

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE WASHINGTON MUTUAL, INC.
ERISA LITIGATION

No. 2:08-md-01919-MJP

Lead Case No. C07-1874 MJP

THIS DOCUMENT RELATES TO:

ALL ACTIONS

**CONSOLIDATED SECOND
AMENDED COMPLAINT FOR
BREACHES OF DUTY UNDER THE
EMPLOYEE RETIREMENT INCOME
SECURITY ACT**

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COMPLAINT FOR BREACHES OF DUTY
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INCOME SECURITY ACT
Case No. 2:08-md-01919-MJP

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1 Plaintiffs Gregory Bushansky, Dana Marra and Marina Ware (“Plaintiffs”) allege the
 2 following based upon personal information as to themselves and the investigation of Plaintiffs’
 3 counsel, which included a review of U.S. Securities and Exchange Commission (“SEC”) filings
 4 by Washington Mutual, Inc. (“WaMu” or the “Company”), including the Company’s proxy
 5 statements (Form DEF 14A), annual reports (Form 10-K), quarterly reports (Form 10-Q), current
 6 reports (Form 8-K), registration statement (Form S-8), and the annual reports (Form 11-K) filed
 7 on behalf of the WaMu Savings Plan (the “Plan”), a review of the Forms 5500 filed by the Plan
 8 with the U.S. Department of Labor (the “Department of Labor” or the “DOL”), interviews with
 9 participants of the Plan, a review of available documents governing the operations of the Plan,
 10 and a review of the very limited materials provided by the Defendants. Plaintiffs believe that
 11 substantial additional evidentiary support will exist for the allegations set forth herein after a
 12 reasonable opportunity for discovery.
 13
 14

15 I. NATURE OF THE ACTION

16 1. This is a class action brought on behalf of the Plan pursuant to §§ 502(a)(2) and
 17 (a)(3) of the Employee Retirement Income Security Act (“ERISA”), as amended, 29 U.S.C.
 18 §§ 1132(a)(2) & (a)(3), against the fiduciaries of the Plan for violations of ERISA (the “fiduciary
 19 Defendants”), and against JPMorgan Chase Bank, National Association (“JPMCNA” or
 20 “JPMorgan Chase, NA”), by virtue of its assumption of Plan-related liability and its role as
 21 successor-in-interest to WaMu.
 22

23 2. The Plan is a defined contribution retirement plan that was sponsored by WaMu.

24 3. Plaintiffs’ claims arise from the failure of the fiduciary Defendants to act solely in
 25 the interest of the participants and beneficiaries of the Plan, and to exercise the required skill,
 26

1 care, prudence, and diligence in administering the Plan and the Plan's assets during the period
2 October 19, 2005 through September 26, 2008 (the "Class Period").

3 4. Plaintiffs allege that the fiduciary Defendants allowed the imprudent investment
4 of the Plan's assets in WaMu common stock throughout the Class Period despite the fact that
5 they knew or should have known that such investment was unduly risky and imprudent due to
6 the Company's serious mismanagement and improper business practices, including, among other
7 practices, the Company's: (a) over-reliance on the origination, securitization, purchase and sale
8 of subprime mortgage loans and other risky mortgage loan products such as "negative
9 amortization" loans; (b) lax underwriting policies for mortgage loans and related loan products;
10 (c) participation in the systematic manipulation of the loan origination and property appraisal
11 processes; (d) failure to implement and maintain risk management control processes; and
12 (e) failure to properly account for its subprime lending and related business operations, all of
13 which caused WaMu's financial statements to be misleading and artificially inflated the value of
14 shares of WaMu stock and the WaMu Company Stock Fund in the Plan. These events ultimately
15 led the Federal Deposit Insurance Corporation ("FDIC") to seize WaMu's banking units on
16 September 25, 2008 and then sell them at a fire-sale price to JPMorgan Chase, NA that same
17 day, and caused the Company to file for bankruptcy on September 26, 2008, the largest bank
18 failure in U.S. history. In short, during the Class Period, the Company was seriously
19 mismanaged and faced seriously deteriorating financial circumstances that rendered WaMu stock
20 an unduly risky and inappropriate investment option for participants' retirement savings. Top
21 management, including certain of the Defendants herein, had a complete picture of how all of the
22 foregoing practices made WaMu stock an unduly risky and inappropriate investment for Plan
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1 participants' retirement accounts. To the extent any fiduciary Defendant lacked actual
 2 knowledge of these risks, they would have acquired knowledge of most, or all of them, had they
 3 conducted the investigation required by ERISA.

4 5. JPMorgan Chase, NA is named as a Defendant by virtue of its position as
 5 successor-in-interest to WaMu. Unlike all of the other Defendants, JPMCNA is *not* being sued
 6 for breach of fiduciary duty.

7 6. Plaintiffs allege in Count I that the Defendants who were responsible for the
 8 investment of the Plan's assets breached their fiduciary duties to the Plan's participants in
 9 violation of ERISA by failing to prudently and loyally manage the Plan's investment in WaMu
 10 stock; JPMCNA is named as Defendant in this Count because it assumed Plan-related liability
 11 and because of its status as successor-in-interest to WaMu. In Count II, Plaintiffs allege that the
 12 Defendants, who were responsible for the selection, monitoring and removal of the Plan's other
 13 fiduciaries, failed to properly monitor the performance of their fiduciary appointees and remove
 14 and replace those whose performance was inadequate; JPMCNA is named as Defendant in this
 15 Count because it assumed Plan-related liability and because of its status as successor-in-interest
 16 to WaMu. In Count III, Plaintiffs allege that the Defendants, with knowledge of the risks
 17 associated with WaMu stock, breached their duty to disclose necessary information to co-
 18 fiduciaries; JPMCNA is named as Defendant in this Count because it assumed Plan-related
 19 liability and because of its status as successor-in-interest to WaMu. In Count IV, Plaintiffs
 20 allege that certain Defendants breached their duty to inform the Plan's participants by failing to
 21 provide complete and accurate information regarding the soundness of WaMu stock and the
 22 prudence of investing and holding retirement contributions in WaMu equity; JPMCNA is named
 23
 24
 25
 26

1 as Defendant in this Count because it assumed Plan-related liability and because of its status as
 2 successor-in-interest to WaMu. In Count V, Plaintiffs allege that the fiduciary Defendants
 3 breached their duties and responsibilities as co-fiduciaries by failing to prevent breaches by other
 4 fiduciaries of their duties of prudent and loyal management, complete and accurate
 5 communications, and adequate monitoring; once again, JPMCNA is named as Defendant in this
 6 Count because it assumed Plan-related liability and because of its status as successor-in-interest
 7 to WaMu. Finally, in Count VI, Plaintiffs state a claim against JPMCNA, by virtue of its
 8 assumption of WaMu's Plan-related liability and its position as successor-in-interest to WaMu,
 9 for WaMu's knowing participation in the fiduciary breaches alleged herein.
 10

11 7. As more fully explained below, during the Class Period, the fiduciary Defendants
 12 imprudently permitted the Plan to hold and acquire millions of dollars in WaMu stock despite the
 13 fundamental problems the Company faced. Based on publicly available information for the Plan,
 14 it appears that Defendants' breaches have caused the Plan to lose over *300 million dollars* of
 15 retirement savings during the Class Period.
 16

17 8. This action is brought on behalf of the Plan and seeks to recover losses to the Plan
 18 for which the fiduciary Defendants are personally liable pursuant to ERISA §§ 409 and
 19 502(a)(2), 29 U.S.C. §§ 1109, and 1132(a)(2). In addition, under § 502(a)(3) of ERISA,
 20 29 U.S.C. § 1132(a)(3), Plaintiffs seek other equitable relief from Defendants, including, without
 21 limitation, injunctive relief and, as available under applicable law, constructive trust, restitution,
 22 equitable tracing, and other monetary relief. In the case of JPMCNA, its liability stems from its
 23 assumption of Plan-related liability and its status as successor-in-interest to WaMu.
 24
 25
 26

1 9. ERISA §§ 409(a) and 502(a)(2) authorize participants such as the Plaintiffs to sue
 2 in a representative capacity for losses suffered by the Plan as a result of breaches of fiduciary
 3 duty. Pursuant to that authority, Plaintiffs bring this action as a class action under Fed. R. Civ. P.
 4 23 on behalf of all participants and beneficiaries of the Plan whose Plan accounts were invested
 5 in WaMu common stock during the Class Period.
 6

7 10. In addition, because the information and documents on which Plaintiffs' claims
 8 are based are, for the most part, solely in Defendants' possession, certain of Plaintiffs'
 9 allegations are made by necessity upon information and belief. At such time as Plaintiffs have
 10 had the opportunity to conduct discovery, Plaintiffs will, to the extent necessary and appropriate,
 11 amend this Complaint, or, if required, seek leave to amend, to add such other additional facts as
 12 are discovered that further support Plaintiffs' claims.
 13

14 II. JURISDICTION AND VENUE

15 11. **Subject-Matter Jurisdiction.** This Court has subject-matter jurisdiction over
 16 this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

17 12. **Personal Jurisdiction.** ERISA provides for nationwide service of process.
 18 ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All of the Defendants are either residents of the
 19 United States or subject to service in the United States and this Court therefore has personal
 20 jurisdiction over them. This Court also has personal jurisdiction over them pursuant to Fed. R.
 21 Civ. P. 4(k)(1)(A) because they would all be subject to the jurisdiction of a court of general
 22 jurisdiction in the State of Washington.
 23

24 13. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C.
 25 § 1132(e)(2), because the Plan is administered in this district, some or all of the fiduciary
 26

breaches for which relief is sought occurred in this district, and/or some Defendants reside and/or transact business in this district.

III. PARTIES

A. Plaintiffs

14. Plaintiff Gregory Bushansky is a resident of Massapequa, New York. Plaintiff Bushansky was a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), during the Class Period and held shares of Company stock in his retirement account in the Plan during the Class Period.

15. Plaintiff Dana Marra is a resident of Palatine, Illinois. Plaintiff Marra is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), and was a participant in the Plan throughout the Class Period. She continues to hold shares of Company stock in her retirement account in the Plan and did so throughout the Class Period.

16. Plaintiff Marina Ware is a resident of Concord, California. Plaintiff Ware is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), and was a participant in the Plan throughout the Class Period. She continues to hold shares of Company stock in her retirement account in the Plan and did so throughout the Class Period.

B. Washington Mutual, Inc.

17. Washington Mutual, Inc. was a consumer and small business banking company with operations in major U.S. markets. WaMu was a Washington corporation with its principal executive offices located at 1301 Second Avenue, Seattle, Washington. WaMu's stock was listed on the New York Stock Exchange and traded under the ticker symbol "WM." With WaMu in bankruptcy, the stock now trades Over The Counter ("OTC") for less than \$1.00 per share. As described more fully below in Section V ("Defendants' Fiduciary Status"), the Company was a

1 fiduciary for the Plan. On September 25, 2008, the FDIC seized the Company, and, on the same
 2 day, sold WaMu's banking entities, Washington Mutual Bank, Henderson, NV and Washington
 3 Mutual Bank, FSB, Park City, UT (collectively, "Washington Mutual Bank") to JPMCNA for
 4 1.9 billion dollars. In purchasing all of the assets of Washington Mutual Bank, JPMCNA
 5 purchased substantially all of the assets of WaMu itself, leaving a nearly empty shell. WaMu
 6 filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code on
 7 September 26, 2008. As such, this action is stayed as to WaMu unless and until such time as the
 8 stay is lifted or relief from the stay is granted by the bankruptcy court. Currently, Plaintiffs are
 9 not asserting claims against, or seeking relief, from WaMu through this action. Plaintiffs are
 10 pursuing claims against WaMu directly in the bankruptcy proceedings.

12 C. Defendants

13 18. The Defendants are identified below. With the exception of JPMCNA, a
 14 Defendant by virtue of its assumption of WaMu's Plan-related liability and its position as
 15 successor-in-interest to WaMu, all of the Defendants were fiduciaries of the Plan within the
 16 meaning of ERISA, as is explained below in Section V ("Defendants' Fiduciary Status"), and all
 17 of them breached their fiduciary duties in various ways as is explained in Section X ("Causes of
 18 Action").

19 19. **Defendant JPMorgan Chase Bank, National Association.** JPMCNA is a
 20 wholly-owned subsidiary of JPMorgan Chase & Co. ("JPMC") (NYSE: JPM), a leading global
 21 financial services firm with assets of \$2.0 trillion and operations in more than 60 countries.
 22 JPMC is a leader in investment banking, financial services for consumers, small business and
 23 commercial banking, financial transaction processing, asset management, and private equity.
 24 JPMCNA is a New York banking corporation headquartered in New York City. Prior to its

1 acquisition of WaMu's banking entities, JPMCNA had branches in 17 states. Through the
 2 September 25, 2008 Purchase and Assumption Agreement with the FDIC (as the receiver of
 3 WaMu), JPMCNA purchased "substantially all of the assets" and "assumed all deposit and
 4 substantially all other liabilities" of Washington Mutual Bank, including all mortgages and loans,
 5 all deposits and all bank branches. Pursuant to the Purchase and Assumption Agreement,
 6 JPMCNA also specifically assumed "all liabilities associated with any and all employee benefit
 7 plans," including the Plan at issue in this case. When used in reference to the Plan, reference to
 8 JPMCNA includes, as appropriate, reference to its predecessor, WaMu. JPMCNA is not named
 9 as a fiduciary, but is named as a successor-in-interest to WaMu, which was a fiduciary.
 10

11 20. **Defendant Kerry K. Killinger ("Killinger").** Defendant Killinger served as a
 12 Director of WaMu from 1988, until September 7, 2008, and was the Chairman of the Board until
 13 July 1, 2008, a position he held since 1991. Defendant Killinger served as the Chief Executive
 14 Officer of WaMu from 1990 until September 7, 2008, and served as the President of the
 15 Company from 1988 until 2005. As is explained in more detail below, Defendant Killinger
 16 engaged in acts of Plan administration by communicating extensively with employees regarding
 17 the Company and Company stock, the single largest asset of the Plan.
 18

19 21. **Human Resources Committee Defendants.** As explained in more detail below,
 20 the Human Resources Committee of the Board of Directors ("HR Committee") had certain
 21 responsibilities with respect to the Plan, including appointment and oversight responsibilities.
 22 The HR Committee and its members were therefore fiduciaries of the Plan. The Defendants
 23 identified in this paragraph are referred to as the "HR Committee Defendants." The HR
 24 Committee Defendants during the Class Period were as follows:
 25
 26

- a. **Defendant Steven I. Chazen** served as a member of the HR Committee during the Class Period;
- b. **Defendant Stephen E. Frank** served as a member of the HR Committee during the Class Period;
- c. **Defendant Charles M. Lillis** served as a member of the HR Committee during the Class Period;
- d. **Defendant Phillip D. Matthews** served as a member of the HR Committee during the Class Period;
- e. **Defendant Margaret Osmer-McQuade** served as a member of the HR Committee during the Class Period;
- f. **Defendant James H. Stever** served as a member of the HR Committee during the Class Period and was the Committee's Chairman; and,
- g. **Defendant Willis Wood** served as a member of the HR Committee through April 2006.

22. **Investment Committee Defendants.** As explained in more detail below, the Investment Committee (or the "PIC") had certain responsibilities with respect to the Plan, including selecting and monitoring the investment funds in the Plan. The PIC and its members were therefore fiduciaries of the Plan. The Defendants identified in this paragraph are referred to as the "Investment Committee Defendants" or the "PIC Defendants." The Investment Committee Defendants during the Class Period were as follows:

- a. **Defendant Todd Baker** served as a member of the PIC from August 23, 2007, until the end of the Class Period, and was Executive Vice President

of Corporate Strategy and Development for the Company during the Class Period;

- b. **Defendant Melissa Ballenger** served as a member of the PIC from April 28, 2007, until the end of the Class Period, and was a Senior Vice President and the Company's Controller until October 11, 2008;
- c. **Defendant David Beck** served as a member of the PIC during the Class Period, and was an Executive Vice President and Head of Capital Markets during the Class Period;
- d. **Defendant Curt Brouwer** served as a member of the PIC from August 21, 2007, until the end of the Class Period, and was a Senior Vice President during the Class Period;
- e. **Defendant Daryl David** served as a member of the PIC during the Class Period and was Executive Vice President, Chief Human Resources Officer during the Class Period;
- f. **Defendant Michelle McCarthy** served as a member of the PIC from January 20, 2006, until the end of the Class Period, and was a Senior Vice President and a Market Risk Manager for the Company, having market risk oversight responsibility for WaMu's interest rate risk management and capital markets activities during the Class Period;
- g. **Defendant Tony Meola** served as a member of the PIC through January 20, 2006, and served as Executive Vice President for Home Lending Sales and Distribution during the Class Period;

- 1 h. **Defendant Robert Williams** served as a member of the PIC during the
 2 Class Period as well as the PIC's Chair, and served as Senior Vice
 3 President and Treasurer during the Class Period; and
 4 i. **Defendant John Woods** served as a member of the PIC from January 20,
 5 2006 through April 28, 2007, and served as the Chief Financial Officer,
 6 Home Loans Division and the Controller during the Class Period.

8 23. **Administration Committee Defendants.** As explained in more detail below, the
 9 Plan assigned certain fiduciary responsibilities and duties to the Plan Administration Committee
 10 Defendants (the "Administration Committee Defendants"). The members of the Administration
 11 Committee (or the "PAC") had full authority and power to administer and construe the Plan.
 12 The PAC and its members were therefore fiduciaries of the Plan. The Defendants identified in
 13 this paragraph are referred to as the "Administration Committee Defendants" or the "PAC
 14 Defendants." The Administration Committee Defendants during the Class Period were as
 15 follows:
 16

- 17 a. **Defendant Beck** served as a member of the PAC through July 31, 2007,
 18 in addition to serving as a member of the PIC as described above;
 19 b. **Defendant Deborah Bedwell** served as a member of the PAC from
 20 August 1, 2007, until the end of the Class Period;
 21 c. **Defendant John Berens** served as a member of the PAC from August 1,
 22 2007, until the end of the Class Period, and was a Senior Vice President of
 23 Servicing at the Company and managed the service delivery team for the
 24 Company's Home Loans division;
 25
 26

- d. **Defendant Tom Casey** served as a member of the PAC through July 31, 2007, and was Executive Vice President and the Chief Financial Officer of the Company until October 11, 2008;
- e. **Defendant Ron Cathcart** served as a member of the PAC from August 1, 2007 through April 29, 2008, and was an Executive Vice President and Chief Enterprise Risk Officer of the Company, having responsibility for the oversight of the credit, market, operational and compliance risk functions for WaMu;
- f. **Defendant David** served as a member of the PAC during the Class Period, in addition to serving on the PIC as described above;
- g. **Defendant Michele Grau-Iverson** served as a member of the PAC from August 1, 2007, until the end of the Class Period;
- h. **Defendant Pia Jorgenson** served as a member of the PAC from August 1, 2007, until the end of the Class Period, and was a Senior Vice President and Chief Technology Officer of the Company;
- i. **Defendant Suzanne Krahling** served as a member of the PAC from August 1, 2007, until the end of the Class Period;
- j. **Defendant William Longbrake** served as a member of the PAC through July 31, 2007, and was a Vice Chair, Enterprise Risk Management until September 2008; and

1 k. **Defendant Williams** served as a member of the PAC from August 1,
 2 2007, until the end of the Class Period, in addition to serving as Chair of
 3 the PIC as described above.

4 **IV. THE WAMU SAVINGS PLAN**

5 **A. Background**

6 24. The Plan, which was sponsored by WaMu until the end of the Class Period, is an
 7 “employee pension benefit plan,” as defined by § 3(2)(A) of ERISA, 29 U.S.C. § 1002(2)(A).
 8 The Plan is a legal entity that can sue and be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1).
 9 However, in a breach of fiduciary duty action such as this, the Plan is neither a defendant nor a
 10 plaintiff. Rather, pursuant to ERISA § 409, 29 U.S.C. § 1109, and the law interpreting it, the
 11 relief requested in this action is for the benefit of the Plan and its participants and beneficiaries.

12 25. The assets of an employee benefit plan, such as the Plan here, must be “held in
 13 trust by one or more trustees.” ERISA § 403(a), 29 U.S.C. § 1103(a). During the Class Period,
 14 the assets of the Plan were held in a trust fund administered by Fidelity Management Trust
 15 Company, the Plan’s Trustee. *See* WaMu Savings Plan Summary Plan Description (Jan. 2007)
 16 (hereinafter the “SPD”), WMU-ERISA 000096-140, at WMU-ERISA 000128; Trust Agreement
 17 Between Washington Mutual, Inc. and Fidelity Management Trust Company, WaMu Savings
 18 Plan Trust, Dated as of May 17, 2004 (hereinafter the “Trust Agreement”), WMU-ERISA
 19 000174-240.

20 26. The Plan became effective on July 1, 1973. The purpose of the Plan was to assist
 21 employees in accumulating capital for their retirement. *See* WaMu Savings Plan as Amended
 22 and Restated Effective January 31, 2006 (hereinafter the “Plan Document”), WMU-ERISA
 23 000001-95, at WMU-ERISA 000007.

1 27. Employees were eligible to participate in the Plan at the commencement of their
2 employment. *Id.* at WMU-ERISA 000019.

3 28. Effective April 1, 2002, the Plan was comprised of the WaMu Savings Program
4 (the “WSP”) and the Employee Stock Ownership Program (the “ESOP”). *Id.* The ESOP
5 purports to qualify as an ESOP within the meaning of ERISA § 407(d)(6). *Id.*
6

7 29. All participant and Company contributions to the Plan (described below) which
8 were directed for investment in the Company Stock Fund were first made to the WSP. *Id.* at
9 WMU-ERISA 000049. To the extent those contributions were eligible to be made to the ESOP,
10 they were immediately transferred to the ESOP, subject to limitations or restrictions the PAC
11 adopts. *Id.* at WMU-ERISA 000049.

12 30. An ESOP is an ERISA plan that is designed to invest primarily in “qualifying
13 employer securities.” 29 U.S.C. § 1107(d)(6)(A). As with a 401(k) plan without an ESOP
14 component, fiduciaries of an ESOP remain bound by core ERISA fiduciaries duties, including
15 the duties to act loyally, prudently, and for the exclusive purpose of providing benefits to plan
16 participants.
17

18 **B. Participant and Employer Contributions to the Plan**

19 31. Individual accounts were maintained for each Plan participant. Participants’
20 accounts were credited with Employer and Participant-directed contributions and earnings,
21 expenses, gains and losses. *Id.* at WMU-ERISA 000047.
22

23 32. Throughout the Class Period, participants in the Plan were permitted to defer a
24 percentage of their base compensation for investment in the Plan. Effective January 1, 2005,
25 Plan participants were allowed to contribute between 1% and 75% of their compensation, up to
26

1 the annual maximum permissible under the Internal Revenue Code. *Id.* at WMU-ERISA
2 000021.

