables of \$275 million due from WMI to WMB, and any amounts awarded by the Court under this Complaint.

82. There is substantial evidence that, contrary to the Debtors' unsupported assertions, at the time of the receivership and at all relevant times before the receivership, WMI, WMB, and WMBfsb were solvent. Indeed, the OTS found that "WMB met the well-capitalized standards *through the receivership date.*" (OTS Fact Sheet 9/25/2008 (emphasis added).)

83. There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

84. JPMC requests a declaratory judgment determining its right to setoff, recoupment, imposition of a constructive trust, and/or enforcement of its security interests.

**Count Four**  
**(Against WMI only)**  
**(Fraud)**

85. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

86. JPMC asserts this counterclaim solely in the event it is determined that the \$3.67 Billion Book Entry Transfer created a deposit liability at WMB fsb.

87. WMI directed the \$3.67 Billion Book Entry Transfer with knowledge that WMB was not a safe and sound institution and would shortly be seized by the regulators.

Indeed, in the days leading up to the \$3.67 Book Entry Transfer, WMB was experiencing rapid deposit outflows from unaffiliated depositors and government regulators had informed WMI that it needed to raise additional capital for WMB in order to avoid receivership. Doreen Logan, WMI's Controller, has already submitted a declaration on WMI's behalf stating that WMI's purpose for the \$3.67 Billion Book Entry Transfer was to try to move funds from WMB to a more well-capitalized institution. This purpose was not disclosed to independent officers or directors of WMB fsb or other individuals who were empowered to object to the \$3.67 Billion Book Entry Transfer, rather the decision was made by WMI.

88. To the extent any portion of the \$3.67 billion reflected a deposit liability to WMI at WMB prior to the purported transfer, upon WMB's failure that liability would have been subject, among other things, to reduction or elimination based upon government insurance levels and/or because it was an obligation of a failed institution to a parent, to claims of setoff and recoupment and offset, to potential claims of WMB's creditors, and to various avoidance powers of the FDIC as Receiver. Thus, the purpose on WMI's part for engaging in this fraudulent transaction was to attempt to maximize WMI's ability to keep for itself any deposit balance free and clear of these avenues of offset, reduction and conflicting claims. However, in doing so, WMI sought to shift the burden of WMB's inevitable failure onto WMB fsb without disclosing to WMB fsb that it was doing so or giving WMB fsb any say or choice in the matter.

89. The \$3.67 Billion Book Entry Transfer did not involve any actual movement of funds to WMB fsb. WMI did not deposit any actual funds with WMB fsb in connection with the purported transfer of this \$3.67 billion, and no funds to support such a deposit balance were deposited at WMB fsb from any other source.

90. Indeed, to the contrary, in conjunction with the purported \$3.67 Billion Book Entry Transfer to WMB fsb, WMI simultaneously booked other entries that purported to reflect the immediate loan of the same \$3.67 billion purportedly being transferred right back to WMB. In other words, without any movement of funds whatsoever, WMI purported to transform a purported \$3.67 billion liability owed to it by WMB – an allegedly insolvent institution – into a \$3.67 billion liability of WMB fsb to it, without ever transferring a single penny to WMB fsb. At the same time, WMI purported to leave WMB fsb holding the bag for WMB’s pending failure as a bank with a “loan” to WMB of the same \$3.67 billion that WMI knew WMB would never be in a position to repay in the ordinary course, but rather would be subject to a receivership process.

91. This round-trip set of book entries was a complete fraud. Nothing about the \$3.67 Billion Book Entry Transfer was done in the ordinary course or for business purposes aligned with the safety and soundness of the banking institutions. At the time of the purported Transfer, no WMI account existed at WMB fsb into which WMI was able to direct such a Transfer. In its rush to make this fictitious transfer, WMI first purported to make a transfer to another account at WMB, which did not accomplish the purpose of the transaction. Then, when this impediment was discovered, WMI purported to direct the opening of a new account at WMB fsb. No account documentation was created at WMB fsb for this supposed new account containing an unprecedented \$3.67 billion. And, since no funds actually moved to WMB fsb, WMI also had to cause the \$3.67 billion to be recorded as a credit to a WMB fsb account under circumstances where no bank would ever make such a credit to an unaffiliated depositor. Then, since no funds were being moved (indeed, it may be that no such funds even existed), WMI had to arrange for the loan of the purportedly transferred funds back to WMB, the place from which



the funds were supposedly coming in the first place. But WMI's and WMB's and WMB fsb's internal documentation would not permit this, which again required WMI to purportedly raise the loan limit for intercompany loans to enable this fabricated transaction to appear to occur. The transaction violated numerous banking laws, rules and regulations, as well as fundamental principles of safety and soundness.