3 33. As explained directly below, during the Class Period, the Company made the
4 following types of contributions to the Plan: (1) Matching Contributions; (2) Profit Sharing
5 Contributions; and (3) Top Heavy Minimum Contributions. *Id.* at WMU-ERISA 000023-24.

6 34. Effective January 1, 2004, the Company provided a Matching Contribution as
7 follows: (a) 100% of a participant's contributions that does not exceed 3% of the participant's
8 considered compensation for the Plan Year; plus (b) 50% of a participant's contribution in excess
9 of the first 3% of the participants considered compensation, up to 5% of a participant's
10 considered compensation for the Plan Year, for a maximum total matching contribution of 4% of
11 a participants considered compensation for the Plan Year. *Id.* at WMU-ERISA 000023.

12 35. Effective January 1, 2004, Profit Sharing Contributions, if any, were made in an
13 amount determined by the Employer, in its sole and absolute discretion. *Id.*

14 36. For any Plan Year in which the Plan was determined to be top heavy under the
15 Internal Revenue Code, the Company made a minimum contribution of not less than 3% of a
16 participant's compensation for those participants who are not "key employees." *Id.* at WMU-
17 ERISA 000024.

18 37. Plan participants were authorized to direct the investment of their contributions and
19 the Company Matching Contributions and Profit Sharing Contributions among the various
20 investment options in the Plan. *Id.* at WMU-ERISA 000049.

21 **C. Investment options in the Plan, including the WaMu Company Stock Fund**

22 38. Throughout the Class Period, the Plan fiduciaries, by and through WaMu and/or
23 the PIC, selected the investment options made available to participants of the Plan, including the

1 WaMu Stock Fund. *Id.* at WMU-ERISA 000049, WMU-ERISA 000056 (the PIC shall “review,
 2 select or remove, and monitor investment funds”); Draft of the Statement of Investment Policy
 3 for Washington Mutual’s Defined Contribution Plan (hereinafter the “Plan Investment Policy”)
 4 at WMU-0000003702 (“the Company has decided to offer Company Stock as an Investment
 5 Option to Plan Participants.”). *See also* Sections V(B) and (E) below.
 6

7 39. The Plan fiduciaries, by and through the PIC, were provided with authority to
 8 change Plan investment options at their discretion. *Id.* at WMU-ERISA 000049, WMU-ERISA
 9 000056; SPD at WMU-ERISA 000114 (the PIC “may change investment funds at any time”);
 10 Washington Mutual, Inc. Plan Investment Committee Charter (hereinafter the “Investment
 11 Committee Charter”), WMU-ERISA 000241-243. *See also* Section V(E) below.
 12

13 40. Nothing in the Plan required the WaMu Company Stock Fund as an investment
 14 option or limited the ability of the Plan fiduciaries to remove the option, or divest assets invested
 15 in the option as prudence dictates.

16 **D. Losses to the Plan**

17 41. The Plan incurred substantial losses as a result of the Plan’s investment in WaMu
 18 common stock. As of December 31, 2005, the Plan held approximately 7 million shares of
 19 WaMu common stock.¹ *See* WaMu Savings Plan, Annual Report (Form 11-K) (Dec. 31, 2005).
 20 Following revelations that WaMu failed to establish adequate reserves for its loan losses due to
 21 subprime lending and participated in the manipulation of loan originations, among other
 22 improper business and accounting practices, WaMu common stock collapsed. The price of
 23

24
 25 ¹ Additionally, the Providian Financial Corporation 401(k) Plan, which merged with the Plan
 26 effective April 1, 2006, also held approximately 839 thousand shares of WaMu common stock.
See Providian Financial Corporation 401(k) Plan, Annual Report (Form 11-K) (Dec. 31, 2005).

1 WaMu stock dropped over 99% during the Class Period, and the Plan incurred devastating
 2 losses. The losses could have been avoided in whole or in part had the Plan fiduciaries acted
 3 prudently, loyally and in the best interest of Plan participants as required by ERISA.

4 **E. JPMCNA Is WaMu's Successor-In-Interest With Respect To Plan-Related Liability**

5 42. As discussed above, in the Purchase and Assumption Agreement through which
 6 JPMCNA acquired substantially all of WaMu's banking assets, JPMCNA expressly assumed "all
 7 liabilities associated with any and all employee benefit plans, except as listed on the attached
 8 Schedule 2.1." Schedule 2.1, Captioned "Certain Liabilities Not Assumed," exempts "[a]ll
 9 employee benefit plans sponsored by the holding company of the Failed Bank *except* the tax-
 10 qualified pension and **401(k) plans**" (emphasis added).

11 43. Accordingly, the Purchase and Assumption Agreement makes clear that liability
 12 related to the Plan (including liability for the fiduciary breaches alleged herein) went to
 13 JPMCNA.
 14

15 44. Especially in light of the due diligence it had already done, JPMCNA had notice
 16 of Plaintiffs' ERISA claims against WaMu prior to executing the Purchase and Assumption
 17 Agreement.
 18

19 45. Washington Mutual Bank constituted substantially all of WaMu's assets prior to
 20 the sale of Washington Mutual Bank to JPMCNA and the bankruptcy of WaMu. As the *New*
 21 *York Times* reported on September 26, 2008, the FDIC "brokered an emergency sale of virtually
 22 all of" WaMu. *See* Eric Dash and Andrew Ross Sorkin, *In Largest Bank Failure, U.S. Seizes,*
 23 *Then Sells*, N.Y. Times, Sept. 26, 2008, at A1.
 24

25 46. According to WaMu's 2007 Form 10-K, "Washington Mutual, through its
 26 subsidiaries, [wa]s one of the nation's leading consumer and small business banks." Washington

1 Mutual, Inc., Annual Report (Form 10-K) (Dec. 31, 2007) (hereinafter the “2007 Form 10-K”).
 2 On information and belief, all of WaMu’s “consumer and small business” banking operations
 3 were run under the auspices of Washington Mutual Bank.

4 47. According to the 2007 Form 10-K, “[t]he Company’s earnings [we]re primarily
 5 driven by lending to consumers and deposit taking activities which generate net interest income
 6 and by activities that generate noninterest income, including the sale and servicing of loans and
 7 providing fee based services to its customers.” On information and belief, all or nearly all of
 8 these activities were conducted by Washington Mutual Bank.

9 48. According to the 2007 Form 10-K, the Company had 2,257 retail banking stores
 10 and 233 lending stores and centers. On information and belief, all of these were run under the
 11 auspices of Washington Mutual Bank. Indeed, the 2007 Form 10-K stresses, WaMu’s
 12 “subsidiary banks currently operate[d] nearly 2,500 consumer and small business banking stores
 13 throughout the nation.”
 14

15 49. In discussing sources of liquidity in its 2005 Form 10-K, the Company noted that
 16 Washington Mutual Bank was a source of liquidity for the Company. Among the sources of
 17 liquidity were Washington Mutual Bank’s customer deposits, wholesale borrowing, the maturity
 18 and repayment of portfolio loans, securities held in the available-for-sale portfolio and mortgage
 19 loans designated as held for sale. *The only non-banking subsidiary* listed as a source of
 20 liquidity for WaMu was Long Beach Mortgage Company (“Long Beach” or “Long Beach
 21 Mortgage”) – but Long Beach Mortgage was closed in 2007. Hence, the 2007 Form 10-K listed
 22 the “banking subsidiaries” (*i.e.*, Washington Mutual Bank) as the *sole* source of liquidity for
 23 WaMu.
 24
 25
 26

1 50. As the FDIC explained to nervous WaMu customers, JPMCNA would continue to
2 carry on the business of Washington Mutual Bank, unchanged:

3 All deposit accounts and all loans have been transferred to
4 JPMorgan Chase Bank, National Association, Columbus, Ohio
5 (JPMorgan Chase Bank). All former Washington Mutual Bank
6 [sic] will reopen for normal business hours as branches of
7 JPMorgan Chase Bank.

8 Your transferred deposits will be separately insured from any
9 accounts you may already have at JPMorgan Chase Bank for six
10 months after the sale of Washington Mutual Bank. Checks that
11 were drawn on Washington Mutual Bank that did not clear before
12 the institution closed will be honored as long as there are sufficient
13 funds in the account.

14 * * * *

15 The Automated Teller Machines (ATM) and on line services will
16 remain available.

17 You may continue to use the services to which you previously had
18 access, such as, safe deposit boxes, night deposit boxes, wire
19 services, etc, as normally available at each branch.

20 Your checks will be processed as usual. All outstanding checks
21 will be paid against your available balance(s) as if no change had
22 occurred. Your new bank will contact you soon regarding any
23 changes in the terms of your account. If you have a problem with
24 a merchant refusing to accept your check, please contact your
25 branch office. An account representative will clear up any
26 confusion about the validity of your checks.

 All interest accrued through Thursday, September 25, 2008, will be
paid at your same rate. JPMorgan Chase Bank will be reviewing
rates and will provide further information soon. You will be
notified of any changes.

 Your automatic direct deposit(s) and/or automatic withdrawal(s)
will be transferred automatically to your new bank. If you have
any questions or special requests, you may contact a representative
of your assuming institution at your branch office.

 * * * *

 If you had a loan with Washington Mutual Bank, you should
continue to make your payments as usual. The terms of your loan
will not change because they are contractually agreed to in your
promissory note. Checks should be made payable as usual and
sent to the same address until further notice.

1 For all questions regarding new loans and the lending policies of
2 JPMorgan Chase Bank, please contact your branch office.

3 51. On information and belief, what the FDIC promised is exactly what happened:
4 JPMCNA continued WaMu's banking operations, and offered the same services using the same
5 branch locations and a substantially similar workforce to perform the same functions that were
6 performed by WaMu using the same methods.

7 52. On information and belief, of the approximately 42,000 employees of Washington
8 Mutual Bank at the time of the Purchase and Assumption Agreement, all or nearly all of them
9 became employees of JPMCNA, and a substantial majority of them are still performing the same
10 functions for JPMCNA that they performed for WaMu to this day.

11 53. WaMu had only 13 employees as of the date of the Purchase and Assumption
12 Agreement. *See* JPMorgan Chase Bank, National Association's Response and Limited
13 Objection to Motion of the Debtors for an Order, Pursuant to Section 502(b)(9) of the
14 Bankruptcy Code, Bankruptcy Rules 2002(a)(7), (f), (l) and 3003(c)(3), and Local Rule 2002-
15 1(e), Establishing the Deadline for Filing Proofs of Claim and Approving the Form and Manner
16 of Notice Thereof ("JPMCNA 1/22/09 Filing") at 7, ¶ 11. The books and records of Washington
17 Mutual Bank were largely maintained on a combined basis with those of WaMu, by the same
18 personnel. *Id.*

19 54. According to a Fact Sheet about the Purchase Agreement issued by the Office of
20 Thrift Supervision ("OTS"), Washington Mutual Bank had \$307 billion in assets as of June 30,
21 2008. In contrast, according to WaMu's December 19, 2008 Schedule of Assets and Liabilities
22 for Washington Mutual, Inc., WaMu had approximately \$4.5 billion in assets and \$7.8 billion in
23 liabilities. Additionally, in bankruptcy court filings, JPMCNA has disputed whether WaMu in
24
25
26

fact owns all the \$4.5 billion it has listed as its “assets.” JPMCNA 1/22/09 Filing at 5, ¶ 4 (WaMu’s schedule of assets “include[s] a number of assets which JP Morgan Chase believes are not property of the Debtors or their estates, but which instead were part of the receivership estate under Title 12 and purchased by JP Morgan Chase . . .”).

55. By purchasing substantially all of WaMu’s banking assets with awareness of Plaintiffs’ ERISA claims (which already had been asserted by Plaintiffs), thereby purchasing substantially all of WaMu’s assets and leaving WaMu as a near-shell, and by continuing WaMu’s operations in substantially the same locations and with substantially the same work force, JPMCNA has become a successor-in-interest to the Company with respect to the Company’s Plan-related liability under ERISA.

V. DEFENDANTS’ FIDUCIARY STATUS

A. The Nature of Fiduciary Status

56. **Named Fiduciaries.** Every ERISA plan must have one or more “named fiduciaries.” ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the “administrator” in the plan instrument is automatically a named fiduciary, and in the absence of such a designation, the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

57. **De Facto Fiduciaries.** ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who in fact perform fiduciary functions. Thus a person is a fiduciary to the extent “(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any

1 moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he
 2 has any discretionary authority or discretionary responsibility in the administration of such plan.”
 3 ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

4 58. With the exception of JPMCNA, which stands in the shoes of WaMu by virtue of
 5 its assumption of WaMu’s Plan-related liability and its status as WaMu’s successor-in-interest,
 6 each of the Defendants was a fiduciary with respect to the Plan and owed fiduciary duties to the
 7 Plan and the participants and beneficiaries under ERISA in the manner and to the extent set forth
 8 in the Plan’s documents, through their conduct, and under ERISA.

9 59. As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C.
 10 § 1104(a)(1), to manage and administer the Plan, and the Plan’s investments solely in the interest
 11 of the Plan’s participants and beneficiaries and with the care, skill, prudence, and diligence under
 12 the circumstances then prevailing that a prudent man acting in a like capacity and familiar with
 13 such matters would use in the conduct of an enterprise of a like character and with like aims.

14 60. Plaintiffs do not allege that each Defendant was a fiduciary with respect to all
 15 aspects of the Plan’s management and administration. Rather, as set forth below, Defendants
 16 were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or
 17 exercised by each of them, and, as further set forth below, the claims against each Defendant are
 18 based on such specific discretion and authority.

19 61. Instead of delegating all fiduciary responsibility for the Plan to external service
 20 providers, WaMu chose to assign the appointment and removal of fiduciaries to the monitoring
 21 Defendants named herein. These persons and entities in turn selected WaMu employees, officers
 22 and agents to perform most fiduciary functions.

62. ERISA permits fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions, ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3), but insider fiduciaries, like external fiduciaries, must act solely in the interest of participants and beneficiaries, not in the interest of the Plan sponsor.

B. WaMu's Fiduciary Status

63. WaMu had the responsibility to appoint, and hence to monitor and remove, the Trustee, and, on information and belief, to execute the Trust documents with the Trustee to provide for the investment, management and control of the assets of the Plan. Plan Document at WMU-ERISA 000053.

64. Additionally, according to the Trust Agreement, WaMu had the duty to "continually monitor the suitability of the Trust acquiring and holding [WaMu] Stock, under the fiduciary duty rules of section 404(a)(1) of ERISA...." Trust Agreement at WMU-ERISA 000188.

65. Further, according to the Plan Investment Policy at WMU-0000003702, WaMu "decided to offer Company Stock as an Investment Option to Plan Participants."

66. On information and belief, the Company exercised *de facto* authority and control with respect to the *de jure* responsibilities of the PAC, the PIC, and the HR Committee Defendants, making itself fully responsible for the prudent and loyal fulfillment of the *de jure* responsibilities assigned by the governing plan documents to the those Defendants, without relieving them of any such responsibility.

67. On information and belief, in order to comply with ERISA, the Company and the PAC exercised responsibility for communicating with participants regarding the Plan in a plan-wide, uniform, mandatory manner by providing participants with information and materials

1 required by ERISA. *See, e.g.*, ERISA § 101(a)(1), 29 U.S.C. § 1101(a)(1) (requiring the plan
 2 administrator to furnish to each participant covered under the plan and to each beneficiary who is
 3 receiving benefits under the plan a summary plan description or “SPD”). In this regard, the
 4 Company and the PAC disseminated the Plan’s documents and related materials which, among
 5 other things, incorporated by reference WaMu’s misleading SEC filings, thus converting such
 6 materials into fiduciary communications.
 7

8 68. Moreover, WaMu, at all applicable times, on information and belief, exercised
 9 control over the activities of its employees that performed fiduciary functions with respect to the
 10 Plan, including the PIC Defendants and PAC Defendants, and, on information and belief, could
 11 hire or appoint, terminate, and replace such employees at will. WaMu is, thus, responsible for
 12 the activities of its employees through traditional principles of agency and *respondeat superior*
 13 liability.
 14

15 69. Finally, under basic tenets of corporate law, WaMu is imputed with the
 16 knowledge that the other Defendants had regarding the misconduct alleged herein, and, hence,
 17 like the fiduciaries who acted on WaMu’s behalf, had knowledge of the imprudent actions
 18 alleged herein.
 19

20 70. Consequently, in light of the foregoing duties, responsibilities, and actions,
 21 WaMu was a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21),
 22 during the Class Period in that it exercised discretionary authority or discretionary control
 23 respecting management of the Plan, exercised authority or control respecting management or
 24 disposition of the Plan’s assets, and/or had discretionary authority or discretionary responsibility
 25 in the administration of the Plan. Because it assumed WaMu’s Plan-related liability in the
 26

Purchase and Assumption Agreement and is WaMu's successor-in-interest, JPMCNA is fully liable for WaMu's breaches of fiduciary duty, as alleged herein.

C. Defendant Killinger's Fiduciary Status

71. According to the Investment Committee Charter, the PIC was to report to the Board "at least twice each year" on the financial status of the Plan. Investment Committee Charter at WMU-ERISA 000243. Thus, the Board monitored the activities of the PIC, and as such under ERISA was required to ensure that the PIC was fully informed of critical information that it needed to faithfully discharge its duties under ERISA. As a member of the Board, Defendant Killinger had and exercised this authority.

72. In addition, throughout the Class Period, Defendant Killinger made numerous statements, many of which were incomplete and inaccurate, to employee Plan participants regarding the Company, and future prospects of the Company specifically with regard to the risk, or purported lack thereof, faced by the Company as a result of its exposure to the subprime market and high-risk loans. These statements, which were made, among other places, in Company publications sent to all employees, on the employee intranet, and in quarterly letters sent to all employees, were made in an ERISA fiduciary capacity because they contained information about the likely future of the Plan's benefits, in particular the value and prudence of the Plan's largest single investment, WaMu stock, and, thus were acts of Plan administration under controlling legal precedent. Defendant Killinger made these statements knowing that, due to his position as CEO, employees would view him as a fully informed, knowledgeable and trustworthy source of information regarding WaMu's financial condition and future prospects.

73. Furthermore, documents produced by Defendants show that Defendant Killinger attended HR Committee meetings. In light of his role as a *de facto* Plan fiduciary, Defendant

1 Killinger was obligated to provide critical information to the HR Committee with regard to the
 2 real but undisclosed risks the Company faced.

3 74. Consequently, in light of the foregoing duties, responsibilities and actions as a
 4 member of the Board (the sole executive, insider Director), and as a result of his communications
 5 with the Plan's participants which constitute acts of Plan administration, Defendant Killinger
 6 was a *de facto* fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21),
 7 during the Class Period in that he exercised discretionary authority or discretionary control
 8 respecting management of the Plan, exercised authority or control respecting management or
 9 disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility
 10 in the administration of the Plan.

12 **D. HR Committee Defendants' Fiduciary Status**

13 75. The Board of Directors established the HR Committee to act as a fiduciary to
 14 "[o]versee the management of any Plan trust funds and periodically review the performance of
 15 the funds and the investment managers of the funds for the purpose of assessing their
 16 effectiveness." See HR Committee Charter at 1. The HR Committee reported to the Board,
 17 including Defendant Killinger, which retained decision-making authority on behalf of the
 18 Company. HR Committee Charter.

19 76. According to the Investment Committee Charter, the PIC was to report to the HR
 20 Committee "at least twice each year" on the financial status of the Plan. Investment Committee
 21 Charter at WMU-ERISA 000243.

22 77. According to the WaMu Savings Plan, Annual Report (Form 11-K) (Dec. 31,
 23 2007) (hereinafter the "2007 Form 11-K") at 13, upon the enactment of the Pension Protection
 24 Act of 2006, in order to ensure that Plan participants continue to have an appropriate range of
 25
 26

1 investment choices in the Plan, the HR Committee “requested a complete evaluation of fund
2 performance and expenses.” As a result of such evaluation, a new investment structure was
3 implemented in March, 2008.

4 78. Additionally, according to the Plan Document, the PAC Defendants and the PIC
5 Defendants were appointed by the HR Committee. Plan Document at WMU-ERISA 000055.
6

7 79. Although the Plan Document identifies the HR Committee as the entity
8 responsible for appointing members to the PAC, a PAC Charter that was adopted circa July,
9 2007, states that, in addition, the Chair of the HR Committee may add, remove, or replace
10 members of the PAC. Read together, it appears that prior to July, 2007, the HR Committee
11 appointed, removed and replaced PAC members, and after July, 2007, the Chair of the HR
12 Committee took on express responsibility for removing and replacing PAC members.
13

14 80. A similar ambiguity exists with respect to the PIC members. Although the Plan
15 Document identifies the HR Committee as the entity responsible for appointing members to the
16 PIC, an undated PIC Charter states that, in addition, the Chair of the HR Committee may remove
17 or replace members of the PIC. Read together, it appears that prior to the undated PIC Charter,
18 the HR Committee appointed, removed and replaced PIC members, and after the undated PIC
19 Charter, the Chair of the HR Committee took on express responsibility for removing and
20 replacing PIC members.
21

22 81. Accordingly, both the HR Committee and its Chair had a duty to monitor the
23 members of the PAC and the PIC, 29 C.F.R. § 2509.75-8 at FR-17 (“At reasonable intervals the
24
25
26

1 performance of trustees and other fiduciaries should be reviewed by the appointing
 2 fiduciary....”), and exercised a fiduciary function under ERISA. 29 C.F.R. § 2509.75-8 (D-4).²

3 82. Consequently, in light of the foregoing duties, responsibilities, and actions, the
 4 HR Committee Defendants were *de facto* fiduciaries of the Plan within the meaning of ERISA §
 5 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary
 6 authority or discretionary control respecting management of the Plan, exercised authority or
 7 control respecting management or disposition of the Plan’s assets, and/or had discretionary
 8 authority or discretionary responsibility in the administration of the Plan.
 9

10 **E. Investment Committee Defendants’ Fiduciary Status**

11 83. According to the Investment Committee Charter, the PIC consisted of five
 12 members, with the Company’s Chief Investment Officer being the chairman. Investment
 13 Committee Charter at WMU-ERISA 000241. The other members of the PIC were: the
 14 Chairman of the PAC; two senior officers of the Company with backgrounds in “finance,
 15 investments or accounting”; and one other “at large” senior officer. *Id.*
 16

17 84. The purpose of the PIC was to “facilitate and assist the [HR Committee] in its
 18 oversight responsibility related to investment and financial matters of the Company’s qualified
 19 retirement plans” including the WaMu Savings Plan. *Id.*
 20
 21
 22

23 ² The Plan Document also states that the “Company or the Board” is responsible for appointing
 24 the PIC. Plan Document § 2.38. Plaintiffs reserve the right to amend the Complaint, or seek
 25 leave to do so if necessary, to add additional members of the Board as Defendants if
 26 discovery demonstrates that they functioned as Plan fiduciaries and breached their duties as
 such under ERISA.

1 85. The PIC was to report to the HR Committee and the Board of Directors on the
2 financial status of the Plan “at least two times per year.” Investment Committee Charter at
3 WMU-ERISA 000242-43.

4 86. The Plan Document provides that the PIC is a “Named Fiduciary” pursuant to
5 ERISA. Plan Document at WMU-ERISA at 000055.

6 87. The PIC Defendants had the responsibility of selecting the investments in the Plan
7 and monitoring the performance of the investment funds, including the WaMu Company Stock
8 Fund in the Plan. Plan Policy Statement at WMU—0000003702 (“In offering Company Stock
9 as an option, the PIC will review the option on an on-going basis to verify that it continues to be
10 a prudent investment”). *See also* Plan Document at WMU-ERISA 000049, 000056-57 (the PIC
11 had the power and duty to “review, select or remove, and monitor investment funds”);
12 Investment Committee Charter at WMU-ERISA 000241 (“The PIC shall be responsible for the
13 overall financial management of the [Plan] including...**Plan Investments:** Determine all
14 investment offerings, policies and practices); *Id.* at WMU-ERISA 000242 (the PIC shall have
15 the power and duty to “add or delete investment alternatives available under the [Plan]”); WaMu
16 Savings—your next Smart MUve! at WMU-0000003037 (the PIC is a “group of senior leaders
17 who are responsible for regularly evaluating the investment options in the WaMu Savings Plan”).
18
19
20

21 88. The PIC was authorized to change the investment funds at its discretion. Plan
22 Document at WMU-ERISA 000049; SPD at WMU-ERISA 000114; Investment Committee
23 Charter at WMU-ERISA 000241-243.

24 89. In addition, the PIC had the power and duty to: direct the Trustee in the
25 investment, reinvestment, and disposition of the Trust, including the investment of up to 100% of
26

1 the Trust in qualifying employer securities (as defined in section 407(d)(5) of ERISA) without
 2 regard to the limitations of ERISA sections 407(a)(2), (3), or (4), as provided in the Trust
 3 Agreement; review, select or remove, and monitor fund managers; receive and review reports of
 4 the financial condition and of the receipts and disbursements of the Trust from the Trustee;
 5 furnish the Employer with information which the Employer may require for tax or other
 6 purposes; engage the services of or remove an Investment Manager or Managers (as defined in
 7 ERISA section 3(38)), each of whom shall have full power and authority to manage, acquire or
 8 dispose (or direct the Trustee with respect to acquisition or disposition) of any Plan asset under
 9 its control; and interpret and construe the Plan with respect to the investment, reinvestment, and
 10 disposition of Plan assets. Plan Document at WMU-ERISA 000056-57. *See also* Investment
 11 Committee Charter at WMU-ERISA 000241-242.

13
 14 90. According to the Investment Committee Charter, the PIC members were to be
 15 “familiar with their responsibilities under ERISA and discharge them with the requisite care and
 16 prudence.” *Id.* at WMU-ERISA 000243. *See also* WaMu Savings Plan—New Fund FAQs at
 17 WMU-0000003045 (The PIC was “a group of senior leaders...who are responsible for regularly
 18 evaluating the investment options in the [Plan]...[and] has a fiduciary responsibility to make sure
 19 that the funds offered through the WaMu Savings Plan meets your retirement planning needs.”).

20
 21 91. In March, 2008, based on a “comprehensive review of the core investment options
 22 in the Plan” requested by the HR Committee, the PIC “implemented a new investment structure
 23 featuring separate accounts and target date funds.” 2007 Form 11-K at 13. *See also* WaMu
 24 Savings—your next Smart MUve! at WMU0000003037 (the PIC “joined forces with some
 25 nationally respected financial experts to review all of the investment options WaMu Savings
 26

offers”). The WaMu Stock Fund remained an investment option following this comprehensive review.

92. According to PIC Meeting Minutes dated July 8, 2008 at WMU-0000003750), on June 6, 2008, the PIC decided to implement a 20% cap on WaMu stock as a percentage of a participant’s 401(k) portfolio, to be effective October 1, 2008.

93. It was noted at the July 8, 2008 PIC meeting that a “BOD Resolution is not required for the change or implementation of the 20% cap on WaMu stock as an investment for participants in the 401(k) plan, and that instead under the Plan document, PIC approval was sufficient.” *Id.* at WMU-0000003752.

94. Consequently, in light of the foregoing duties, responsibilities, and actions, the PIC Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan’s assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

F. Administration Committee Defendants’ Fiduciary Status

95. The Plan provides that the PAC is a “Named Fiduciary” pursuant to ERISA. Plan Document at WMU-ERISA 000055. The Plan also provides that the PAC is the “Plan Administrator,” and that it shall have the following powers and duties:

- i. Make and enforce such rules and regulations as it shall deem necessary or proper for the efficient administration of the Plan;
- ii. Interpret the provisions of the Plan and resolve any question arising under the Plan, or in connection with the administration or operation thereof;

- iii. Make all determinations affecting the eligibility of any Employee to be or become a Participant;
- iv. Determine eligibility for and amount of retirement benefits for any Participant;
- v. Authorize and direct the Trustee with respect to all disbursements of benefits under the Plan;
- vi. Employ and engage such persons, counsel and agents and to obtain such administrative, clerical, medical, legal, audit and actuarial services as it may deem necessary in carrying out the provisions of the Plan;
- vii. Delegate and allocate specific responsibilities, obligations and duties imposed by the Plan to one or more employees, officers or such other persons as the Plan Administrator deems appropriate; and
- viii. Amend the Plan for changes in the laws or regulations related to the Plan, to clarify any provisions in the Plan or correct any errors in the document, to simplify administration or for administrative convenience, and for any other reason provided that with respect to an amendment for any other reason, the delegate reasonably believes that the amendment will not have the impact of significantly increasing the cost or potential liability exposure of the Plan to the Employer. The authority set forth in this section 12.2(b)(viii) may be delegated only to a senior executive of the Company.

Plan Document § 12.2(b) at WMU-ERISA 000055-56.

96. The PAC consisted of up to fifteen members, with the Company's Chief Human Resources Officer being the Chairman. The other members of the PAC were the Chairman of the PIC and other senior officers of the Company.

97. On information and belief, in order to comply with ERISA, the Company and the PAC exercised responsibility for communicating with participants regarding the Plan in a plan-wide, uniform, mandatory manner, by providing participants with information and materials required by ERISA. *See, e.g.*, ERISA § 101(a)(1) (requiring the plan administrator to furnish to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan a summary plan description). In this regard, the Company and the PAC disseminated

1 the Plan's documents and related materials which, among other things, incorporated by reference
 2 WaMu's misleading SEC filings, thus converting such materials into fiduciary communications.

3 98. Consequently, in light of the foregoing duties, responsibilities, and actions, the
 4 PAC Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29
 5 U.S.C. § 1102(a)(1), and *de facto* fiduciaries within the meaning of ERISA § 3(21), 29 U.S.C.
 6 § 1002(21), in that they exercised discretionary authority or discretionary control respecting
 7 management of the Plan, exercised authority or control respecting management or disposition of
 8 the Plan's assets, and/or had discretionary authority or discretionary responsibility in the
 9 administration of the Plan.
 10

11 VI. FACTS BEARING ON FIDUCIARY BREACH

12 A. WaMu Was an Imprudent Investment for the Plan during the Class Period

13 1. Summary

14 99. During the Class Period, WaMu stock became an imprudent investment for
 15 participants' retirement savings due to the Company's serious mismanagement and improper
 16 business practices, which elevated the risk of WaMu stock far beyond what was appropriate for
 17 retirement savings, including, but not limited to the fact that the Company: (1) was heavily
 18 dependant on the origination, purchase, sale and holding for investment of subprime mortgage
 19 loans and other high-risk loan products, including Option ARMs (or "Pay Option
 20 ARMs"), "stated income" or "liar loans" and so-called "piggyback" loans, and home equity lines
 21 of credit ("HELOCs"); (2) maintained lax underwriting standards in connection with the
 22 origination of subprime and other high-risk mortgage loans; (3) spearheaded an illegal scheme to
 23 systematically inflate property appraisals during the loan origination process; (4) lacked adequate
 24 risk-management controls; and (5) failed to adequately account for its exposure to loan losses,
 25
 26

engaged in other questionable accounting practices and made misrepresentations regarding the Company's financial condition, all of which caused the price of WaMu stock to be artificially inflated during the Class Period and ultimately forced the Company into bankruptcy.

100. Throughout the Class Period, the Company suffered from grave mismanagement and corresponding deterioration of its financial condition. As the consequences of this conduct came to light, WaMu's share price lost more than 99% of its value, the Company had its banks seized by the FDIC, and WaMu was forced to file for bankruptcy after the FDIC sold off its banking assets in a fire-sale to JPMCNA. Under these circumstances, investment in WaMu stock was imprudent.

2. The rise of the subprime lending industry and the proliferation of high-risk loan products for "prime" and "subprime" borrowers

101. WaMu, like the mortgage banking industry as a whole, experienced rapid growth in mortgage loan revenue in the years just prior to the start of the Class Period. Between 2003 and 2005, WaMu's production of subprime loans increased from \$14.1 billion to \$34.5 billion. Washington Mutual, Inc., Annual Report (Form 10-K) (Dec. 31, 2005) (hereinafter the "2005 Form 10-K").

102. Industry experts have attributed the proliferation of subprime loans to a confluence of factors in 2004 and 2005, including rising home prices, declining affordability, historically low interest rates, intense lender competition, innovations in the structure and marketing of mortgages, and an abundance of capital from lenders and mortgage securities investors. *See* Sandra L. Thompson, Dir., Div. of Supervision and Consumer Prot., *Testimony Before the Committee on Banking, Housing and Urban Affairs, U.S. Senate: Federal Deposit*

1 *Insurance Corporation on Mortgage Market Turmoil: Causes and Consequences*, Mar. 22, 2007,
 2 <http://www.fdic.gov/news/news/speeches/chairman/spmar22071.html>.

3 103. On information and belief, in 2004, as interest rates began to climb, the pool of
 4 potential prime borrowers looking to refinance began to dry up and lenders began extending
 5 loans to subprime borrowers with troubled credit histories in an effort to maintain or grow
 6 market share in a declining origination environment, and also set out to entice prime borrowers
 7 to take out ever-larger mortgage loans. Lenders did this in order to profit from the heavy
 8 demand for mortgage loans that could be securitized and sold by Wall Street to institutional
 9 investors.
 10

11 104. To take advantage of this new market lenders, including WaMu, weakened their
 12 underwriting standards by, among other things:
 13

- 14 a. reducing the minimum credit score borrowers need to qualify for certain loans;
- 15 b. allowing borrowers to finance a greater percentage of a home's value or to carry a higher debt load;
- 16 c. introducing new products designed to lower borrowers' monthly payments for an initial period; and
- 17 d. allowing borrowers to take out loans with little, if any, documentation of income and assets.

18
 19 See Ruth Simon, *Mortgage Lenders Loosen Standards – Despite Growing Concerns, Banks Keep*
 20 *Relaxing Credit-Score, Income and Debt-Load Rules*, Wall St. J., July 26, 2005, at D1.
 21

22 105. In addition to lowering underwriting standards, lenders, including WaMu,
 23 introduced and/or accelerated the use of an array of non-traditional mortgage loan products,
 24 which enticed borrowers to take out large mortgage loans, but also put them at greater risk of
 25 default. These mortgage loan products are explained, in part, in the following paragraphs.
 26

1 106. **Adjustable-Rate Mortgages (“ARMs”)**: ARMs are typically marketed with
 2 promotional or “teaser” rates during the loan’s introductory period that later balloon to much
 3 higher rates once the introductory period has ended. ARMs accounted for between one-half and
 4 one-third of subprime mortgages. *See* Testimony of Roger T. Cole, Director, Division of
 5 Banking Supervision and Regulation, The Federal Reserve Board, Mortgage Markets, Before the
 6 Committee on Banking, Housing and Urban Affairs, U.S. Senate, Mar. 22, 2007,
 7 <http://www.federalreserve.gov/boarddocs/testimony/2007/20070322/default.htm>. Among the
 8 ARMs issued by WaMu were so-called “2/28”, “3/27”, and “5/25” ARMs (also known as
 9 “Hybrid ARMs”). By way of example, a 3/27 ARM offered a low, fixed interest rate for the first
 10 three years (the “3” in “3/27”). After the initial rate expires, the interest rates adjust upward over
 11 the remaining 27 years. During this period, the interest rate typically is determined by adding a
 12 margin to the LIBOR index. For example, if the LIBOR index is 6% and the margin on the
 13 loan is 5%, the fully indexed interest rate will be 11%. Thus, the borrower faces payment shock
 14 when the “teaser” period ends, as well as the potential for steadily increasing payments. The risk
 15 of nonpayment is further exacerbated by the fact the “2/28” “3/27” and other ARM loans were
 16 available to subprime borrowers. In July 2007, WaMu announced that it would no longer offer
 17 “2/28” or “3/27” ARMs, but it continued to offer “5/25” ARMs.

18 107. **“Option ARMs” (also known as “Pay Option ARMs”)**: WaMu was
 19 particularly aggressive in the origination of “Option ARMs.” Option ARMs enticed borrowers
 20 by offering a very low “teaser” rate of as low as 1% for an introductory period of one to three
 21 months, after which the interest would spike dramatically. When the teaser rate expired, Option
 22 ARMs became adjustable rate loans in which the rate could fluctuate monthly based on changes
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1 to a rate index. Each month the borrower could choose one of four options for payment:
 2 (1) minimum payments; (2) interest only payments; (3) full principal and interest; or
 3 (4) accelerated principal and interest. Borrowers who chose to make minimum payments saw
 4 the amount owed on their loans *increase*. On November 29, 2005, the *Wall Street Journal*
 5 reported that roughly 70% of Option ARM borrowers were making minimum payments; hence
 6 their principle amounts were *increasing* during the life of their loan. *See* Ruth Simon, *A Trendy*
 7 *Mortgage Falls From Favor; Demand for Option ARMs, Which Helped Fuel Boom, Wanes Amid*
 8 *Rising Rates, Growing Risk*, Wall S. J., Nov. 29, 2005. These “negative amortization” loans
 9 were ticking time bombs, as they had negative amortization caps, in the range of 120% of the
 10 original principal of the loan. Once the balance hits the cap, the monthly payment is
 11 immediately raised to the fully amortizing level (*i.e.*, all payments after the date the cap is
 12 reached must be sufficient to pay off the new balance over the remaining life of the loan). When
 13 this happens, the borrower will experience significant payment shock. Nonetheless, on these
 14 negative amortization loans, WaMu declared the accrued (but *unpaid*) interest as income. Even
 15 though WaMu did not make Option ARMs available to subprime borrowers, they were
 16 extremely high-risk loans, and played a significant role in the Company’s financial crisis.
 17 Incredibly, WaMu did not discontinue the origination of Option ARMs until June 2008.

18
 19 108. **“Stated-income,” “No-Documentation” or “Low-Documentation” Loans**
 20 **(also known as “Liar Loans”):** The practice of making loans based on “stated income” or
 21 requiring little or no documentation from borrowers became pervasive; such loans constituted as
 22 much as 40% of subprime mortgages issued in 2006, up from 25% in 2001. *See* Gretchen
 23 Morgenson, *Crisis Looms In Mortgages*, N.Y. Times, Mar. 11, 2007. These loans usually
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1 carried higher interest rates than fully documented loans. For much of the Class Period, WaMu
 2 had very lax standards in this regard. Between 2004 and the end of 2007, WaMu made
 3 \$44 billion worth of “limited documentation” loans. Drew DeSilver, *Where WaMu Went Wrong*,
 4 *Seattle Times*, Apr. 14, 2008. Only on August 8, 2007, did WaMu announce that it would no
 5 longer accept mortgages unaccompanied by traditional documentation of income or assets if the
 6 loan exceeds 65% of the home’s value and the borrower’s credit score is below 680.

8 109. **“PiggyBack” Loans:** This type of loan combines a mortgage with a HELOC,
 9 allowing borrowers to finance more than 80% of the home’s value without paying for private
 10 mortgage insurance. As of 2006, about half of all subprime loans included “piggyback” loans,
 11 and on average all borrowers financed 82% of the underlying value of their property, markedly
 12 up from 48% in 2000. *See Id.*; *see also* James R. Hagerty & Ruth Simon, *Home Lenders Pare*
 13 *Risky Loans – More Defaults Prompt Cut in ‘Piggyback’ Mortgages; Housing Market May*
 14 *Suffer*, *Wall St. J.*, Feb. 14, 2007, at A3. The first loan typically covered 80% of the mortgaged
 15 home’s appraised value, while the HELOC covered any of the home’s remaining value up to
 16 (and sometimes exceeding) 20%. Thus the HELOC and the first loan together often encumbered
 17 100% or more of a home’s appraised value. Because WaMu offered HELOCs as piggybacks to
 18 Option and Hybrid ARMs, 100% or more of a property’s appraised value could be encumbered
 19 with loans that required interest only payments or allowed for negative amortization.

22 110. **Interest-Only Mortgages:** These allow borrowers to pay interest and no
 23 principal in the loan’s early years, which keep payments low for a time, but require that the
 24 deferred payment of principal be made in the future through increased monthly or balloon
 25 payments.

1 111. Traditionally, lenders such as WaMu typically retained ownership of the loan and
 2 mortgage for the life of the loan. Hence, their primary interest was in ensuring that a borrower
 3 would be able to repay a loan, and that the loan was adequately collateralized in the case of
 4 default by the borrower.

5 112. This model changed in recent times, as lenders such as WaMu started to sell off
 6 the majority of their mortgage loans to investment banks, trusts or government sponsored
 7 enterprises such as the Federal National Mortgage Association (“Fannie Mae”) or the Federal
 8 Home Loan Mortgage Corporation (“Freddie Mac”). The loans were pooled together,
 9 securitized, and sold as mortgage-backed securities, allowing lenders such as WaMu to profit
 10 from the volume and value of loans procured, as well as from the retention of rights such as
 11 Mortgage Servicing Rights (“MSRs”) and pre-payment penalties. In addition, lenders often
 12 retained a portion of the earnings streams from the pools.
 13
 14

15 113. As lenders such as WaMu sold more and more of the loans they originated in a
 16 lucrative secondary market, the lenders lost their incentives to protect their assets through
 17 vigorous underwriting standards and accurate property appraisals.

18 114. In addition, on information and belief, lenders such as WaMu incentivized
 19 employees and executives to generate as many subprime loans and Option ARM loans as
 20 possible. That is because bank profits now correlated more strongly to the volume and value of
 21 loans generated than to the likelihood that a loan would be repaid.
 22

23 115. Subprime loans were more valuable to lenders than traditional loans – *provided*
 24 that the less-creditworthy borrowers who took them were able to pay the high interest rates. As
 25 set forth in WaMu’s regulatory filings, the average return rate in WaMu’s subprime mortgage
 26

1 channel (WaMu's held for investment portfolio) was 6.31%, but only 5.83% for other mortgage
 2 loans. In 2005, the interest rate spread was nearly one full percentage point – 5.9% vs. 4.97%.
 3 2007 Form 10-K at 26.

4 116. Option ARM loans were also attractive fodder for mortgage-backed securities,
 5 and – in general and as long as it could – WaMu off-loaded many of these high-risk loans.
 6

7 117. Lenders such as WaMu were able to obtain higher returns on both subprime loans
 8 and Option ARMs that were bundled and sold to investors as mortgage-backed securities. That
 9 is because subprime loans carried higher (and often increasing) interest rates, and tended to carry
 10 harsh prepayment penalties, making it less likely that they would be paid off in the near future
 11 (and therefore making it more likely that monthly payments would continue). Subprime and
 12 ARM loans (whether subprime or not) were ideal for securitization because an increase in market
 13 rates would make the loans more profitable, yet a drop in market interest rates would not lessen
 14 the return (and concomitantly the value) of the associated mortgage-backed security.
 15

16 118. However, for reasons discussed in part *infra*, even after lenders such as WaMu
 17 had sold subprime and Option ARM loans, they retained a devastating exposure to the
 18 subsequent impairment of those loans. WaMu's top executives knew of this exposure, but failed
 19 to in any meaningful way manage the risk it presented to the Company and to the Plan's huge
 20 investment in Company stock.
 21

22 119. WaMu's aggressively pursued and rapidly developed subprime mortgage business
 23 and Option ARM mortgage business ultimately was doomed by one simple fact: the subprime
 24 loans and the Option ARM loans at the heart of the business were inherently low quality and
 25
 26

1 faced inevitable and devastating impairments over time – even though WaMu was able to mask
2 its exposure for a period of time.

3 **3. The fall of the subprime lending industry**

4 120. As early as 2004, industry watchdogs began expressing fears that relaxed lending
5 practices were increasing risks for borrowers and lenders in overheated housing markets. *See*
6 Simon, *Mortgage Lenders, supra*. As lenders made it easier for borrowers to qualify for a loan
7 by such practices as described above, they were also greatly increasing the likelihood that
8 borrowers would be unable to make payments, and that defaults would increase. Of particular
9 concern was the prevalence of adjustable-rate loans, which, in combination with the lowered
10 lending standards, were more likely to result in borrowers' early payment defaults.