92. WMI did not make any disclosures to WMB fsb in connection with the \$3.67 Billion Book Entry Transfer. WMI did not seek WMB fsb's consent or approval of this Transaction or any aspect of it. WMI did not seek WMB fsb's consent to acknowledge a \$3.67 billion deposit prior to the receipt of good funds. WMI did not seek WMB fsb's consent or approval to "loan" the supposed deposit back to WMB. WMI did not disclose to WMB fsb that it would never be depositing good funds to cover the supposed \$3.67 billion deposit. It never disclosed to WMB fsb that WMB (as WMI now alleges) was not financially able to repay the money that was supposedly being loaned back to it by the series of book entries because of the impending receivership. WMI never disclosed its knowledge that federal banking regulators were about to seize WMB or its knowledge that it was unable to raise sufficient capital in order to keep WMB operating. And it never disclosed to WMB that it was engaging in this transaction in order to try to maximize what WMI would be able to keep when WMB failed, and that the consequence of that goal would be to cause WMB fsb to incur a corresponding loss.

93. In addition, in connection with the \$3.67 Billion Book Entry Transfer, WMI knew that the amount purportedly being transferred contained at least \$234 million in tax refunds that belonged to WMB and not to WMI. WMI did not disclose to WMB fsb that these amounts did not belong to WMI, and thereby sought to create a deposit liability of WMB fsb to WMI with amounts that did not belong to WMI at all.

94. Further, in the weeks leading up to the receivership, at least \$1 billion in purported funds associated with the \$3.67 Billion Book Entry Transfer were invented by WMI when it directed that an unsecured general ledger debt allegedly due to it from WMB—that was not supported by good funds or collateral—be converted into a purported deposit liability due to WMI. WMI did not do this in the ordinary course of business, but because it recognized that WMB was shortly going to be seized by the regulators.

95. WMI intentionally did not disclose these facts to, and willfully concealed them from, WMB fsb.

96. The concealed and omitted facts were material. WMB fsb—indeed no financial institution—would have accepted a \$3.67 billion deposit and credited it as a deposit liability prior to the receipt of good funds or loaned \$3.67 billion to WMB without any collateral or security or reasonable likelihood of normal repayment under the circumstances given the pending receivership.

97. JPMC is the successor to WMB fsb by merger and is entitled to recover any damages caused by WMI's fraud.

98. JPMC has been damaged in an amount to be proven at trial.

99. WMI acted with fraud, malice and/or oppression and, as a result, JPMC is entitled to an award of punitive damages.

**Count Five**  
**(Against All Defendants)**  
**(Interpleader Pursuant to Bankruptcy Rule 7022)**

100. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

101. Pursuant to the terms of the P&A Agreement, JPMC, WMI, and the FDIC have asserted, and may assert, competing claims to any funds that constitute deposit liabilities and JPMC may be exposed to double liability if it were to pay these claims to the wrong party.

102. JPMC seeks to interplead any remaining funds that constitute deposit liabilities pursuant to Bankruptcy Rule 7022, less any attorneys' fees and costs, so that all claims to the amounts can be adjudged and the funds can be properly disbursed.

**Count Six**  
**(Against WMI only)**  
**(Declaratory Judgment as to Other Assets)**

103. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

104. In addition to the Intercompany Amounts in the Disputed Accounts, Debtors have improperly asserted claims to certain assets that belong to JPMC and not to Debtors. These assets (the "Other Assets"), and the basis for JPMC's ownership of these assets, are described more fully in the complaint filed by JPMC in the JPMC Adversary Proceeding, *JPMorgan Chase Bank, N.A. v. Washington Mutual, Inc.*, Adv. Proc. No. 09-50551 (MFW) (Bankr. D. Del.), which is incorporated herein fully by reference.