11 121. By this time, WaMu was aware of the risks associated with subprime lending. In
12 its 2004 Form 10-K WaMu acknowledged:
13

14 A continuing emphasis on subprime lending could negatively
15 impact our business. The Company began accelerating purchases
16 of subprime loans in 2003, increased its specialty mortgage finance
17 portfolio significantly in 2004 and intends to continue to grow this
18 portfolio in the future ... [h]owever, if there were a downturn in
the national economy or local economics where we do business,
the credit performance of this portfolio could suffer, with a
potential adverse effect on our earnings.

19 Washington Mutual, Inc., Annual Report (Form 10-K) (Dec. 31, 2004) (hereinafter the "2004
20 Form 10-K") at 3.

21 122. In May 2005, bank regulators issued their first-ever guideline for credit-risk
22 management for home-equity lending and, in December 2005, proposed new guidelines for
23 mortgage lenders were issued as well. *See* Office of the Comptroller of the Currency Board of
24 Governors of the Federal Reserve System, *Credit Risk Management Guidance for Home Equity*
25 *Lending*, May 16, 2005, <http://www.occ.treas.gov/ftp/bulletin/2005-22a.pdf>; Office of the
26

1 Comptroller of the Currency Board of Governors of the Federal Reserve System, *Addendum to*
 2 *Credit Risk Management Guidance for Home Equity Lending*, Oct. 4, 2006,
 3 <http://www.occ.treas.gov/ftp/bulletin/2006-43a.pdf>; Office of the Comptroller of the Currency
 4 Board of Governors of the Federal Reserve System, *Interagency Guidance on Nontraditional*
 5 *Mortgage Products*, Dec. 29, 2005, <http://www.occ.treas.gov/fr/fedregister/70fr77249.pdf>;
 6
 7 Testimony of Sandra L. Thompson, *supra*. The proposed “Interagency Guidance on
 8 Nontraditional Mortgage Products” sent a clear message to high-ranking industry insiders that
 9 bank regulators were concerned about the lessened underwriting standards and general lax risk
 10 management practices of subprime lenders.

11 123. In September 2005, the *Wall Street Journal* reported that “bank regulators [were]
 12 sounding the alarm bells about rising risks in the mortgage market.” Ruth Simon & James R.
 13 Hagerty, *Mortgage Lenders Tighten Standards*, Wall St. J., Sept. 29, 2005. The then Federal
 14 Reserve Chairman Alan Greenspan testified that “the apparent froth in housing markets may
 15 have spilled over into mortgage markets” and stated that the “dramatic increase” in interest-only
 16 mortgages and “more exotic forms of adjustable rate mortgages” were “developments that bear
 17 close scrutiny.” *Id.*

19 124. In 2005 and 2006, the Federal Reserve instituted a series of interest rate hikes and
 20 the interest rates on variable rate loans, including mortgage loans, began to rise. Subprime
 21 borrowers who were able to afford the initially low “teaser rate” loan payments no longer could
 22 meet their monthly payment obligations. At the same time, home values began to decline
 23 sharply, leading some borrowers to walk away from loans when they could not afford the
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1 increased monthly mortgage and could not readily re-sell the property for a profit. As a result,
2 many borrowers no longer paid their mortgages, causing defaults to increase significantly.

3 125. As of mid-2005, delinquency rates for subprime loans (60-days or more past due)
4 rose for the first time since 2002. By the fourth quarter of 2005, delinquencies and foreclosures
5 began to rise even more severely – as of October 2005 the delinquency rate was twice that
6 recorded on new subprime loans a year earlier. *See Simon & Hagerty, More Borrowers, supra.*

7 126. The risks of Option ARMs also were identified by industry watchdogs. As
8 reported in November 2005, “[r]egulators have raised concerns about the risks of these complex
9 loans and whether borrowers truly understand them.” Ruth Simon, *A Trendy Mortgage Falls*
10 *from Favor – Demand for Option ARMS, Which Helped Fuel Boom, Wanes Amid Rising Rates,*
11 *Growing Risk*, Wall St. J., Nov. 29, 2005.

12 127. According to the FDIC, total subprime delinquencies rose from 10.33% in the
13 fourth quarter of 2004 to 13.33% in the fourth quarter of 2006 and foreclosures rose from 1.47%
14 to 2.0% over the same period. Testimony of Sandra L. Thompson, *supra*.

15 128. ARM subprime loans accounted for the largest rise in delinquency rates, an
16 increase from 9.83% to 14.44% between the fourth quarter of 2004 and the fourth quarter of
17 2006; foreclosures rose from 1.5% to 2.7% during the same period. *Id.*

18 129. The high delinquency rates of ARM subprime borrowers ought to have been
19 particularly troubling to WaMu, as the Company originated large volumes of ARMs.

20 130. In 2006 alone, roughly 80,000 subprime borrowers fell into delinquency, many
21 shortly after origination. *See Simon & Hagerty, More Borrowers, supra.*

1 131. On October 4, 2006, the bank regulators issued their final guidelines for mortgage
2 lenders. *See* Office of the Comptroller of the Currency Board of Governors of the Federal
3 Reserve System, *Interagency Guidance on Nontraditional Mortgage Products Risks*, Oct. 4,
4 2006, <http://www.occ.treas.gov/fr/fedregister/71fr58609.pdf>.

5 132. The imminent collapse of the subprime lending industry was documented by
6 industry experts. In December 2006, the *Center for Responsible Lending* issued a report
7 predicting the worst foreclosure crisis in the modern mortgage market. Ron Nixon, *Study*
8 *Predicts Foreclosure For 1 In 5 Subprime Loans*, N.Y. Times, Dec. 20, 2006. Shortly after,
9 several major mortgage lenders disclosed extraordinary rates of loan defaults, triggering inquiries
10 from SEC and FDIC, and resulting in several bankruptcy filings. WaMu executives, including
11 Defendants Killinger, Casey, Cathcart, and Woods, knew the risks created by WaMu's
12 imprudent business practices, but failed to control the risk in any meaningful way.
13
14

15 **4. WaMu shifts its focus to the high-risk subprime market and high-risk**
16 **mortgage loan products**

17 133. During the real estate industry's rapid growth from 2002 - 2005, WaMu grew its
18 mortgage business substantially, recording record levels of revenue in 2005. However, WaMu,
19 which sold its direct subprime lending business to Citigroup in 2003, was late to expand into the
20 subprime lending business.

21 134. WaMu's subsidiary, Long Beach Mortgage, experienced strong growth in the
22 subprime lending market, which prompted WaMu executives to target the broader subprime
23 market for expansion. WaMu decided to expand its subprime business despite the cooling
24 housing market and despite the fact that subprime lending was a notoriously dodgy segment of
25 the mortgage industry. Prior to its acquisition by WaMu, Long Beach Mortgage had been sued
26

1 by the United States Department of Justice for violations of the Fair Housing Act and related
 2 discriminatory practices. See <http://www.usdoj.gov/crt/housing/documents/longbeachsettle.htm>.

3 135. In 2004, Option ARM loans accounted for as much as 40% of WaMu's mortgage
 4 volume. In 2005, increases in short term interest rates led to a temporary drop-off, such that
 5 Option ARM loans accounted for 29% of WaMu's mortgage volume. Ruth Simon, *Demand for*
 6 *Option ARMs Drops as Short-Term Interest Rates Rise*, Wall St. J., Dec. 1, 2005. Nonetheless,
 7 in 2006 and 2007, WaMu aggressively underwrote Option ARM loans, and booked the "negative
 8 amortization" generated by these loans as profit.
 9

10 136. In its 2005 Form 10-K, WaMu announced that:

11 The Company remains committed to the subprime mortgage
 12 market and intends to increase the loan volume of its subprime
 13 mortgage business, Long Beach Mortgage Company, and to
 14 maintain the size of its purchased subprime home loan portfolio. A
 15 portion of the Company's Card Services portfolio is made up of
 subprime credit card loans and Card Services may continue to
 originate a portion of its credit card loans to subprime borrowers.

16 2005 Form 10-K at 4.

17 137. Contemporaneous industry observers questioned both the wisdom and timing of
 18 WaMu's decision to make subprime lending a prominent part of its business operations. As the
 19 *Seattle Times* reported in November 2005:

20 For anyone who thinks of Washington Mutual as a buttoned-down
 21 bank dishing up only plain-vanilla loans, meet Long Beach
 Mortgage.

22 The WaMu subsidiary is one of the country's largest lenders to
 23 people with damaged credit.

24 That's not the kind of business most folks associate with WaMu, a
 25 conservative institution with roots in the meat-and-potatoes thrift
 industry. By dipping into subprime lending – a term that refers to
 borrowers who can't get best, or prime, rate – WaMu has moved
 26

1 into an arena that was once dominated by specialty lenders, such as
2 Household Finance and The Money Store.

3 Long Beach made more than a quarter of all WaMu home-
4 purchase loans last year, and [CEO] Killinger wants the business to
5 grow faster than WaMu's traditional mortgage lending.

6 For one thing, it's more profitable.

7 "We earn better margins in the subprime business because we're
8 very efficient and have an advantage over some competitors," he
9 said.

10 That does not appease analysts who worry about what will happen
11 when interest rates go up and borrowers have a harder time making
12 payments.

13 "I hate the business," said Richard Bove, an analyst with Punk,
14 Ziegel & Co. "Asking people who can't afford to buy something
15 to pay up to buy that product is a concept that, for me, doesn't
16 work."

17 Long Beach is one of the top 10 subprime mortgage lenders in the
18 country and growing fast. It made loans of \$8.4 billion in the third
19 quarter, more than twice its volume a year earlier. And it has
20 added about 900 of its 2,500 employees in the past year.

21 WaMu sells many of Long Beach's loans to investors, and it buys
22 subprime mortgages from other lenders as investments. About 10
23 percent of the loans in its portfolio at the end of the quarter were
24 subprime.

25 Robert Napoli, an analyst at Piper Jaffray, asked executives on a
26 recent conference call why they want to expand the subprime area.

"It seems that margins in the industry are, for the most part, at
record lows, so it seems that maybe this isn't the best time to be
aggressively growing the business," Napoli said.

Melissa Allison & Justin Mayo, *WaMu Has Stake In Risky, Sub-Prime Arena*, Seattle Times,
Nov. 13, 2005.

138. Turnover of key personnel exacerbated the risk posed by WaMu's increased
exposure to the subprime market and to high-risk "prime" products such as Option ARMs. In
November 2005, WaMu announced the retirement of its Chief Enterprise Risk Officer, James

1 Vanasek. *See* Washington Mutual, Inc., Current Report (Form 8-K) (Nov. 2, 2005) at Ex. 99.1.
 2 Defendant Cathcart replaced Mr. Vanasek as Chief Enterprise Risk Officer.

3 139. Likewise, the hiring of Stephen Rotella in January 2005 also increased WaMu's
 4 exposure to dicey mortgage products. One of Rotella's first orders of business at WaMu was to
 5 speed up the processing of mortgage customers' loan applications. *See* Melissa Allison,
 6 *Washington Mutual Confident It's On Right Path*, Seattle Times, Apr. 20, 2005. Since WaMu's
 7 collapse, former executives have reported that during Rotella's tenure at WaMu he pushed for
 8 more subprime and risky loans despite colleagues' warnings about the precarious mortgage
 9 market. Melissa Allison, *WaMu's No. 2 Faulted By Some For Wrong Priorities*, Seattle Times,
 10 Nov. 4, 2008. They also recalled that "Rotella became involved more than most top bank
 11 executives when the mortgage sales staff complained about applications that were declined.
 12 More than once Rotella pressured credit officers to reverse their decisions ...[he also] hassled the
 13 bank's internal reviewers, whose job was to make sure WaMu followed its own policies on
 14 lending ..." *Id.*

15 140. In late December 2005, WaMu announced a dramatic re-alignment of its
 16 subprime lending oversight, and that Craig Chapman, then-president of the group responsible for
 17 overseeing subprime, would leave WaMu in January 2006. WaMu touted the operating
 18 efficiencies that this shift would produce and assured investors and Plan participants that "we
 19 have a strong and experienced leadership team that recognizes the unique characteristics of the
 20 subprime business." *See* Washington Mutual, Inc., Current Report (Form 8-K) (Dec. 21, 2005)
 21 at Ex. 99.1. Under the new structure, management responsibility for Long Beach Mortgage and
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1 Mortgage Banker Finance moved from the Commercial Group to the Company's Home Loans
2 Group.

3 141. Despite its ramp-up of its subprime and Option ARM business, WaMu
4 consistently represented that it had implemented and maintained adequate internal controls and
5 sufficient risk management strategies. *See* Washington Mutual, Inc., Quarterly Report (Form 10-
6 Q) (June 30, 2006) at 59; Washington Mutual, Inc. Quarterly Report (Form 10-Q) (Sept. 30,
7 2006) at 58; Washington Mutual, Inc., Annual Report (Form 10-K) (Dec. 31, 2006) (hereinafter
8 the "2006 Form 10-K") at 3. These representations were false.

9
10 142. During this period of time, WaMu dramatically increased both its origination of
11 subprime and Option ARM mortgages and its securitization and resale of those mortgages to
12 other banks and investors. The short-term revenue and profit gains appeared promising. In
13 2005, revenue from sales and servicing of home mortgage loans grew to \$1.79 billion, compared
14 with \$1.47 billion in 2004. WaMu attributed the improved performance to increased sales of the
15 Company's Option ARM product. *See* Washington Mutual, Inc., Current Report (Form 8-K)
16 (Jan. 18, 2006) at Ex. 99.1.

17
18 143. The Company's 2005 results also showed that the mortgage-lending boom had
19 run out of steam. Revenue from sales and servicing of home mortgage loans, mortgage sales and
20 servicing revenue fell from \$497 million in the third quarter to only \$264 million in the fourth
21 quarter. *Id.* Despite the declining revenue and deteriorating market conditions, including a
22 cooling market and interest rate increases, WaMu threw caution to the wind and expanded its
23 subprime operations and its issuance of high-risk "prime" loan products.
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1 **5. WaMu continued to originate, buy, sell and hold subprime and Option ARM**
 2 **loans despite the high risk of default or foreclosure**

3 144. Despite the many warnings issued by industry analysts and government
 4 regulators, as well as other negative indicators that WaMu's top executives appeared to ignore,
 5 such as rising interest rates and a cooling housing market, for much of the Class Period, WaMu
 6 continued to engage in risky, inappropriate and illegal practices in connection with its origination
 7 of mortgage loans and its issuance of HELOCs.

8 145. Even after the risks of the subprime and Option ARM lending business
 9 indisputably were known by WaMu's top executives, WaMu continued to extend subprime and
 10 Option ARM loans to borrowers which contained many of the perilous lending terms discussed
 11 in Section VI(A)(2), *supra*. WaMu's aggressive marketing of these loans resulted in massive
 12 increases in loan delinquencies and foreclosures and put the financial health of the Company in
 13 jeopardy.
 14

15 146. For every quarter from Q1 2006 through Q3 2007, WaMu ranked as one of the
 16 largest subprime lenders in the country. *See* Nat'l Mortgage News Online,
 17 <http://data.nationalmortgagenews.com>.
 18

19 147. In 2005, WaMu booked \$949 million in revenue for sales of mortgage loans and
 20 originated mortgage-backed securities. In 2006, WaMu booked an additional \$735 million in
 21 mortgage sales revenue. 2007 Form 10-K at 30.

22 148. WaMu was particularly aggressive in its origination of Option ARM loans.
 23 Between April 2004 and the end of 2007, WaMu underwrote \$184.8 billion worth of Option
 24 ARM loans, and \$9.5 billion of other ARM loans. Drew DeSilver, *Where WaMu Went Wrong*,
 25 Seattle Times, Apr. 14, 2008.
 26

1 149. In December 2006, over 50% of the Option ARM Loans held by WaMu (68% by
2 value) had negative amortization and these principle increases added \$888 million to WaMu's
3 bottom line. In December 2007 the negative amortization remained at 50% (69% by value) and
4 added an astonishing (and illusory) \$1.73 billion to the Company's balance sheet. 2007 Form
5 10-K at 38, 57.

6
7 150. During this same time period, WaMu made \$44 billion worth of "limited
8 documentation" loans. DeSilver, *Where WaMu Went Wrong, supra*. These loans did not require
9 borrowers to even provide the lender with documentation supporting their ability to afford the
10 loan. *Id.* WaMu issued these low documentation loans even though, as the Company has
11 acknowledged, these loans are more prone to default in an economic downturn. *Id.* WaMu was
12 eager to originate as many mortgage loans as possible because it could package them into
13 mortgage-backed securities and sell them to hedge funds and institutional investors. *Id.*

14
15 151. In a statement responding to the *Interagency Guidance on Nontraditional*
16 *Mortgage Products*, WaMu Home Loans President David Schneider reiterated that "the Option
17 ARM is an attractive product for many of our customers." *WaMu Statement from David*
18 *Schneider, President, Home Loans, Regarding Interagency Guidance on Nontraditional*
19 *Mortgages*, Business Wire, Sept. 29, 2006.

20
21 152. Indeed, WaMu responded to worsening conditions in the mortgage market by
22 introducing new risky loan products.

23 153. In May 2006, WaMu introduced another high-risk loan product in the form of the
24 "enhanced" WaMu Equity Plus™ account that allowed customers to obtain lines of credit for up
25 to 89.9% of the value of their home and to make interest-only payments for an introductory
26

1 period. After this introductory period, the loan would convert to a variable interest rate.
 2 Customers could convert the loan to another fixed loan at the current interest rate or remain in a
 3 variable line and continue to make interest-only payments. *See Washington Mutual Enhances*
 4 *Home Equity Line of Credit Product to Provide Greater Flexibility; Allows Consumers to Make*
 5 *Interest Only Payments on Fixed-Rate Loan Option*, Business Wire, May 16, 2006.
 6

7 154. In April 2007, WaMu introduced the WaMu Mortgage Plus™, another high-risk
 8 “piggyback” product that bundled a first mortgage and home equity line of credit into a single
 9 loan. The equity line in this product would automatically increase as principal payments on the
 10 mortgage were made. WaMu allowed customers to move their loan from a fixed-rate to a
 11 variable-rate at no cost, but, after the first reset, charged \$250 to move the loan from a variable-
 12 rate to a fixed-rate. *See WaMu Delivers Unprecedented Mortgage Product to Market*, Business
 13 Wire, Apr. 26, 2007.
 14

15 155. Not until early 2007 did WaMu even begin to acknowledge the dire consequences
 16 of its risky business practices, as management publicly recognized the impact of the deteriorating
 17 housing market on its business and increased its forecast for losses due to loans. But,
 18 management’s acknowledgement of the true problems facing WaMu were grossly understated.
 19

20 156. Defendant Killinger admitted that lending standards had deteriorated during the
 21 subprime boom:

22 Q: Why would anyone make a stated-income loan in the first
 place? Why would a practice like that become the norm?

23 A: From competitive pressures, from significant excess of capital
 24 flooding into the business from Wall Street. That’s really what it
 25 was. Severe competitive pressure leading to a loosening of
 underwriting standards for the industry.

26 *Kerry Killinger Washington Mutual CEO*, S.F. Chron., Aug. 12, 2007, at E-1.

1 157. In January of 2007, the *Wall Street Journal* reported on what would become a
2 quarterly habit, the Company's substantially increasing its forecast for loan losses:

3 WaMu's mortgage unit was hit hard by the slowing housing
4 market. The thrift's subprime mortgage business, which lends to
5 customers with blemished credit, was hurt as more borrowers
6 struggled to make their payments and more loans became
7 delinquent.

8 "Subprime encountered significant difficulties," Chief Executive
9 Kerry Killinger said, citing a mix of a slowing housing market,
10 overcapacity in the sub-prime mortgage-origination industry and
11 credit deterioration.

12 The Seattle bank now forecasts that its overall provision for loan
13 and credit-card losses this year would reach between \$1.1 billion
14 and \$1.2 billion, up from the \$850 million to \$950 million it had
15 projected in October. In addition to worsening subprime credit
16 quality, WaMu also attributed the increase to an accounting change
17 for credit-card loans held for sale, among other factors. But
18 management stressed that its credit-card portfolio has performed
19 very well.

20 Ann Carrns, *Earnings Digest: WaMu Net Rises On Sale of Unit; Revenue Declines*, Wall St. J.,
21 Jan. 18, 2007.

22 158. On January 18, 2007, WaMu's stock closed at \$44.26 per share.

23 159. As noted in a *Motley Fool* article dated January 18, 2007, WaMu was being
24 dragged down by its subprime mortgage division. *See* Emil Lee, *Washington Mutual Regroups*
25 *for 2007*, Motley Fool, Jan. 18, 2007. For Q4-06, subprime mortgage losses totaled \$160
26 million. For the full year 2006, the Home Loans Division lost \$48 million, while it had made
\$1 billion in net income during the year 2005.

160. The Company's 2006 Form 10-K detailed the marked increase in delinquencies
and loan foreclosures for the subprime loans the Company was servicing. 2006 Form 10-K.

161. In March 2007, Defendant and former Chief Financial Officer Tom Casey told
analysts that 2006 subprime mortgages were performing "exceedingly poorly relative to price."

1 Eric Martin & Jeff Kearns, *Experts Predict Snag at WaMu*, Seattle Post-Intelligencer, Mar. 13,
 2 2007. Such loans to the riskiest borrowers represented 9 percent of the Company's loan portfolio
 3 at the end of 2006. *Id.*

4 162. In April 2007, WaMu announced a 20% decline in first quarter profit and once
 5 again revised its estimated losses due to bad loans – this time nearly tripling its estimate for loan
 6 losses. The *Wall Street Journal* reported:

8 Washington Mutual Inc., taking a beating from the cratering
 9 subprime-mortgage sector amid a housing downturn, said first-
 quarter profit fell 20%.

10 The Seattle thrift, the largest U.S. savings and loan by stock-
 11 market value, nearly tripled its provision for loan losses, to \$234
 million from \$82 million, as its home-loans business swung to a
 12 loss of \$113 million from a profit of \$52 million a year ago.

13 Chief Executive Kerry Killinger said the thrift has curtailed its
 14 subprime-mortgage lending by 51% from the prior-year quarter to
 reduce its exposure. The thrift also stopped buying mortgages
 from smaller “correspondent” lenders because it has less control
 over loan underwriting in that business.

15 WaMu ranked 11th last year in originating subprime mortgages, as
 16 home loans to borrowers with weak credit are called, according to
 Inside Mortgage Finance, a Bethesda, Md., industry newsletter.

17 Also, among the top-five U.S. home-mortgage lenders, WaMu last
 18 year made the highest percentage of loans to investors or second-
 19 home buyers, according to a Wall Street Journal analysis of data
 filed with banking regulators. Such loans are generally considered
 riskier than those to owner-occupants.

20 Our home-loans business was challenged during the first quarter
 21 by difficult market conditions, Mr. Killinger said in a statement.
 22 He said the steps taken so far should position the thrift to grow as
 the market improves.

23 Ann Carrns, *Earnings Digest: Washington Mutual Earnings Slide on Home-Loan Losses*, Wall
 24 St. J., Apr. 18, 2007.

25 163. In the face of the constant stream of negative results relating to subprime
 26 operations, the Company forged ahead and continued writing extremely risky subprime loans, all

1 the while downplaying the peril created by these products. In April 2007, Rotella told
 2 employees that WaMu had effectively managed the subprime market turmoil by tightening
 3 subprime credit guidelines and proactively reducing WaMu's exposure to these loans. Rotella
 4 reassured employees that "Subprime mortgage lending is a business that, over the long term,
 5 remains a good one for us." *Steve Rotella Discusses Subprime Challenges*, wamu.net, Apr. 5,
 6 2007.

8 164. Defendant Killinger acknowledged WaMu continued to offer these hazardous
 9 loans as late as July 2007, but claimed these products were being offered at significantly lower
 10 volumes. *Kerry Killinger Washington Mutual CEO*, S.F. Chron., Aug. 12, 2007, at E-1.
 11 Killinger told the San Francisco Chronicle:

12 We tried to reduce our participation. The conclusion we have
 13 made is that the slowdown in housing prices and the risk of the
 14 housing market have increased this year, making the 2/28 and 3/27
 15 products less appropriate than they'd been in the past. Those
 products worked well when housing prices were continuing to
 increase.

16 *Id.*

17 165. Defendant Killinger attempted to assure investors and Plan participants:

18 "Over the past 12 months, we have taken a number of prudent
 19 actions to reduce our exposure to the subprime mortgage industry,"
 Mr. Killinger said in a statement. "These actions, along with a
 20 diversified business mix, limited our exposure to the mortgage
 market's downturn and position us well to expand and grow as
 market conditions improve."

21 *Bad Loans Inhibit Profits At Three Regional Banks*, N.Y. Times, Apr. 18, 2007.

22 166. Defendant Killinger also opined that the mortgage crisis presented WaMu with an
 23 opportunity:

24 With a number of competitors going out of business, we're now
 25 able to have better pricing, and the credit quality of the loans being
 26 originated thus far in '07 is significantly better than in '06....It's
 too early to declare victory, but we are seeing encouraging signs.

1 Amy Martinez, *Subprime Fallout Hits WaMu*, Seattle Times, Apr. 18, 2007. At the time
 2 Defendant Killinger made these statements, shares of WaMu stock were trading at about \$41.
 3 Statements such as this one and others Defendant Killinger made directly to employees
 4 obfuscated the dire circumstances faced by WaMu as a result of its perilous and highly risky loan
 5 practices.

6 167. Defendant Killinger reiterated his positive outlook in July 2007, when he
 7 announced his expectation that the Company's home loans group would return to profitability.
 8 *WaMu Beats Forecasts With 8.2% Profit Gain*, Seattle Times, July 18, 2007. In fact, the full
 9 extent of WaMu's exposure to the mortgage market's downturn had yet to be disclosed.

10 168. By August 2007, the Company was forced to acknowledge that liquidity had
 11 diminished significantly in the market for subprime-backed securities. WaMu's share price lost
 12 2.2% of its value, falling to \$35.95 per share. *WaMu's Shares Decline on Mortgage Woes*,
 13 Seattle Times, Aug. 11, 2007.

14 169. In the interview appearing in the *San Francisco Chronicle* on August 12, 2007,
 15 Defendant Killinger admitted that the Company had been aware of serious risks in the subprime
 16 sector at least since 2004: "We were concerned that there was a risk of correction in housing
 17 prices" as early as 2004, "[s]o we did sell off all our 2004 and 2005 residuals of subprime
 18 origination. ... We also sold off the majority of our prime loan originations in the last two years,
 19 whereas in the past we had retained those." *Kerry Killinger Washington Mutual CEO*, S.F.
 20 Chron., Aug. 12, 2007. Nonetheless, Defendant Killinger conceded, the Company had held onto
 21 the MSRs, and therefore retained substantial risk as discussed below. Finally, Defendant
 22 Killinger conceded that "in hindsight, we would probably have made additional adjustments . . .
 23 .'" *Id.*

170. On September 10, 2007, Defendant Killinger spoke at the Lehman Brothers 2007 Financial Services Conference and assured the market that WaMu had positioned itself “to be successful in what is rapidly *becoming* a challenging business environment.” See Washington Mutual Current Report (Form 8-K) (Sept. 13, 2007) at Ex. 99.1 (emphasis added).

171. Defendant Killinger lauded, among other things, the quality of loans held in the Company’s investment portfolio. On a PowerPoint slide, he assured investors that 82% of WaMu’s home loans, including those made through the subprime mortgage channel, had loan-to-value ratios of less than 80%. *Id.* at Slide 12.

172. Two days later, WaMu announced that it was shuttering its erstwhile subprime juggernaut, Long Beach Mortgage. Matthew Padilla, *Washington Mutual Shutting Down Anaheim Subprime Unit*, Orange County Register, Sept. 14, 2007.

173. WaMu’s belated efforts to rein in its subprime business could not mitigate the impact of its subprime binge. On October 5, 2007, WaMu announced a 75% drop in third-quarter profit:

The other shoe dropped Friday for Washington Mutual, as the giant Seattle-based thrift said the collapsed housing and mortgage markets will lead to a 75 percent drop in third-quarter profit.

As the nation’s housing bubble has deflated, WaMu’s stockpile of delinquent loans, foreclosed properties and other non-performing assets has risen – both in absolute terms, to more than \$4 billion, and as a share of its total assets, to 1.3 percent, as of June 30.

Drew DeSilver, *WaMu Forecasts Big Drop in Profit*, Seattle Times, Oct. 6, 2007.

6. WaMu masked its exposure and artificially inflated the price of its stock through questionable accounting

174. In light of the increasingly risky nature of the loans that WaMu originated and purchased, the quality of the Company’s held for investment portfolio grew weaker and weaker

1 as foreclosure and default rates increased – yet the Company refused to reasonably recognize this
2 impairment.

3 175. As the market for subprime loans and mortgage-backed securities inevitably dried
4 up, WaMu was left holding low-quality loans that it could no longer jettison, and faced the risk
5 of being forced to buy back now-worthless loans when it became known that WaMu originated
6 them by using a fraudulent property appraisal scheme that it had also concealed from investors.
7

8 176. All the while, the Company and certain of the Defendants, including Defendant
9 Killinger, made inaccurate and misleading prognostications about the Company's financial
10 future.

11 177. Even after it curtailed its subprime origination practices in the latter part of 2007,
12 WaMu refused to adequately account for its mounting losses, and, as detailed in part below, the
13 Company used various methods of questionable accounting in order to mask the burgeoning
14 crisis that ultimately threatened the very survival of the Company.
15

16 **a. WaMu failed to sufficiently reserve for various liabilities and**
17 **obligations related to mortgages that it securitized or sold**

18 178. In part for the reasons detailed herein, WaMu's financial statements throughout
19 the Class Period failed to reflect the actual liabilities and losses to which the Company was
20 exposed.

21 179. As the credit squeeze tightened and mortgage woes escalated through late 2006
22 and into early 2007, WaMu failed to disclose and adequately account for the increased risks it
23 faced as a result. The Company allocated allowances for loan and lease losses, and, as a
24 specialized subprime lender, WaMu expressly allocated allowances for losses from its subprime
25 mortgage channel. But as the subprime crisis loomed over the mortgage market, WaMu
26

allocated *less* for both general loan and lease losses and losses in its subprime mortgage channel in December 31, 2006 than it did in the prior year ending December 31, 2005 as demonstrated in the following chart of WaMu's publicly stated allowances for loan and lease losses:

2006 Allowances for Loan and Lease Losses

	Allowance for Loan and Lease Losses	Allocated Allowance as a % of Loan Category	Loan Category as a % of Total Loans ⁽¹⁾
Allocated allowance:			
Loans secured by real estate:			
Home loans ⁽²⁾	\$ 202	0.20%	44.22%
Home equity loans and lines of credit ⁽²⁾	184	0.35	23.51
Subprime mortgage channel ⁽³⁾	326	1.57	9.23
Home construction ⁽⁴⁾	5	0.24	0.93
Multi-family	85	0.28	13.41
Other real estate	54	0.80	2.99
Total allocated allowance secured by real estate	856	0.40	94.29

\$202M
allocated for
home loan
losses

\$326M
allocated for
subprime
loan losses

\$856M
allocated for
total loan/lease
losses

2005 Allowances for Loan and Lease Losses

	Allowance for Loan and Lease Losses	Allocated Allowance as a % of Loan Category	Loan Category as a % of Total Loans ⁽¹⁾
(dollars in millions)			
Allocated allowance:			
Loans secured by real estate:			
Home loans ⁽²⁾	\$ 222	0.19%	49.71%
Home equity loans and lines of credit ⁽²⁾	106	0.21	22.14
Subprime mortgage channel ⁽³⁾	374	1.77	9.21
Home construction ⁽⁴⁾	6	0.29	0.89
Multi-family	122	0.48	11.15
Other real estate	69	1.37	2.19
Total allocated allowance secured by real estate	899	0.41	95.29

\$222M
allocated for
home loan
losses

\$374M
allocated for
subprime loan
losses

\$899M
allocated for
total loan/lease
losses

See 2006 Form 10-K at 61.

180. WaMu retained subordinated interests in mortgages that it securitized and made representations to buyers about performance and other characteristics of mortgages that it sold. The Company's Quarterly Reports for 2007 reveal that WaMu under-reserved for credit risk

1 arising from its retained subordinated interests and understated liabilities arising from
 2 representations it made regarding sold mortgages.

3 181. For instance, between March 31, 2007 and September 30, 2007, the Company
 4 increased its recorded reserves and liabilities despite a substantial *decrease* of the related assets
 5 or revenue. From March 31, 2007 to September 30, 2007 WaMu's subordinated interests
 6 decreased from \$2.71 billion to \$2.29 billion; during the same period, its allowance for loan and
 7 lease losses mushroomed from \$1.54 billion to \$1.89 billion, an increase of more than 20%
 8 despite the decrease in subordinated interests. *See* Washington Mutual, Inc., Quarterly Report
 9 (Form 10-Q) (Mar. 31, 2007) and Washington Mutual, Inc., Quarterly Report (Form 10-Q) (Sept.
 10 30, 2007) (hereinafter, "Q3 2007 Form 10-Q").
 11

12 182. WaMu's need to increase its loan loss provisions demonstrates that its previously
 13 announced earnings and equity were inflated and did not properly account for the actual
 14 condition of the Company's loan holdings.
 15

16 183. As detailed further below, these increased loan loss provisions in 2007 were
 17 themselves grossly understated.

18 **b. WaMu's questionable valuation of its loans held for investment, and**
 19 **failure to account for the declining quality of those loans**

20 184. Generally Accepted Accounting Principles ("GAAP") are the conventions, rules
 21 and procedures recognized by the accounting profession as necessary to define accepted
 22 accounting practices at a particular time. The SEC has the statutory authority to promulgate
 23 GAAP for public companies and has delegated that authority to the Financial Accounting
 24 Standards Board (the "FASB"). SEC Regulation S-X (17 C.F.R. § 210.4-01(a)(1)) provides that
 25
 26

1 financial statements filed with the SEC which are not presented in accordance with GAAP will
2 be presumed to be misleading, despite footnotes or other disclosures.

3 185. Pursuant to Statement of Financial Accounting Standards (FAS) 65: "Accounting
4 for Certain Mortgage Banking Activities," a loan held for investment is considered "impaired"
5 only when the holder determines in its discretion that the impairment is "other than temporary."
6

7 186. According to Statement of Financial Accounting Standards (FAS) 115:
8 "Accounting for Debt and Equity Securities," investments (including debt securities such as
9 mortgages) must be placed in one of three categories at the time of acquisition, depending on the
10 company's intentions with regard to holding the investment:

- 11 (i). Securities held to maturity: This category includes mortgages that the
12 company intends to hold to maturity. Under FAS 115, unrealized losses
13 on mortgages held to maturity are only reflected in financial statements if
14 they are considered to be permanent in nature. Because this determination
is made at the discretion of management, classifying a loan in this
category gives the Company the ability to hide losses.
- 15 (ii). Trading securities: This category includes debt and equity securities that
16 are held with the short-term objective of generating profits from short-
17 term differences in price. Mortgage loans held for sale are treated as
trading securities, and unrealized gains and losses from trading securities
are included in the determination of net income.
- 18 (iii). Securities available for sale. All other mortgage loans are included in this
19 category. Unrealized gains and losses are excluded from the
20 determination of net income, except in cases of permanent impairment,
21 which is, again, subject to management discretion.

22 187. Despite mounting evidence of significant impairments to the Company's held for
23 investment portfolio, the Company failed to adequately increase its loan loss reserves.

24 188. According the Company's Q3 2007 Form 10-Q, non-performing loans were up
25 126.3% year-over-year to \$5.45 billion; on a relative basis, non-performing loans surged from
26 0.69% of total assets up to 1.65% of total assets during the same period. Q3 2007 Form 10-Q
at 54.

189. Despite this massive decrease in the quality of the Company's loans, the allowance for loan losses increased by only 18.3% (from \$1.54 billion to \$1.82 billion). The inadequacy of this allowance is evident from the fact that in the year ending September 30, 2006, the allowance equaled 63.9% of nonperforming loans, while in the year ending September 30, 2007, the allowance accounted for only 33.4% of nonperforming loans. *If the allowance for loan and lease losses remained constant as a percentage of nonperforming loans, trailing one-year income would have been reduced by \$1.6 billion.*

190. ARMs played a major role in decreasing the quality of the Company's held for investment portfolio. As of the end of the third quarter of 2007, WaMu carried \$111.3 billion (90.4% of its home loan portfolio) in ARMs. These loans are highly risky given that: (i) when they reset at higher rates, the borrower's payments will often dramatically increase; and (ii) it is all but impossible for many borrowers to refinance at favorable terms, if at all (and has been since the summer of 2007).

191. Still more troubling, approximately 52% (or \$57.9 billion) of the ARMs held in the Company's portfolio as of this time were Option ARMs. These loans were particularly susceptible to impairment. According to the Q3 press release, \$1.5 billion, or 2.59% of the total Option ARMS held by the Company represented unpaid principal, in contrast to one year earlier when the figures were \$0.9 billion, or 1.4% of the total Option ARMs held by the Company.

192. In light of the concentration of ARMs, and Option ARMs, in the Company's held for investment portfolio, the Company should have assumed that impairments would *increase*, and, correspondingly, should have *increased* its loan and lease loss allowances.

1 193. Instead, the Company chose not to recognize any material decline in the market
2 value of any of its loans held for investment.

3 **c. The shifting of loans from the “held for sale” to the “held for**
4 **investment” category**

5 194. Pursuant to Statement of Financial Accounting Standards (FAS) 65: “Accounting
6 for Certain Mortgage Banking Activities,” a bank’s balance sheet must distinguish between a
7 loan held for sale and a loan held for investment.

8 195. According to paragraph 6 of FAS 65, a loan held for investment is one that the
9 holder has both the ability and the intent to hold “for the foreseeable future or until maturity.”
10 Similarly, under FAS 115, “*Securities held to maturity*” includes mortgages that the holder
11 intends to hold to maturity.
12

13 196. In the third quarter of 2007, the Company shifted “\$17 billion in home, multi-
14 family and other commercial real estate loans” from the “held for sale” to the “held for
15 investment” category.
16

17 197. Presumably, these are questionable loans that the Company could not sell due to
18 adverse market conditions.

19 198. However, on the date of transfer, the Company marked the dollar value of these
20 loans down by only \$147 million, or less than 1% of the total value of the loans transferred.

21 199. By changing the classification of these loans, the Company avoided accounting
22 for a much larger impairment. That is because, pursuant to both FAS 65 and FAS 115, a loan
23 held for investment is considered to be impaired only when management determines the
24 impairment to be permanent.
25
26

1 200. Regardless of whether the Company's \$17 billion transfer into the "held for
2 investment" category was proper, the Company's mark-down of the value of the loans was
3 grossly understated, and was therefore false.

4 **d. The questionable recognition of interest income from "Negative**
5 **Amortization" loans**

6 201. A "negative amortization" loan is one in which the balance owed on the loan
7 actually *increases* over time. That is because the borrower's monthly payments do not even
8 cover the monthly interest, and the unpaid interest amounts are added to the loan balance.

9 202. Option ARMs can be negative amortization loans at the discretion of the borrower
10 who chooses to make a minimum monthly payment.

11 203. At all relevant times, the Company knew or should have known that negative
12 amortization loans carry a high risk of delinquency and default. Indeed, common sense suggests
13 that many (or most) borrowers postponing their interest payments did so because they could not
14 afford to pay them.

15 204. Nonetheless, the Company recognized interest income when borrowers postponed
16 their interest payments, even though the Company received no cash.

17 205. In the first nine months of 2007, WaMu recognized \$1.05 billion in interest
18 income from negative amortization, or 7.2% of the Company's interest income during that time
19 period. That represented a massive increase from the year 2005, when negative amortization
20 income was just 1.8% of the Company's interest income.

21 206. The Company's reliance on low-quality negative amortization income, and its
22 failure to adequately account for impairments to that income, was the result of serious
23 mismanagement.
24
25
26

e. **WaMu's reliance on "Gain on Sale" accounting**

207. FAS 140, "Accounting for the Transfer and Servicing of Financial Assets and Extinguishments of Liabilities," sets out the accounting treatment for mortgages that are transferred to a third party. A major purpose of FAS 140 is to proscribe when the securitization of a debt (such as a mortgage) may be deemed a "sale" for accounting purposes.

208. When a securitization is deemed a "sale," a gain on sale is realized and that loan is shifted off the bank's books.

209. However, if a securitization is deemed a collateralization of assets in support of a financing, no gain is realized and the asset (as well as the related borrowings) remains on the bank's balance sheet.

210. Under FAS 140, the securitization of a debt security can be considered a "sale" if (i) the debt security has been properly isolated in a qualifying special purpose entity ("QSPE") and (ii) control over the security has been transferred to the securitization trust.

211. After the "sale" of a mortgage debt via securitization to a secondary entity such as a trust or a QSPE, the secondary entity sells bonds that represent claims on the principal and some of the interest that will come in from the mortgage debt.

212. After such a "sale," the primary enterprise (here, the Company) retains the right to certain interests in the mortgage – such as the servicing rights and possibly other elements such as the right to collect prepayment penalties. To calculate the profits that (theoretically) are still to come, the primary enterprise makes estimates about future losses from nonperforming loans and how long the average account will stay on the books generating interest. The hypothetical earnings, discounted to current value, are then reported as a "gain on sale."

1 213. During the years 2005-2007, WaMu was second (behind only Countrywide
2 Financial Corp.) among major lenders in its reliance on “gain on sale” income. During this time
3 period, gain on sale income accounted for 11.8% of the Company’s operating income.

4 214. Though securitization income declined as the secondary market for subprime
5 mortgages evaporated, WaMu’s prior aggressive use of gain on sale accounting left it highly
6 vulnerable to later write-downs of the Company’s “trading securities” and “available for sale
7 securities,” where most of its retained interests are held.

8 215. Despite the high level of gains on sale from the securitization of low-quality
9 loans, the Company was slow to write down the value of its retained interests through the first
10 six months of 2007.

11 216. Inevitably, however, WaMu was forced to account for the poor quality of its
12 retained interests. In the Third Quarter of 2007, the Company reported impairments to “trading
13 securities” of \$153 million, and impairments to “available for sale securities” of \$104 million.
14 Unfortunately for unsuspecting Plan participants, that was just the tip of the iceberg. In fact, the
15 Company’s heavy reliance on “gain on sale” accounting together with its failure to account for
16 the poor quality of its retained interests meant that its earnings were materially overstated.

17 **f. WaMu’s questionable valuation of mortgage servicing rights**

18 217. As discussed above, one of the assets WaMu typically retained after the “sale” of
19 a mortgage was the MSR. Mortgage servicing is the activity of keeping a mortgage loan current,
20 including collecting monthly mortgage payments, forwarding principal and interest payments to
21 the current mortgage holder (if the loan has been sold), maintaining escrow accounts, paying
22 taxes and insurance premiums, and taking steps to collect overdue payments. An MSR is the
23 right to perform these services in exchange for a fee.
24
25
26

1 218. Significantly, in 2007 WaMu voluntarily adopted FAS 156, “Accounting for
2 Servicing of Financial Assets, an Amendment of FASB Statement No. 140.” This standard was
3 optional, and, by adopting it, WaMu obtained the ability to revalue servicing assets, such as
4 MSRs, on a quarterly basis.

5 219. Under FAS 156 and FAS 157, companies are required to report various assets at
6 “fair value” – including MSRs.

7 220. In order to determine the “fair value” of an asset, a company must consider three
8 “levels” of information. When available, a company must use “Level 1” values, which come
9 from quoted prices in active markets. When Level 1 values are unavailable, a company must
10 next look to “Level 2” evidence; Level 2 values are based on “observable inputs” such as market
11 prices for similar assets. When Level 2 values are unavailable, the company must rely on “Level
12 3” values.

13 221. Level 3 valuations are based on “unobservable inputs.” They are therefore the
14 lowest quality, inherently subjective and most highly suspect valuations.

15 222. According to the Company’s 10-Q for the second quarter of 2007, in the first six
16 months of that year WaMu recognized \$849.0 million in Level 3 gains on its MSRs – or some
17 52.6% of the Companies’ H1 operating income.

18 223. In the first three quarters of 2007, WaMu reported \$6.9 billion in MSRs. By the
19 end of 2007, the Company reported \$6.278 billion in MSRs for the year.

20 224. As WaMu knew or should have known at the time, this amount was materially
21 overstated given that these gains were reported during a period in which default and delinquency
22

1 rates were rising, and, therefore, WaMu's earning were materially overstated during this time
2 period.

3 **7. WaMu concealed the fact that its fraudulent and illegal property appraisals**
4 **artificially inflated the value of its loans**

5 225. On November 1, 2007, WaMu's woes were exacerbated, when New York State
6 Attorney General Andrew Cuomo filed suit against First American Corp. ("First American") and
7 its subsidiary eAppraiseIT, alleging that it had conspired with WaMu to artificially inflate
8 property appraisals in connection with WaMu's origination of loans (hereinafter the "Attorney
9 General Suit"), <http://www.oag.state.ny.us/press/2007/nov/EA%20Complaint.pdf>.