105. These Other Assets include the following: (i) intercompany amounts in certain additional accounts that are not included in Debtors' complaint in this action; (ii) certain trust securities in an aggregate face amount of approximately \$4 billion (the "Trust Securities") (described in JPMC Adversary Complaint ¶¶ 41-56); (iii) tax refunds that WMB is or was entitled to receive, including tax refunds that are owned by and attributable to the tax attributes of WMB but that may be nominally payable to WMI as agent for WMB because of the form in which tax returns were filed by the WaMu Group (described in JPMC Adversary Complaint ¶¶

57-92); (iv) the proceeds of goodwill litigation (described in JPMC Adversary Complaint ¶¶ 125-129); (v) ownership of certain Rabbi trusts and benefit plans (described in JPMC Adversary Complaint ¶¶ 130-148); (vi) ownership of certain life insurance policies (described in JPMC Adversary Complaint ¶¶ 149-157); (vii) ownership of certain class B shares of common stock in Visa, U.S.A., Inc. (described in JPMC Adversary Complaint ¶¶ 158-171); and (viii) ownership or rights to certain intellectual property, contracts and intangible assets (described in JPMC Adversary Complaint ¶¶ 172-179).

106. In counterclaims filed in the JPMC Adversary Proceeding, in its complaint in the D.C. Action, and in connection with these Chapter 11 cases, WMI has asserted that the Other Assets are its property.

107. WMI previously asserted a claim to some or all such Other Assets in the Receivership and its claims were disallowed by the Receiver. WMI is currently challenging the disallowance of its claims in the D.C. Action.

108. Absent a determination by the Court in the D.C. Action that the disallowance of WMI's claims to the Other Assets was improper, WMI is bound by the disallowance of its claims in the Receivership and has no right to continue to claim such Other Assets as its property as against JPMC or anyone else.

109. There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

110. JPMC requests a declaratory judgment finding that: (i) Debtors are bound by the disallowance of their claim to the Other Assets and have no right to assert such a claim against JPMC to the same assets; and (ii) any challenge by Debtors to the disallowance of their claim to the Other Assets must proceed in the D.C. Action.

**Count Seven**  
**(Against All Defendants)**  
**(Declaratory Judgment as to Ownership of Other Assets)**

111. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

112. As set forth above, JPMC contends that, pursuant to the P&A, it purchased the Other Assets. The Debtors have disputed JPMC's ownership of these Other Assets in this bankruptcy case, in their Schedules, in their answer and counterclaims in the JPMC Adversary Proceeding, and in the D.C. Action. Resolution of these disputes is a necessary predicate to any determination of solvency or setoff.

113. The FDIC is a party to the P&A Agreement, has certain indemnification obligations to JPMC under that Agreement, is the Receiver of WMB, and has an interest in the determination of what assets were owned by WMB, seized in the receivership, and transferred to JPMC pursuant to the P&A Agreement.

114. There is thus an actual controversy that is of sufficient immediacy to warrant judicial relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

115. To the extent it is found that Debtors are not bound by the disallowance of their claim to the Other Assets in the Receivership or obligated to proceed with any claim to the Other Assets through the D.C. Action, JPMC requests a declaratory judgment determining that the Other Assets were purchased by JPMC from the FDIC as Receiver under the P&A Agreement and belong to JPMC.

**Count Eight**  
**(Against WMI only)**  
**(Unjust Enrichment)**

116. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

117. The Debtors would be unjustly enriched if they retained the Other Assets.

118. Thus, to the extent the Court does not enter a declaratory judgment determining that the Other Assets are assets purchased by and belonging to JPMC, JPMC requests that the Court establish a constructive trust for the benefit of JPMC consisting of: (i) the value recognized by Debtors as a result of the treatment of the Trust Securities as core capital; (ii) the tax refunds received by and/or deductions recognized by WMI to which WMB is entitled; (iii) the value of the assets of the Rabbi trusts and the life insurance policies; (iv) amounts necessary to reimburse JPMC for amounts it contributed to any benefit plans; (v) to the extent JPMC is not fully protected against liabilities associated with the reorganization of Visa, the Visa shares; and (vi) the value of the intellectual property, contracts and intangible assets.