10 226. The Attorney General Suit alleges that, beginning in July 2006, WaMu pressured
11 First American and its affiliates to use certain "preferred appraisers" and that First American
12 responded by allowing "WaMu's loan production staff to hand-pick appraisers who bring in
13 appraisal values high enough to permit WaMu's loans to close, and improperly permits WaMu to
14 pressure [] appraisers to change values that are too low to permit loans to close...." *Id.* at ¶ 8.

15 227. Announcing the suit against First American, the New York Attorney General
16 published a release that stated, in part, the following:

17 Attorney General Andrew M. Cuomo today announced that he is
18 suing one of the nation's largest real estate appraisal management
19 companies and its parent corporation for colluding with the largest
20 savings and loan in the country to inflate the appraisal values of
21 homes.

22 In a scheme detailed in numerous e-mails, eAppraiseIT ("EA"), a
23 subsidiary of First American Corporation (NYSE: FAF), caved to
24 pressure from Washington Mutual ("WaMu") (NYSE: WM) to use
25 a list of preferred "Proven Appraisers" who provided inflated
26 appraisals on homes. The e-mails also show that executives at EA
knew their behavior was illegal, but intentionally broke the law to
secure future business with WaMu.

"The independence of the appraiser is essential to maintaining the
integrity of the mortgage industry. First American and

eAppraiseIT violated that independence when Washington Mutual strong-armed them into a system designed to rip off homeowners and investors alike,” said Attorney General Cuomo. “The blatant actions of First American and eAppraiseIT have contributed to the growing foreclosure crisis and turmoil in the housing market. By allowing Washington Mutual to hand-pick appraisers who inflated values, First American helped set the current mortgage crisis in motion.”

As First American acknowledged in its 2006 annual report, appraisal fraud can damage the entire housing market, including consumers and investors alike. Consumers are harmed because they are misled as to the value of their homes, increasing the risk of foreclosure and hindering their ability to make sound economic decisions. Investors are hurt by such fraud because it skews the value and risk of loans that are sold in financial markets.

In April 2006, EA began providing appraisal services for WaMu, which became EA’s biggest client. Within weeks, WaMu began complaining to EA that its appraisals were not high enough. WaMu pressured EA to employ exclusively a new panel of appraisers that WaMu hand-selected as “Proven Appraisers.” This set of appraisers was chosen by WaMu specifically because they inflated property appraisals. WaMu profited from these higher appraisals because they could close more home loans, at greater values. Over the course of their relationship, between April 2006 and October 2007, EA provided approximately 262,000 appraisals for WaMu.

* * *

Attorney General Cuomo’s lawsuit seeks to end the illegal relationship between First American and EA and WaMu. It also seeks penalties and disgorgement from First American and EA. The lawsuit alleges that First American and EA violated appraiser independence laws, which regulate the conduct of real estate appraisers. The lawsuit was filed in the Supreme Court of New York, New York County.

NY Attorney General Sues First American and its Subsidiary for Conspiring with Washington Mutual to Inflate Real Estate Appraisals, Nov. 1, 2007, http://www.oag.state.ny.us/press/2007/nov/nov1a_07.html (emphasis added).

228. The Attorney General investigation uncovered a series of e-mails between executives of eAppriaseIT, First American and WaMu that demonstrated that appraisal officials conspired to violate state and federal appraisal independence rules and regulations in order to

1 comply with pressure and demands by Defendants. These emails, which evidenced this scheme
2 and illegal course of conduct, were summarized in the release, in part, as follows:

3 On February 22, 2007, in response to a description of the WaMu
4 “proven appraiser” program as one in which “we will now assign
5 all WaMu’s work to WaMu’s ‘proven appraisers’... [and]
6 performance ratings to retain position as a WaMu proven appraiser
7 will be based on how many come in on value,” eAppraiseIT’s
8 president told senior executives at First American: “We have
9 agreed to roll over and just do it...”

10 On April 4, 2007, eAppraiseIT’s executive vice president stated in
11 an e-mail to First American: “We as an AMC [appraisal
12 management company] need to retain our independence from the
13 lender or it will look like collusion... eAppraiseIT is clearly being
14 directed who to select. The reasoning... is bogus for many reasons
15 including the most obvious – the proven appraisers bring in the
16 values.”

17 On April 17, 2007, eAppraiseIT’s president wrote an e-mail to
18 First American explaining why its conduct was illegal: “We view
19 this as a violation of the OCC, OTS, FDIC and USPAP influencing
20 regulation.”

21 E-mail evidence also shows that WaMu pressured eAppraiseIT to
22 inflate appraisals as a condition for doing future business together:
23 on September 27, 2006, First American’s vice chairman reported
24 that a WaMu executive told him: “If the appraisal issues are
25 resolved and things are working well he would welcome
26 conversations about expanding our relationship...”

Id.

229. The inflation of the property appraisals not only permitted WaMu to write loans
in circumstances where none should have been written, but also, by falsifying the key Loan-to-
Value ratio, permitted WaMu’s inflation of the value of those loans whether kept as investments
or securitized and sold to third parties. As WaMu explained in its Annual Report:

Loan-to-value ratios are a key determinant of future performance.
Home loans with loan-to-value ratios of greater than 80 percent at
origination without private mortgage insurance or government
guarantees expose the Company to greater credit risk than home
loans with loan-to-value ratios of 80 percent or less at origination.
This greater credit risk arises because, in general, both default risk

and the severity of loss is higher when borrowers have less equity to protect in the event of foreclosure.

2006 Form 10-K.

230. Put differently, not only did WaMu dramatically alter its risk exposure through increasing its subprime lending exposure, it also purposefully exposed itself to higher risk loans and more severe loss – without disclosing so – by participating in the manipulation of the origination process.

231. In addition to creating the risk of liability for violating state and federal laws, these fraudulent practices pose grave danger to WaMu's financial condition. With regard to affected loans that were sold to third-parties, WaMu is susceptible to the forced re-purchase of the loan due to its breach of warranties regarding the loan's origination process or subsequent performance.

232. As set forth in the Company's 2006 Annual Report:

In the ordinary course of business, the Company sells loans to third parties and in certain circumstances ... retains credit risk exposure on those loans. The Company may also be required to repurchase sold loans when representations and warranties made by the Company in connection with those sales are breached.

233. WaMu fared little better with regard to those loans it kept as its own investments. Discovery of the revised Loan-to-Value ratio required that WaMu recalculate the value of the asset in its own portfolio. The heightened risk profile of the loans also meant that WaMu had insufficient reserves for loan losses.

234. On November 2, 2007, *MarketWatch.com*, an internet financial news website, reported that the revelations that WaMu had artificially inflated loans that were in its portfolio as well as loans it sold and which were later securitized and re-sold, would result in charges to the Company of between \$400 million and \$2.1 billion – a loss of as much as \$1.57 per share.

1 Alistair Barr, *WaMu Vulnerable on Securitized Mortgages? Likely to Set Aside Extra Reserves if*
 2 *Appraisals Found Fraudulent: Analyst*, MarketWatch, Nov. 2, 2007. In addition to the
 3 foregoing, this report stated, in part, the following:

4 ***Washington Mutual may have to set aside some \$412 million to***
 5 ***\$2.1 billion in extra reserves*** if a lawsuit filed by New York state's
 6 attorney general against the mortgage lender succeeds, a Keefe
 Bruyette & Woods analyst estimated on Friday.

7 Attorney General Andrew Cuomo announced the suit on Thursday,
 8 alleging that First American Corp. and its eAppraiseIT unit had
 9 been "colluding" with Washington Mutual, also known as WaMu,
 to inflate the appraisal value of homes.

10 WaMu suspended its relationship with eAppraiseIT and said it has
 no incentive to have appraisers inflate home values. First American
 said the complaint "has no foundation in fact or law."

11 If Cuomo succeeds in proving eAppraiseIT's appraisals on WaMu
 12 home loans were fraudulent, that could create big problems for the
 13 Seattle-based lender, KBW's Frederick Cannon wrote in a note to
 clients.

14 After lenders like WaMu originate home loans, they are often
 15 packaged up into mortgage-backed securities and sold to
 16 institutional investors around the world. The process gets the loans
 off the lenders' books, freeing them from the risk that those loans
 may default and also providing fresh cash to make more new
 mortgages.

17 But if parts of the origination process are found to be fraudulent,
 18 investors can potentially force lenders to buy the mortgages back at
 19 the original price. If the assets have suffered delinquencies and
 have dropped in value, the lender takes a financial hit.

20 * * *

21 **'Considerable risk'**

22 The lawsuit filed by Cuomo ***"raises an issue of considerable risk***
 23 ***to Washington Mutual: that poorly performing securitized loans***
 24 ***will be put back to WaMu from bondholders on the basis of***
fraudulent appraisals and WaMu would be forced to put bad
loans back on its balance sheet," Cannon said.

25 ***"In such a scenario, WaMu would have to buy the loans back at***
 26 ***par and then mark them to market on its balance sheet."***

1 Cannon also questioned WaMu's assertion that it has no incentive
2 to inflate the appraised value of homes that it lends against.

3 For mortgages that the company originates and then keeps on its
4 balance sheet, the assertion is valid. But for home loans that
5 WaMu sells as mortgage-backed securities, such an argument can
6 be dubious, he said.

7 ***For loans that a bank plans to sell, high appraisals support a***
8 ***greater amount of loans that can be sold, and loan officers are***
9 ***generally paid on volume,"*** Cannon explained.

10 "Further, if a mortgage loan is sold it is generally accepted by the
11 lender that they have passed on the default risk to the security
12 holder," he added. "Therefore, it would seem that there indeed
13 could be an incentive for loan officers and the bank to push for
14 inflated home values in the case of sold loans."

15 Cuomo's suit claims that eAppraiseIT provided appraisals or
16 appraisal reviews on roughly 262,000 properties for WaMu
17 between April 2006 and October 2007. If the average loan size was
18 \$200,000 to \$300,000, this would account for between \$52.4
19 billion and \$78.6 billion of loans, Cannon estimated.

20 During the period in question excluding October 2007, WaMu
21 originated \$275.4 billion of real-estate loans, selling \$172.5 billion
22 as mortgage-backed securities. As a result, the loans appraised by
23 eAppraiseIT could account for 19% to 29% of loan production, the
24 analyst wrote.

25 ***The value of mortgages that could be "put back" to WaMu may***
26 ***be about \$33 billion, Cannon estimated. That may require***
additional reserves of \$412 million, or the equivalent of 30 cents
a share, he said.

In a worst-case scenario -- in which inflated appraisals were
systemic throughout WaMu -- the lender might need to set aside an
extra \$2.1 billion, or \$1.57 a share, of reserves, he added.

Id. (emphasis added).

235. The revelations that the Company had conspired to illegally inflate mortgage
appraisals (which conspiracy had the effect of materially misrepresenting the Company's
financial and operational condition, its controls and procedures, and its results of operations),
caused shares of WaMu stock to fall precipitously. On November 1 and 2, 2007, shares of the
Company collapsed over 15%, on very high trading volume. This share price decline

1 represented a huge loss for Plan participants and equated to a loss of almost \$4 billion of
 2 WaMu's market capitalization during that time.

3 236. On November 7, 2007, WaMu stock closed at \$20.04 per share, its lowest closing
 4 price in seven years. Jessica Mintz, *Tough Looking 2008 Sinks WaMu Shares*, Associated Press,
 5 Nov. 7, 2007.
 6

7 **8. WaMu's "SuperScore Scorecard Monitoring" Reports**

8 237. Further allegations of corporate wrongdoing at WaMu emerge from the federal
 9 employment discrimination and whistleblower complaint of Yi Huang filed on May 11, 2007.
 10 *See Huang v. Washington Mutual, Inc.*, No. 07-00736 (W.D. Wash.).

11 238. Huang was a Risk Analyst for WaMu. According to his complaint, he witnessed
 12 a colleague remove unfavorable data from a "SuperScore Scorecard Monitoring" default-risk
 13 report to produce false results for federal banking examiner. Because Mr. Huang believed this
 14 conduct was in violation of 18 U.S.C. § 1006 and banking regulations, he reported it to
 15 management at the Company, including Defendant Killinger.
 16

17 239. Mr. Huang alleges that, after his report, he was reassigned to a different job, and a
 18 less-experienced Caucasian woman was assigned to his Scorecard Monitoring position.
 19 Concerned that his report of fraud was not being taken seriously, Mr. Huang reported his co-
 20 worker's conduct to the U.S. Attorney in July 2005. The co-worker who made the allegedly
 21 fraudulent report was transferred to another job.
 22

23 240. Defendant Killinger never responded to Huang's complaint or to the allegedly
 24 discriminatory and retaliatory conduct to which Huang was subjected.
 25
 26

1 **9. WaMu's Financial Problems Come to Light**

2 241. WaMu's financial problems began to come to light shortly before the stunning
3 allegations of the New York Attorney General Suit became public.

4 242. On October 17, 2007, WaMu officially reported its third-quarter results and
5 dropped a bombshell regarding its losses on loans:

6 If you think the worst is over for mortgage lenders, a close look at
7 Washington Mutual's balance sheet should dispel that notion pretty
8 quickly. The largest U.S. savings and loan stunned investors Oct.
9 17 when it said it would set aside as much as \$1.3 billion this
10 quarter to cover anticipated loan losses. The news came the same
11 day Seattle-based WaMu announced a 72 percent drop in third-
12 quarter profit to \$210.

13 Since then, its stock has fallen 28 percent.

14 But the real wonder is that WaMu's forecast for fourth-quarter
15 loan-loss provisions wasn't substantially higher.

16 Jonathan Weil, *Mortgage Mess Hitting WaMu Hard*, Seattle Times, Nov. 4, 2007.

17 243. According to Weil and other finance commentators, WaMu still had not come
18 clean on its full exposure to risky subprime loans. Weil noted that WaMu's third-quarter
19 "balance sheet maneuvers are a classic case of earnings management." Jonathan Weil,
20 *Countrywide, WaMu Play Shell Games*, Bloomberg News, Nov. 4, 2007. As discussed above,
21 WaMu shifted \$17 billion of loans to its investment portfolio, which permitted it to avoid
22 accounting for them based on their current market value. According to Weil: "While the
23 distinction may look arbitrary, the effect on short-term earnings under the accounting rules can
24 be huge when loan values are falling, as they are now." *Id.*

25 244. On the basis of the Company's third-quarter results, financial analysts panned
26 WaMu. Between October 18 and October 22, four analysts downgraded the stock. Lehman

1 Brothers analyst Bruce Harting estimated WaMu's loan losses for 2008 at \$5 billion, topping his
 2 original estimate of \$3.8 billion. Mintz, *Tough Looking 2008 Sinks WaMu Shares, supra*.

3 245. The Company's earnings management and incremental disclosure of its loan loss
 4 failed to satisfy investors. The stock, which traded above \$40 per share as recently as June 2007,
 5 fell to \$19.39 on November 8, 2007. As a local Seattle columnist noted:
 6

7 At the close of trading Wednesday, WaMu stock finished at \$20.04
 8 a share. That's grim enough when put in historical context. That
 9 was the lowest price since June 2000.

10 It's even worse with a considerably shorter horizon. WaMu
 11 peaked at \$46.55 in November 2003. As recently as June this year,
 12 you could have paid \$44.41 a share.

13 And it really gets ugly when looking back a few days. On
 14 Wednesday, WaMu's stock dropped 17 percent from its Tuesday
 15 close, down \$4.19 a share; at one point during the trading day, it
 16 was actually below \$20 a share.

17 To sum up: In less than six months, WaMu has seen more than half
 18 of its stock price melt away.

19 Bill Virgin, *WaMu Executives Try to Rally Investors, Meet Skepticism*, Seattle P.I., Nov. 7, 2007.

20 246. On December 10, 2007, the Company announced a series of actions designed to
 21 assure the market that it was strengthening its capital and liquidity positions. In particular,
 22 WaMu announced: (i) a \$2.5 billion capital offering of convertible stock; (ii) a reduction in
 23 Company-wide noninterest expenses of about \$500 million for 2008 as a result of downsizing the
 24 Home Loans business and reduced corporate expense; and (iii) a change in the "strategic focus"
 25 of the Home Loans business. Press Release, *WaMu to Raise \$2.5 Billion in Additional Capital,*
 26 *Reduce Dividend, Resize Home Loans Business and Cut Expenses to Fortify Capital Base*, Dec.
 10. 2007.

27 247. These measures occurred as JPMorgan Chase, NA considered buying WaMu.
 28 Punk Ziegel analyst Richard Bove believed that, given the problems at WaMu, the acquisition

1 price would be relatively cheap. Carol Gutierrez, *JPMorgan Looks Hungry*, Forbes, Dec. 11,
2 2007.

3 248. On January 17, 2008, the Company reported a Q4-07 loss of \$1.87 billion,
4 including an after-tax write-down of \$1.6 billion to WaMu's home loan portfolio. WaMu's
5 home loans volume dropped 97 percent to \$19.09 billion compared with the fourth quarter of
6 2006. WaMu also announced that it would set aside \$1.53 billion to cover future loan losses.
7 Press Release, *WaMu Reports Fourth Quarter Net Loss Per Share of \$2.19*, Jan. 17, 2008.

8 249. Nonetheless, Defendant and former CFO Casey sought to reassure investors and
9 Plan participants, claiming that only \$2.1 billion of the Company's \$57 billion option ARM
10 portfolio was "at risk," identifying high risk loans as those originated between 2005 and 2007
11 with an original Loan-to-Value over 80 percent. See Paul Jackson, *WaMu Posts \$1.87 Billion*
12 *Q4 Loss on Mortgage Woes*, HousingWire.Com, Jan. 17, 2008. Defendant Casey further noted
13 that the Company expected net charge-offs in the first quarter of 2008 to be up "20-30 percent"
14 versus Q4 of 2007, and that the loss provision would be in the "range of \$1.8 to \$2.0 billion." *Id.*

15 250. On April 8, 2008, the Company reported a \$1.1 billion first quarter loss, and
16 announced that it would set aside \$3.5 billion to cover future expected losses. Press Release,
17 *WaMu to Strengthen Capital Position, Raising \$7 Billion Anchored by a TPG Capital*
18 *Investment*, Apr. 8, 2008.

19 251. On April 8, 2008, WaMu announced that it had entered into definitive agreements
20 to raise an aggregate of \$7 billion through direct sale of equity securities to an investment vehicle
21 managed by TPG Capital ("TPG"), and other investors, including many of WaMu's top
22
23
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26

1 institutional investors. TPG's investment vehicle would purchase \$2 billion in newly-issued
 2 WaMu securities. *Id.*

3 252. TPG's founder, David Bonderman, was himself a former WaMu Board member,
 4 and, as a result of the TPG equity deal, the Company announced that Bonderman would re-join
 5 the Board as a director of the Company. *Id.*

6 253. As a result of the TPG deal, which was ultimately approved in June 2008,
 7 shareholders including Plan participants faced a nearly 50% dilution to their shares. Bill Virgin,
 8 *Changes at Top for WaMu*, Seattle Times, June 2, 2008.

9 254. On April 11, 2008, a Goldman Sachs analyst stated that the Company might still
 10 face another \$23 billion in mortgage-related losses. David Gaffen, *Goldman: Short WaMu*
 11 *Stock, Buy the Bonds*, MarketBeat, Wall St. J., Apr. 11, 2008.

12 255. On June 9, 2008, a UBS AG analyst report stated that WaMu continued to
 13 underestimate its losses on home loans. According to the report, WaMu "will not demonstrate
 14 meaningful profitability until late 2010 or later," and total losses to the Company may reach a
 15 staggering \$27 billion. Ari Levy & Linda Shen, *Washington Mutual Falls on \$22 Billion Loss*
 16 *Estimate*, Bloomberg, June 9, 2008. WaMu stock dropped on this news to \$12.

17 256. According to a June 24, 2008 Lehman Brothers analyst report, WaMu would have
 18 to set aside as much as \$30 billion for credit losses through 2011, including residential
 19 mortgages, multi-family mortgages, commercial loans and credit card loans. Bhaswati
 20 Mukhopadhyay, *WaMu May Face \$30 Bln Credit Losses Through 2011: Lehman*, Reuters, June
 21 24, 2008.

1 257. On July 22, 2008, WaMu reported losses of \$3.3 billion for the second quarter of
 2 2008, or a diluted loss per share of \$6.58 (including a per-share reduction of \$3.24 related to the
 3 Company's capital issuance in April of 2008). These results were "far worse than Wall Street
 4 was anticipating." David Ellis, *Washington Mutual loses \$3.3 billion*, CNN Money, July 22,
 5 2008.

6 258. According to WaMu's July 22, 2008 press release, the Company increased its
 7 loan loss reserves by \$3.74 billion in the second quarter of 2008, and those loan loss reserves
 8 now totaled \$8.46 billion (by contrast, for the second quarter of 2007, the Company reserved
 9 only \$372 million in loan loss reserves). Press Release, *WaMu Reports Significant Build-Up of*
 10 *Reserves Contributing to Second Quarter Net Loss of \$3.3 Billion*, July 22, 2008. As a
 11 percentage of loans held in portfolio, the reserves stood at 3.52%, up from 1.05% at the end of
 12 2007. The ratio of the reserve to nonperforming loans was 87.26% as of June 30, 2008, more
 13 than double the 41.99% at the end of 2007. *Id.*

14 259. The July 22, 2008 release further stated that nonperforming assets had grown to
 15 3.62% of the Company's total assets as of June 30, 2008, an increase from 2.87% at the end of
 16 the first quarter of 2008. *Id.*

17 260. By then, the end was near for WaMu. Analysts and commentators agreed that the
 18 Company would have to either find a buyer willing to take on its massive portfolio of bad loans
 19 or face bankruptcy.

20 261. According to press reports, possible suitors for WaMu included JPMC and
 21 Goldman Sachs.

1 262. At Defendant Killinger's behest, WaMu reportedly turned down a \$7 billion
2 dollar offer (or roughly \$8 a share) from JPMC earlier in 2008. Had this transaction occurred,
3 the Plan alone would have been spared millions of dollars of subsequent losses.

4 **10. WaMu Collapses**

5 **a. The FDIC seizes Washington Mutual Bank and WaMu files for**
6 **bankruptcy court protection**

7 263. As news of WaMu's ever-growing loan losses spread, its banking customers
8 began withdrawing their money from WaMu. Those withdrawals quickly created what has been
9 described as a liquidity crisis for the beleaguered bank.

10 264. Finally, on September 25, 2008, the OTS appointed the FDIC as receiver of
11 WaMu's banking unit and the FDIC seized Washington Mutual Bank. On the same day, the
12 FDIC sold Washington Mutual Bank -- substantially all of WaMu's assets -- to JPMCNA for
13 \$1.9 billion, a fire-sale price to say the least given JPMC's roughly \$7 billion offer earlier in the
14 year.
15

16 265. On September 26, 2008, WaMu filed for bankruptcy.

17 266. On September 29, 2008, the New York Stock Exchange notified the Company
18 that it had suspended the listing of WaMu stock due to the FDIC receivership, the bankruptcy,
19 JPMCNA's acquisition, and the "abnormally low" trading price of the Company's stock which
20 traded as low as \$0.15 prior to the regulatory trading halt in the Company's securities at the
21 opening of the market on September 26, 2008.
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b. Former CFO – Defendant Longbrake Comes Clean

267. Defendant Longbrake was the CFO of WaMu from 1982 to 2002. During the Class Period, he served as the Company’s Vice-Chair of Enterprise Risk Management, and was a member of the PAC.

268. On October 2, 2008, Defendant Longbrake granted an interview with National Public Radio reporters Alex Blumberg and Adam Davidson. Defendant Longbrake explained that now that Wamu was “gone,” there was no one left to sue him for breaking any non-disclosure agreements.

269. Liberated from such purported restraints, Defendant Longbrake revealed that starting back in 2003 something “disturbed him deeply” about WaMu’s financial condition. As he explained:

...that's when home prices began to rise at a rate that was much faster than people's incomes were rising. Housing prices felt good when they were going up. Everyone was giddy with all the wealth they were accumulating, and a lot of them spent it. The problem was that, all the time, as housing prices were getting higher and higher and higher, the affordability was declining. Eventually, the ability of a lot of people to buy homes just disappeared, and we had too many houses.

Interview of William Longbrake with Alex Blumberg and Adam Davidson, *WaMu Banker Bares Soul*, Oct. 2, 2008, http://www.npr.org/blogs/money/2008/10/hear_wamu_banker_bares_soul.html.

270. According to Defendant Longbrake, he warned Board members that the housing market was becoming too risky; however, his warnings were ignored. He stated:

When you’re in good times and things are going up, everybody tends to be incredibly optimistic and straight-line out that optimism into the future forever. And it’s very hard to go against the tide,

1 those who were raising the red flags and saying, hey, this is too
 2 good to be true. It's building up to a peak that will have to reverse,
 3 and when it does it'll create a lot of damage. Those people just
 4 don't get listened to.

5 Interview of William Longbrake with Alex Blumberg, *Washington Mutual Executive Predicted*
 6 *the Collapse*, Oct. 3, 2008, <http://www.npr.org/templates/story/story.php?storyId=95357008>.

7 271. As reported, Defendant Longbrake said that by 2006, it was clear inside the
 8 Company that too many of WaMu's mortgage customers were not paying back their loans.

9 He knew WaMu was in trouble, but he didn't expect the current
 10 global banking crisis. That's because bank insiders know how
 11 strong or weak their portfolios of mortgages and mortgage-backed
 12 securities really are. But outsiders have no way to know exactly
 13 how risky a bank is.

14 *Id.* As the interviewer noted:

15 People on the inside like Longbrake might know they have all sorts
 16 of dodgy mortgages and mortgage-related securities on their
 17 books. But someone outside has no way to know exactly how
 18 risky the bank is.

19 *Id.*

20 272. As further admitted by Defendant Longbrake:

21 You don't have on the public information an explicit delineation of
 22 what the value of the loans are. You have the types of loans,
 23 whether it's residential mortgage loans or commercial real estate
 24 loans or credit card loans, you can make your own guesses about
 25 what that is, but one bank could have very conservatively
 26 underwritten loans of good value, good performance and another
 bank could have garbage.

27 *Id.*

28 273. When asked about the collapse at WaMu, Defendant Longbrake stated: "It wasn't
 29 like one day it was a great company and the next day it was put into receivership by the
 30

1 FDIC...It progressed over a very long period of time.” *Id.* He followed up by saying that he had
 2 long since resigned himself to the “likely outcome.” *Id.*

3 274. Unfortunately, Defendant Longbrake waited until after the Company collapsed to
 4 come forward and reveal what he knew about the dire circumstances WaMu faced. As a Plan
 5 fiduciary, Defendant Longbrake was duty bound to protect the Plan, which he, and the other
 6 executives and Board members he warned, failed abysmally to do.
 7

8 **11. WaMu’s financial statements failed to reflect the actual liabilities and losses**
 9 **to which the Company was exposed**

10 275. As the following SEC filings and statements illustrate by way of example,
 11 Defendants failed to provide the Plan’s participants with complete and accurate information
 12 regarding WaMu’s serious mismanagement and improper business practices, including, among
 13 other practices, the Company’s: (1) increasingly risk-fraught lending practices; (2) lack of
 14 adequate risk-management controls over its improper lending practices contributing to high
 15 delinquency and foreclosure rates among borrowers; (3) role in the systematic inflation of
 16 property appraisals during the loan origination process; (4) accounting manipulations designed to
 17 understate the Company’s risk and inflate its income; and (5) misrepresentations regarding the
 18 Company’s financial condition. Many such filings and statements were incorporated by
 19 reference into Plan documents and Plan-related materials that were directed to participants
 20 through the SPD and the Plan’s Form S-8.
 21

22 276. **3Q:05 Results Announced.** On October 19, 2005, WaMu published its
 23 purported earnings for the third quarter of 2005 concluding September 30, 2005.
 24
 25
 26

3Q 2005 FINANCIAL SUMMARY

	Sept. 30, 2005	June 30, 2005	Mar. 31, 2005
Interest Income			
(In millions)			
Loans held for sale	\$661	\$576	\$470
Loans held in portfolio	2,862	2,754	2,544
Available-for-sale securities	238	234	224
Trading securities	114	91	79
Other interest and dividend income	65	51	43
Total Interest Expenses	2,024	1,780	1,470
Provision for loan and lease losses	52	31	16
Net interest income including provisions for loan losses	\$1,864	\$1,895	\$1,874
Profitability Ratios			
Return on average common equity	14.66%	15.33%	16.63%
Net interest margin	2.61	2.66	2.73
Efficiency ratio	58.52	57.24	55.77
Nonperforming assets/total assets	0.52	0.53	0.57
Tangible equity/total tangible assets	5.09	5.13	5.03

See Press Release, *Washington Mutual Announces Third Quarter 2005 Earnings; Diluted EPS Increased 21 Percent; Board of Directors Increases Cash Dividend*, Oct. 19, 2005.

277. On November 4, 2005, WaMu filed the Company's third quarter 10-Q Form with the SEC, signed and certified by Defendant Casey. In addition to making substantially similar statements concerning the Company operations, including expenses, costs and ratios, as had been published previously in the Company's October 19, 2005 release, the 1Q:06 Form 10-Q also provided statements concerning the Company's Significant Accounting Policies and the Basis of its Accounting Presentation, in part, as follows:

The preparation of financial statements, in accordance with accounting principles generally accepted in the United States of America, requires management to make a number of judgments, estimates and assumptions that affect the reported amount of assets, liabilities, income and expenses in the Consolidated Financial Statements and accompanying Notes to the Consolidated Financial Statements. *The Company believes that the judgments, estimates and assumptions used in the preparation of its*

1 ***Consolidated Financial Statements are appropriate given the***
 2 ***facts and circumstances as of September 30, 2005.***

3 Various elements of the Company's accounting policies, by their
 4 nature, are inherently subject to estimation techniques, valuation
 5 assumptions and other subjective assessments. ***In particular, the***
 6 ***Company has identified two accounting policies that, due to the***
 7 ***judgments, estimates and assumptions inherent in those policies,***
 8 ***and the sensitivity of its Consolidated Financial Statements to***
 9 ***those judgments, estimates and assumptions, are critical to an***
 10 ***understanding of its Consolidated Financial Statements. These***
 11 ***policies relate to the valuation of its MSR and the methodology***
 12 ***that determines its allowance for loan and lease losses.***

13 Management has discussed the development and selection of these
 14 critical accounting policies with the Company's Audit Committee.
 15 These policies and the judgments, estimates and assumptions are
 16 described in greater detail in the Company's 2004 Annual Report
 17 on Form 10-K in the "Critical Accounting Policies" section of
 18 Management's Discussion and Analysis and in Note 1 to the
 19 Consolidated Financial Statements – "Summary of Significant
 20 Accounting Policies."

21 Washington Mutual, Inc. Quarterly Report (Form 10-Q) at 23 (Nov. 4, 2005) (emphasis added).

22 278. Defendant Killinger praised the third quarter results:

23 ***Our solid third quarter earnings reflected excellent retail banking***
 24 ***household growth*** driven by our long track record of industry leading
 25 customer service, ***as well as our ability to adjust to a challenging interest***
 26 ***rate environment*** ...The results also highlight our continued focus on
 balanced growth, earnings diversity and risk management.

Press Release, *Washington Mutual Announces Third Quarter 2005 Earnings; Diluted EPS*
Increased 21 Percent; Board of Directors Increases Cash Dividend, Oct. 19, 2005 (emphasis
 added).

279. During the conference call to discuss the Q3-05 earnings Bob Napoli, analyst for
 Piper Jaffray stated, "On your subprime business, you talked pretty much about the aggressive
 growth you're seeing in that business, but it seems that the industry is also for the most part at
 record lows, it seems that maybe this isn't the best time to be aggressively growing that business
 ..." *Event Brief of Q3 2005 Washington Mutual Earnings Conference Call – Part 2, The*

1 America's Intelligence Wire, Oct. 1, 2005. WaMu executive Steve Rotella responded, "[W]e
 2 think there may be a [sic] inflexion point here both in subprime and prime, where things may get
 3 a little tough, but *we believe properly with the growth objectives ... we'll come out stronger.*"

4 *Id.*

5
 6 280. The statements made by Defendants and others in the earnings release and
 7 conference call and those statements contained in the Company's 3Q:05 Form 10-Q were
 8 materially false and misleading when made, and were known by Defendants to be false at that
 9 time for, among other reasons, the following:

10 a. During the Class Period, Defendants artificially inflated the income from
 11 the Company's mortgage underwriting and origination, and under-reported its true costs and
 12 failed to take adequate reserves for mortgages because Defendants engaged in a conspiracy and
 13 illegal course of conduct designed to and which did inflate property appraisals and propped up
 14 the Company's results by manipulating WaMu's accounting for revenues and income, and failed
 15 to report other material information about the Company;

17 b. During the Class Period, unbeknownst to Plan participants and the market
 18 as a whole, WaMu materially overstated the Company's profitability by failing to properly
 19 reserve for its inflated and high-risk mortgages and by failing to properly account for the
 20 Company's results of operations, and by artificially inflating the Company's financial results as
 21 detailed above;

23 c. Throughout the Class Period, it was also not true that WaMu contained
 24 adequate systems of internal operational or financial controls, such that WaMu's reported
 25 financial statements were true, accurate or reliable;

d. As a result of the foregoing, throughout the Class Period it also was not true that the Company's financial statements and reports were prepared in accordance with GAAP and SEC rules; and

e. As a result of the aforementioned adverse conditions which Defendants failed to disclose, throughout the Class Period, WaMu lacked any reasonable basis to claim that WaMu was operating according to plan, or that WaMu could achieve guidance sponsored and/or endorsed by the Company.

281. **4Q:05 Results Announced.** On January 18, 2006, the Company announced its fourth quarter earnings for 2005:

4Q 2005 FINANCIAL SUMMARY

	<u>Dec. 31, 2005</u>	<u>Sept. 30, 2005</u>	<u>June 30, 2005</u>
Interest Income			
(In millions)			
Loans held for sale	\$673	\$661	\$576
Loans held in portfolio	3,347	2,862	2,754
Available-for-sale securities	303	238	234
Trading securities	185	114	91
Other interest and dividend income	73	65	51
Total Interest Expenses	2,427	2,024	1,780
Provision for loan and lease losses	<u>121</u>	<u>52</u>	<u>31</u>
Net interest income including provisions for loan losses	\$2,033	\$1,864	\$1,895
Profitability Ratios			
Return on average common equity	12.49%	14.66%	15.33%
Net interest margin	2.77	2.61	2.66
Efficiency ratio	60.79	58.52	57.24
Nonperforming assets/total assets	0.57	0.52	0.53
Tangible equity/total tangible assets	5.73	5.09	5.13

1 See Press Release, *Washington Mutual Announces Fourth Quarter and 2005 Earnings; Diluted*
 2 *EPS Increased 12 Percent for the Quarter and 14 Percent for the Year Board of Directors*
 3 *Increases Cash Dividend*, Jan. 18, 2006.

4 282. On March 15, 2006, the Company filed its Annual report for 2005, signed and
 5 certified by Defendants Killinger and Casey. The Company reiterated its commitment to the
 6 origination of and purchase of subprime home loans, and claimed to be keeping a vigilant watch
 7 on its involved in Option ARM portfolio and the adequacy of its loan loss provisions:

8
 9 The Company continually monitors the credit risk inherent in its option
 10 adjustable-rate mortgage product ("Option ARM") portfolio and assesses
 11 the adequacy of its loan loss allowance in light of prevailing
 12 circumstances and the historical and current levels of negative
 13 amortization in its Option ARM portfolio. . . .

14 *The Company remains committed to the subprime mortgage market and*
 15 *intends to increase the loan volume of its subprime mortgage business,*
 16 *Long Beach Mortgage Company, and to maintain the size of its*
 17 *purchased subprime home loan portfolio. . . .*

18 Washington Mutual, Inc. Annual Report (Form 10-K) at 23 (Mar. 15, 2006) (emphasis added).

19 283. Despite the Company's decision to more than double the provisions for loan and
 20 lease losses from the prior quarter, Defendant Killinger touted WaMu's allegedly solid
 21 performance and reassured investors (including Plan participants) that, "Our strategies are sound
 22 and we continue to execute on our growth and productivity initiatives." Press Release,
 23 *Washington Mutual Announces Fourth Quarter and 2005 Earnings; Diluted EPS Increased*
 24 *12 Percent for the Quarter and 14 Percent for the Year Board of Directors Increases Cash*
 25 *Dividend*, Jan. 18, 2006.

26 284. **1Q:06 Results Announced.** On April 18, 2006, WaMu published a press release
 announcing purported results for the first quarter of 2006, ended March 31, 2006. This release
 stated, in part, the following:

1Q 2006 FINANCIAL SUMMARY

	Mar. 31, 2006	Dec. 31, 2005	Sept. 30, 2005
Interest Income			
(In millions)			
Loans held for sale	\$466	\$676	\$661
Loans held in portfolio	3,576	3,431	2,862
Available-for-sale securities	322	303	238
Trading securities	198	185	114
Other interest and dividend income	95	73	65
Total Interest Expenses	2,540	2,427	2,024
Provision for loan and lease losses	82	217	52
Net interest income including provisions for loan losses	\$2,117	\$2,024	\$1,864
Profitability Ratios			
Return on average common equity	% 14.18	% 12.49	% 14.66
Net interest margin	2.75	2.77	2.61
Efficiency ratio	57.54	60.79	58.52
Nonperforming assets/total assets	0.59	0.57	0.52
Tangible equity/total tangible assets	5.85	5.73	5.09

285. In addition to the foregoing, the April 18, 2006 release also quoted Defendant Killinger, in part, as follows:

We are very pleased with our first quarter results, said Kerry Killinger, Washington Mutual chairman and chief executive officer. *The company's strong performance demonstrates the benefits of our continued diversification and enhanced operational focus.* This past quarter we had particularly strong results in Retail Banking and Card Services.

These businesses added customers at a record pace and delivered significant revenue and earnings even in this difficult interest rate environment, Killinger added. [Emphasis added.]

286. **1Q:06 Form 10-Q.** On or about May 10, 2006, WaMu filed with the SEC the Company's 1Q:06 Form 10-Q, for the quarter ended March 31, 2006, signed and certified by Defendants Killinger and Casey. In addition to making substantially similar statements concerning the Company operations, including expenses, costs and ratios, as had been published previously in the Company's April 18, 2006 release, the 1Q:06 Form 10-Q also provided

1 statements concerning the Company's Significant Accounting Policies and the Basis of its
 2 Accounting Presentation, in part, as follows:

3 The accompanying Consolidated Financial Statements are
 4 unaudited and include the accounts of Washington Mutual, Inc.
 5 and its subsidiaries ("Washington Mutual" or the "Company").
 6 *The Company's financial reporting and accounting policies
 conform to accounting principles generally accepted in the
 United States of America ("GAAP")....* [Emphasis added.]

7 287. The Company's 1Q:06 Form 10-Q also contained representations which attested
 8 to the purported effectiveness and sufficiency of the Company's controls and procedures, as
 9 follows:

10 **Controls and Procedures**

11 **Disclosure Controls and Procedures**

12 *The Company's management, with the participation of the*
 13 *Company's Chief Executive Officer and Chief Financial Officer,*
 14 *has evaluated the effectiveness of the Company's disclosure*
 15 *controls and procedures as of the end of the period covered by*
 16 *this report.* Based on such evaluation, the Company's Chief
 17 Executive Officer and Chief Financial Officer have concluded that,
 18 as of the end of such period, *the Company's disclosure controls*
 19 *and procedures are effective in recording, processing,*
 20 *summarizing and reporting, on a timely basis, information*
 21 *required to be disclosed by the Company in the reports that it files*
 22 *or submits under the Securities Exchange Act of 1934.*

18 *Management reviews and evaluates the design and effectiveness*
 19 *of the Company's disclosure controls and procedures on an*
 20 *ongoing basis,* which may result in the discovery of deficiencies,
 21 and improves its controls and procedures over time, correcting any
 22 deficiencies that may have been discovered.

21 **Changes in Internal Control Over Financial Reporting**

22 *Management reviews and evaluates the design and effectiveness*
 23 *of the Company's internal control over financial reporting on an*
 24 *ongoing basis,* which may result in the discovery of deficiencies,
 25 some of which may be significant, and changes its internal control
 26 over financial reporting as needed to maintain their effectiveness,
 correcting any deficiencies, as needed, in order to ensure the
 continued effectiveness of the Company's internal controls. *There*
have not been any changes in the Company's internal control
over financial reporting during the first quarter of 2006 that

1 *have materially affected, or are reasonably likely to materially*
 2 *affect, the Company's internal control over financial*
reporting.... [Emphasis added.]

3 288. In addition to the foregoing, the Company's 1Q:06 Form 10-Q also contained
 4 certifications by Defendants Killinger and Casey, that attested to the purported accuracy and
 5 completeness of the Company's financial and operational reports, as follows:

6 **WASHINGTON MUTUAL, INC.**
 7 **Certification of the Chief Executive Officer**

8 Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to
 9 Section 906 of the Sarbanes-Oxley Act of 2002, **Kerry K.**
 10 **Killinger**, the Chief Executive Officer of Washington Mutual, Inc.,
 11 does hereby certify that this report on Form 10-Q fully complies
 12 with the requirements of Section 13(a) or 15(d) of the Securities
 Exchange Act of 1934 and that *the information contained in this*
report fairly presents, in all material respects, the financial
condition and results of operations of Washington Mutual, Inc.

13 Date: May 10, 2006

14 By: /s/ KERRY K. KILLINGER

15 Kerry K. Killinger
 Chairman and Chief Executive Officer
 of Washington Mutual, Inc.

16 **WASHINGTON MUTUAL, INC.**
 17 **Certification of the Chief Financial Officer**

18 Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section
 19 906 of the Sarbanes-Oxley Act of 2002, **Thomas W. Casey**, the
 20 Chief Financial Officer of Washington Mutual, Inc., does hereby
 21 certify that this report on Form 10-Q fully complies with the
 requirements of Section 13(a) or 15(d) of the Securities Exchange
 Act of 1934 and that *the information contained in this report*
fairly presents, in all material respects, the financial condition
and results of operations of Washington Mutual, Inc.

22 Date: May 10, 2006

23 By: /s/ THOMAS W. CASEY

24 Thomas W. Casey
 25 Executive Vice President and Chief Financial Officer
 26 of Washington Mutual, Inc. [Emphasis added.]

289. The statements made by and contained in the Company's May 10, 2006 release and in the Company's 1Q:06 Form 10-K were materially false and misleading when made, and were known by Defendants to be false at that time or were recklessly disregarded as such thereby for the reasons stated herein.

290. **2Q:06 Results Announced.** On July 19, 2006, WaMu published a release announcing purported results for the second quarter of 2006, the period ended June 30, 2006. This release stated, in part, the following:

Washington Mutual, Inc. (NYSE:WM) today reported second quarter 2006 net income of \$767 million, or \$0.79 per diluted share, including an after tax adjustment of \$101 million to reflect the pending sale of \$2.6 billion of mortgage servicing rights and an after tax restructuring charge of \$52 million related to the company's efficiency initiatives.

Net income excluding these two items would have been \$920 million, or \$0.94 per diluted share, compared with net income of \$844 million, or \$0.95 per diluted share in the second quarter of 2005.

The company announced today a series of actions it is taking that will significantly improve the company's market risk profile, greatly accelerate the achievement of its operating efficiency goals, and be accretive to earnings in 2006 and 2007. [Emphasis added.]

2Q 2006 FINANCIAL SUMMARY

	<u>Jun. 30, 2006</u>	<u>Mar. 31, 2006</u>	<u>Dec. 31, 2005</u>
Interest Income			
(In millions)			
Loans held for sale	\$398	\$466	\$676
Loans held in portfolio	3,884	3,576	3,431
Available-for-sale securities	368	322	303
Trading securities	165	198	185
Other interest and dividend income	120	95	73
Total Interest Expenses	2,875	2,540	2,427
Provision for loan and lease losses	<u>224</u>	<u>82</u>	<u>217</u>
Net interest income including provisions for loan losses	\$1,836	\$2,035	\$2,024

CONSOLIDATED SECOND AMENDED
COMPLAINT FOR BREACHES OF DUTY
UNDER THE EMPLOYEE RETIREMENT
INCOME SECURITY ACT - 91
Case No. 2:08-md-01919-MJP

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Profitability Ratios

Return on average common equity	% 11.39	% 14.18	% 12.49
Net interest margin	2.65	2.75	2.77
Efficiency ratio	61.27	57.54	60.79
Nonperforming assets/total assets	0.62	0.59	0.57
Tangible equity/total tangible assets	5.94	5.85	5.73

Press Release, *Washington Mutual Reports Second Quarter Earnings Per Share of 79 Cents, 94 Cents Per Share Before the Second Quarter Impact of the Pending Sale of Mortgage Servicing Rights and Restructuring Charges*, July 19, 2006 (emphasis added).