**Count Nine**  
**(Against WMI only)**  
**(Breach of Contract re: Trust Securities)**

119. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

120. WMI assumed a direct obligation to WMB upon entering into the Contribution Agreement (as defined in the JPMC Adversary Proceeding Complaint) to immediately contribute and transfer the Trust Securities to WMB following the conditional exchange. In the alternative, WMB was the third party beneficiary of WMI's commitment to the OTS and the FDIC under the Contribution Agreement. WMI also assumed a direct obligation to

WMB pursuant to the Assignment Agreement (as defined in the JPMC Adversary Proceeding Complaint).

121. To the extent the Assignment Agreement is interpreted as leaving WMI with anything other than bare legal title, WMI breached the Contribution Agreement. WMI further breached the Contribution Agreement and the Assignment Agreement by refusing to assist JPMC in obtaining registered ownership of the Trust Securities.

122. JPMC (as successor in interest to WMB), has suffered, and will suffer, substantial monetary damages as a proximate result of WMI's breach of the Contribution Agreement and the Assignment Agreement.

**Count Ten  
(Against WMI only)  
(Administrative Expenses)**

123. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

124. To the extent the Court accepts WMI's claims of ownership of any of the Pension and 401(k) Plans or other assets and JPMC has made payments and incurred expenses in connection with these assets, JPMC is entitled to reimbursement from Debtors of all post-petition expenses it has incurred and payments it has made on account of those assets.

125. To the extent JPMC incurs any liability or suffers any loss as the result of conduct by Debtors after the Petition Date, including conduct by the Debtors as the sponsor of any of the Pension and 401(k) Plans, JPMC is entitled to post-petition administrative claim for those amounts.

**Count Eleven  
(Against WMI only)  
(Indemnification)**

126. JPMC realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

127. Claims have been threatened against JPMC arising out of or relating to the acts, omissions or conduct of Debtors prior to the Petition Date. To the extent that any claim is asserted against JPMC as a result of such matters, JPMC is entitled to be indemnified and held harmless by the Debtors for any loss, damage or liability JPMC might incur.

**PRAYER FOR RELIEF**

WHEREFORE, JPMC respectfully requests that this Court grant judgment:

- (i) determining that Debtors are bound by the disallowance of their claims to the Intercompany Amounts by the Receiver and must proceed, if at all, on claims of ownership of such amounts in the D.C. Action in accordance with Title 12;
- (ii) declaring that the legal title and all beneficial interest in each of the assets described in the Debtors' complaint in this action belong to JPMC;
- (iii) awarding JPMC damages as a result of WMI's fraud;
- (iv) awarding JPMC prejudgment interest and punitive damages to the extent permitted by law;
- (v) determining that JPMC is entitled to setoff, recoup, or impose a lien against any liabilities that JPMC may owe to Debtors, for all amounts JPMC may be entitled to under this Complaint;



(vi) determining that any and all interested persons, entities or agencies are restrained from instituting any actions against JPMC for recovery of any amounts being interplead with the Court;

(vii) determining that JPMC be discharged from any and all liability with regard to claims to the interpleaded funds;

(viii) declaring that the legal title and all beneficial interest in each of the assets described in these Counterclaims belong to JPMC;

(ix) ordering Debtors to deliver the assets described in these Counterclaims to JPMC;

(x) ordering Debtors to take steps to allow, and where appropriate, direct third parties to act in accordance with JPMC's ownership of its assets;

(xi) awarding JPMC damages as a result of Debtors' failure to transfer, or facilitate the transfer of, assets JPMC acquired under the P&A Agreement;

(xii) ordering Debtors to indemnify JPMC for all losses JPMC incurs as a result of Debtors' pre-petition actions;

(xiii) requiring Debtors to reimburse JPMC for all amounts by which Debtors have been unjustly enriched;

(xiv) awarding JPMC damages for losses resulting from Debtors' post-petition actions;

(xv) granting JPMC an administrative claim for amounts paid into or on account of the Pension and 401(k) Plans and other assets;

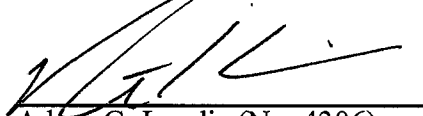
(xvi) awarding JPMC its attorneys' fees and costs; and

(xvii) awarding JPMC such other and further relief as this Court deems just and

proper.

Dated: July 6, 2009  
Wilmington, Delaware

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