291. **2Q:06 Form 10-Q.** On or about August 9, 2006, WaMu filed with the SEC the Company's 2Q:06 Form 10-Q, for the quarter ended June 30, 2006, signed and certified by Defendants Killinger and Casey. In addition to making substantially similar statements concerning the Company's operations, including expenses, costs and ratios, as had been published previously in the Company's July 19, 2006 release, the 2Q:06 Form 10-Q also provided statements concerning the Company's Significant Accounting Policies and the Basis of its Accounting Presentation, in part, as follows:

Note 1: Summary of Significant Accounting Policies*Basis of Presentation*

The accompanying Consolidated Financial Statements are unaudited and include the accounts of Washington Mutual, Inc. and its subsidiaries ("Washington Mutual" or the "Company").

The Company's financial reporting and accounting policies conform to accounting principles generally accepted in the United States of America ("GAAP").... [Emphasis added.]

292. The Company's 2Q:06 Form 10-Q again contained representations which attested to the purported effectiveness and sufficiency of the Company's controls and procedures, as follows:

Controls and Procedures**Disclosure Controls and Procedures**

The Company's management, with the participation of the Company's Chief Executive Officer and Chief Financial Officer, has evaluated the effectiveness of the Company's disclosure controls and procedures as of the end of the period covered by this report. ***Based on such evaluation, the Company's Chief Executive Officer and Chief Financial Officer have concluded that, as of the end of such period, the Company's disclosure controls and procedures are effective in recording, processing, summarizing and reporting, on a timely basis, information required to be disclosed by the Company in the reports that it files or submits under the Securities Exchange Act of 1934.***

In reaching the conclusion that disclosure controls and procedures were effective, management had considered the potential financial impact of control deficiencies associated with the matters giving rise to the restatement described in Note 2 to the Consolidated Financial Statements on page 7. Management believes this restatement is immaterial and was not the result of a material weakness in the Company's internal control over financial reporting. Accordingly, management has not changed its conclusion described above that the Company's disclosure controls and procedures were designed and operating effectively as of June 30, 2006.

Management reviews and evaluates the design and effectiveness of the Company's disclosure controls and procedures on an ongoing basis, which may result in the discovery of deficiencies, and improves its controls and procedures over time, correcting any deficiencies that may have been discovered.

Changes in Internal Control Over Financial Reporting

Management reviews and evaluates the design and effectiveness of the Company's internal control over financial reporting on an ongoing basis, which may result in the discovery of deficiencies, some of which may be significant, and changes its internal control over financial reporting as needed to maintain their effectiveness, correcting any deficiencies, as needed, in order to ensure the continued effectiveness of the Company's internal controls. There have not been any changes in the Company's internal control over financial reporting during the second quarter of 2006 that have materially affected, or are reasonably likely to materially affect, the Company's internal control over financial reporting....
[Emphasis added.]

293. In addition to the foregoing, the Company's 2Q:06 Form 10-Q also contained certifications by Defendants Killinger and Casey, that attested to the purported accuracy and completeness of the Company's financial and operational reports, as follows:

WASHINGTON MUTUAL, INC.
Certification of the Chief Executive Officer

Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, **Kerry K. Killinger**, the Chief Executive Officer of Washington Mutual, Inc., does hereby certify that this report on Form 10-Q fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that *the information contained in this report fairly presents, in all material respects, the financial condition and results of operations of Washington Mutual, Inc.*

By: /s/ KERRY K. KILLINGER
 Kerry K. Killinger
 Chairman and Chief Executive Officer
 of Washington Mutual, Inc.

WASHINGTON MUTUAL, INC.
Certification of the Chief Financial Officer

Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, **Thomas W. Casey**, the Chief Financial Officer of Washington Mutual, Inc., does hereby certify that this report on Form 10-Q fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that *the information contained in this report fairly presents, in all material respects, the financial condition and results of operations of Washington Mutual, Inc.*

Date: August 9, 2006
 By: /s/ THOMAS W. CASEY
 Thomas W. Casey
 Executive Vice President and
 Chief Financial Officer of Washington Mutual, Inc. [Emphasis added.]

294. The statements made by and contained in the Company's July 19, 2006 release and in the Company's 2Q:06 Form 10-Q were materially false and misleading when made, and were known by Defendants to be false at that time or were recklessly disregarded as such thereby for the reasons stated herein.

295. **3Q:06 Results Announced.** On October 18, 2006, WaMu published a release announcing purported results for the third quarter of 2006, ended September 30, 2006. This release stated, in part, the following:

**Washington Mutual Reports Third Quarter Earnings Per Share of 77 Cents;
Results Included Charges Associated with the Sale of Mortgage Servicing
Rights and Efficiency Initiatives Board of Directors Increases Cash Dividend
to 53 Cents**

SEATTLE – Washington Mutual, Inc. (NYSE: WM) today reported third quarter 2006 net income of \$748 million, or \$0.77 per diluted share compared with net income of \$821 million, or \$0.92 per diluted share, in the third quarter of 2005.

Third quarter 2006 earnings included net after tax charges of \$31 million, or \$0.03 per diluted share, related to the previously announced sale of \$2.53 billion of mortgage servicing rights, and after tax charges of \$33 million, or \$0.04 per diluted share, related to the company's ongoing efficiency initiatives, which are expected to continue into the fourth quarter.

* * *

WaMu's Board of Directors declared a cash dividend of 53 cents per share on the company's common stock, up from 52 cents per share in the previous quarter. Dividends on the common stock are payable on November 15, 2006 to shareholders of record as of October 31, 2006.

3Q 2006 FINANCIAL SUMMARY

	Sept. 30, 2006	Jun. 30, 2006	Mar. 31, 2006
Interest Income			
(In millions)			
Loans held for sale	\$439	\$398	\$466
Loans held in portfolio	4,008	3,884	3,576
Available-for-sale securities	379	368	322
Trading securities	140	165	198
Other interest and dividend income	139	120	95
Total Interest Expenses	3,158	2,875	2,540
Provision for loan and lease losses	166	224	82
Net interest income including provisions for loan losses	\$1,781	\$1,836	\$2,035
Profitability Ratios			
Return on average common equity	% 11.47	% 11.82	% 14.18
Net interest margin	2.53	2.65	2.75
Efficiency ratio	62.09	61.27	57.54
Nonperforming assets/total assets	0.69	0.62	0.59
Tangible equity/total tangible assets	5.86	5.94	5.85

1 Press Release, *Washington Mutual Reports Third Quarter Earnings Per Share of 77 Cents --*
 2 *Results Included Charges Associated with the Sale of Mortgage Servicing Rights and Efficiency*
 3 *Initiatives*, Oct. 18, 2006 (emphasis added).

4 296. In addition to the foregoing, the October 18, 2006 release also quoted Defendant
 5 Killinger, in part, as follows:

6 *“We continue to focus on the successful execution of our*
 7 *strategic plan despite the challenging operating environment,”*
 8 said Kerry Killinger, WaMu Chairman and CEO, noting that, as
 9 anticipated, the costs associated with the MSR sale announced in
 the second quarter and the company’s ongoing efficiency
 initiatives impacted third quarter results. . . .

10 Killinger added, *“We remain confident in our strategy to*
 11 *reposition the company and set the stage for stronger*
performance in 2007.”

12 *Id.* (emphasis added).

13 297. On a conference call also on October 18, 2006, Killinger stated, “Despite the
 14 challenging environment impacting the mortgage banking industry, we feel good about the
 15 proactive steps we have taken. Our portfolio remains in very good shape and nonperforming
 16 assets remain very low.... The quality of our Option ARM portfolio remains strong.”

17 298. **3Q:06 Form 10-Q.** On or about November 9, 2006, WaMu filed with the SEC
 18 the Company’s 3Q:06 Form 10-Q, for the quarter ended September 30, 2006, signed and
 19 certified by Defendants Killinger and Casey. In addition to making substantially similar
 20 statements concerning the Company’s operations, including expenses, costs and ratios, as had
 21 been published previously in the Company’s October 18, 2006 release, the 3Q:06 Form 10-Q
 22 also provided statements concerning the Company’s Significant Accounting Policies and the
 23 Basis of its Accounting Presentation, in part, as follows:
 24
 25
 26

Note 1: Summary of Significant Accounting Policies

Basis of Presentation

The accompanying Consolidated Financial Statements are unaudited and include the accounts of Washington Mutual, Inc. and its subsidiaries ("Washington Mutual" or the "Company"). ***The Company's financial reporting and accounting policies conform to accounting principles generally accepted in the United States of America ("GAAP")....*** [Emphasis added.]

299. The Company's 3Q:06 Form 10-Q also contained representations which attested to the purported effectiveness and sufficiency of the Company's controls and procedures, as follows:

Controls and Procedures

Disclosure Controls and Procedures

The Company's management, with the participation of the Company's Chief Executive Officer and Chief Financial Officer, has evaluated the effectiveness of the Company's disclosure controls and procedures as of the end of the period covered by this report. Based on such evaluation, ***the Company's Chief Executive Officer and Chief Financial Officer have concluded that, as of the end of such period, the Company's disclosure controls and procedures are effective in recording, processing, summarizing and reporting, on a timely basis, information required to be disclosed by the Company*** in the reports that it files or submits under the Securities Exchange Act of 1934.

Management reviews and evaluates the design and effectiveness of the Company's disclosure controls and procedures on an ongoing basis, which may result in the discovery of deficiencies, and improves its controls and procedures over time, correcting any deficiencies that may have been discovered.

Changes in Internal Control Over Financial Reporting

Management reviews and evaluates the design and effectiveness of the Company's internal control over financial reporting on an ongoing basis, which may result in the discovery of deficiencies, some of which may be significant, and changes its internal control over financial reporting as needed to maintain their effectiveness, correcting any deficiencies, as needed, in order to ensure the continued effectiveness of the Company's internal controls. ***There have not been any changes in the Company's internal control over financial reporting during the third quarter of 2006 that have materially affected, or are reasonably likely to materially***

1 *affect, the Company's internal control over financial*
 2 *reporting....[Emphasis added.]*

3 300. The Company's 3Q:06 Form 10-Q also contained certifications by Defendants
 4 Killinger and Casey, that attested to the purported accuracy and completeness of the Company's
 5 financial and operational reports, as follows:

6 **WASHINGTON MUTUAL, INC.**
 7 **Certification of the Chief Executive Officer**

8 Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section
 9 906 of the Sarbanes-Oxley Act of 2002, **Kerry K. Killinger**, the
 10 Chief Executive Officer of Washington Mutual, Inc., does hereby
 11 certify that this report on Form 10-Q fully complies with the
 requirements of Section 13(a) or 15(d) of the Securities Exchange
 Act of 1934 and that *the information contained in this report*
fairly presents, in all material respects, the financial condition
and results of operations of Washington Mutual, Inc.

12 Date: November 9, 2006

13 By: /s/ KERRY K. KILLINGER
 14 Kerry K. Killinger
 15 *Chairman and Chief Executive Officer*
of Washington Mutual, Inc.

16 **WASHINGTON MUTUAL, INC.**
 17 **Certification of the Chief Financial Officer**

18 Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section
 19 906 of the Sarbanes-Oxley Act of 2002, **Thomas W. Casey**, the
 20 Chief Financial Officer of Washington Mutual, Inc., does hereby
 21 certify that this report on Form 10-Q fully complies with the
 requirements of Section 13(a) or 15(d) of the Securities Exchange
 Act of 1934 and that *the information contained in this report*
fairly presents, in all material respects, the financial condition
and results of operations of Washington Mutual, Inc.

22 Date: November 9, 2006

23 By: /s/ THOMAS W. CASEY
 24 Thomas W. Casey
 25 *Executive Vice President and Chief Financial Officer*
 26 *of Washington Mutual, Inc.* [Emphasis added.]

301. The statements contained in WaMu's October 18, 2006 release and those statements contained in the Company's 3Q:06 Form 10-Q, referenced above, were each materially false and misleading when made, and were known by Defendants to be false or were recklessly disregarded as such thereby, for the reasons stated herein.

302. **4Q:06 Results Announced.** On January 17, 2007, WaMu published a release announcing purported results for the 4Q and FY:2006, ended December 31, 2006. This release stated, in part, the following:

Washington Mutual, Inc. (NYSE:WM) today reported fourth quarter 2006 net income of \$1.06 billion, or \$1.10 per diluted share, compared with net income of \$865 million, or \$0.85 per diluted share, in the fourth quarter of 2005. Net income for 2006 was \$3.56 billion, or \$3.64 per diluted share, compared with net income of \$3.43 billion, or \$3.73 per diluted share, in 2005.

* * *

On Jan. 3, 2007, the company entered into an accelerated share repurchase agreement with a dealer, buying back \$2.7 billion of its common stock. The company also increased its cash dividend to 54 cents per common share, up from 53 cents per share in the previous quarter.

4Q 2006 FINANCIAL SUMMARY

	<u>Dec. 31,</u> <u>2006</u>	<u>Sept. 30,</u> <u>2006</u>	<u>Jun. 30,</u> <u>2006</u>
Interest Income			
(In millions)			
Loans held for sale	\$520	\$439	\$398
Loans held in portfolio	4,048	4,008	3,884
Available-for-sale securities	392	379	368
Trading securities	102	140	165
Other interest and dividend income	148	139	120
Total Interest Expenses	3,212	3,158	2,875
Provision for loan and lease losses	<u>344</u>	<u>166</u>	<u>224</u>
Net interest income including provisions for loan losses	\$1,654	\$1,781	\$1,836

Profitability Ratios

Return on average common equity	% 16.03	% 11.47	% 11.82
Net interest margin	2.58	2.53	2.65
Efficiency ratio	62.87	62.09	61.27
Nonperforming assets/total assets	0.80	0.69	0.62
Tangible equity/total tangible assets	6.04	5.86	5.94

303. The January 17, 2007 release also quoted Defendant Killinger, in part, as follows:

Killinger noted that opportunities to grow the balance sheet at attractive risk-adjusted returns are limited, making the accelerated share repurchase transaction a superior use of capital.

Our outlook for 2007 reflects the strategic actions we took in 2006 to prepare the company for the future, Killinger added. Those decisive actions have positioned us well to deliver stronger operating performance in 2007. [Emphasis added.]

304. **2006 Form 10-K.** On or about March 1, 2007, WaMu filed with the SEC the Company's 2006 Form 10-K, for the quarter and year ended December 31, 2006, certified by Defendants Killinger and Casey. In addition to making substantially similar statements concerning the Company operations, including expenses, costs and ratios, as had been published previously in the Company's November 18, 2006 release, the 2006 Form 10-K also provided statements concerning the Company's significant accounting policies, including the Fair Value of Certain Financial Instruments and Assets, in part, as follows:

Fair Value of Certain Financial Instruments and Other Assets

A portion of the Company's assets are carried at fair value, including: mortgage servicing rights, certain retained interests from securitization activities (which are classified as trading assets), available-for-sale securities and derivatives. In addition, *loans held for sale are recorded at the lower of carrying value or fair value.* Changes in fair value of those instruments that qualify as hedged items under fair value hedge accounting are recognized in earnings and offset the changes in fair value of derivatives used as hedge accounting instruments.

Fair value is defined as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date. Generally, for assets that are reported at fair value, the Company uses quoted market prices or internal valuation models that utilize market data

inputs where readily available and other assumptions, such as loan prepayment speeds, forward interest rate yield curves, market volatilities and pricing spreads to determine their fair values. The degree of management judgment involved in determining the fair value of a financial instrument or other asset is dependent upon the availability of quoted market prices or observable market value inputs. For financial instruments that are actively traded in the marketplace or whose values are based on readily available market value data, little, if any, subjectivity is applied when determining the instrument's fair value. ***When observable market prices and data are not readily available, significant management judgment often is necessary to estimate fair value....***

The following financial instruments and other assets require the Company's most complex judgments and assumptions when estimating fair value:

Mortgage Servicing Rights and Certain Other Retained Interests in Securitizations

MSR and certain other retained interests from securitization activities do not trade in an active, open market with readily quoted prices. Although sales do occur from time to time, the terms of such sales are generally not readily available. Consequently, the Company estimates the fair value of MSR and certain other retained interests in securitization activities utilizing internal discounted cash flow models.

The discounted cash flow model for MSR calculates the present value of the expected future net cash flows of the servicing portfolio based on various assumptions, such as estimated future servicing costs, expected servicing portfolio prepayment speeds and discount rates that are commensurate with the risk profile of the serviced assets. This model is highly sensitive to changes in certain assumptions. Different expected prepayment speeds, in particular, can result in substantial changes in the estimated fair value of MSR. If actual prepayment experience differs materially from the expected prepayment speeds used in the Company's model, this difference would likely result in a material change in MSR fair value. While the Company's model estimates a value, the specific value used is based on a variety of market-based factors, such as documented observable data and expected changes in prepayment speeds. ***The reasonableness of management's assumptions about these factors is evaluated through quarterly independent broker surveys. Independent appraisals of the fair value of the mortgage servicing rights are obtained at least quarterly, and are used by management to evaluate the reasonableness of the fair value conclusions....*** [Emphasis added.]

305. In addition to the foregoing, the 2006 Form 10-K also provided statements concerning the Company's accounting for Allowance for Loan Losses and Contingent Risk Liabilities, in part, as follows:

Allowance for Loan and Lease Losses and Contingent Credit Risk Liabilities

Allowance for loan and lease losses

The allowance for loan and lease losses represents management's estimate of incurred credit losses inherent in the Company's loan and lease portfolios as of the balance sheet date.

The estimation of the allowance is based on a variety of factors, including past loan loss experience, the current credit profile of the Company's borrowers, adverse situations that have occurred that may affect the borrowers' ability to repay, ***the estimated value of underlying collateral***, the interest rate climate as it affects adjustable-rate loans and general economic conditions. ***Loans held in portfolio that are evaluated for collective impairment and loans held in portfolio that are individually reviewed for impairment but deemed not to be impaired may have both an allocated and unallocated allowance. Loans that are individually deemed to be impaired may only have an allocated allowance.***

The allowance for loans evaluated for collective impairment is comprised of an allocated allowance that is computed for each portfolio based on specific loan portfolio metrics and an unallocated allowance that is computed based on certain environmental factors we believe are not adequately captured in the allocated allowance computations. Determining the adequacy of the allowance, particularly the unallocated allowance, is complex and requires judgment by management about the effect of matters that are inherently uncertain. Subsequent evaluations of the loan portfolio, in light of the factors then prevailing, may result in significant changes in the allowance for loan and lease losses in future periods.

The allowance is comprised of an allowance for individually impaired loans, as well as an allowance for other individually unimpaired loans that share common risk characteristics that, in the aggregate, have incurred a probable loss on a collective basis. ***The determination of common risk factors that indicate a probable loss on a collective basis is complex and requires significant judgment by management about the shared risk characteristics that suggest a probable loss.***

The allowance for loan and lease losses is reported within the Consolidated Statements of Financial Condition and the provision

for loan and lease losses is reported within the Consolidated Statements of Income. [Emphasis added.]

306. The Company's 2006 Form 10-K again contained representations which attested to the purported effectiveness and sufficiency of the Company's controls and procedures, as follows:

Controls and Procedures

Disclosure Controls and Procedures

The Company's management, with the participation of the Company's Chief Executive Officer and Chief Financial Officer, has evaluated the effectiveness of the Company's disclosure controls and procedures as of the end of the period covered by this report. Based on such evaluation, the Company's Chief Executive Officer and Chief Financial Officer have concluded that, as of the end of such period, *the Company's disclosure controls and procedures are effective in recording, processing, summarizing and reporting, on a timely basis, information required to be disclosed by the Company in the reports that it files or furnishes under the Securities Exchange Act of 1934.*

Management reviews and evaluates the design and effectiveness of the Company's disclosure controls and procedures on an ongoing basis, which may result in the discovery of deficiencies, and improves its controls and procedures over time, correcting any deficiencies, as needed, that may have been discovered.

Changes in Internal Control Over Financial Reporting

Management reviews and evaluates the design and effectiveness of the Company's internal control over financial reporting on an ongoing basis, which may result in the discovery of deficiencies, some of which may be significant, and changes its internal control over financial reporting as needed to maintain its effectiveness, correcting any deficiencies, as needed, in order to ensure the continued effectiveness of the Company's internal control over financial reporting. *There have not been any changes in the Company's internal control over financial reporting during the fourth quarter of 2006 that have materially affected, or are reasonably likely to materially affect, the Company's internal control over financial reporting.* For management's assessment of the Company's internal control over financial reporting, refer to Management's Report on Internal Control Over Financial Reporting on page 79.

* * *

[p.79] **Management's Report on Internal Control Over Financial Reporting**

The management of Washington Mutual, Inc. and subsidiaries (the "Company") is responsible for establishing and maintaining effective internal control over financial reporting, including safeguarding of assets. The Company's internal control structure contains monitoring mechanisms, and actions are taken to correct deficiencies identified.

* * *

*Management assessed the effectiveness of the Company's internal control over financial reporting, including safeguarding of assets as of December 31, 2006. This assessment was based on criteria for effective internal control over financial reporting, including safeguarding of assets, described in "Internal Control – Integrated Framework," issued by the Committee of Sponsoring Organizations of the Treadway Commission. **Based on this assessment, management believes that, as of December 31, 2006, the Company maintained effective internal control over financial reporting, including safeguarding of assets.** [Emphasis added.]*

307. The Company's 2006 Form 10-K again contained certifications by Defendants Killinger and Casey that attested to the purported accuracy and completeness of the Company's financial and operational reports, as follows:

**WASHINGTON MUTUAL, INC.
Certification of the Chief Executive Officer**

Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, **Kerry K. Killinger**, the Chief Executive Officer of Washington Mutual, Inc., does hereby certify that this report on Form 10-K fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that *the information contained in this report fairly presents, in all material respects, the financial condition and results of operations of Washington Mutual, Inc.*

Date: March 1, 2007

By: /s/ KERRY K. KILLINGER
Kerry K. Killinger
Chairman and Chief Executive Officer
of Washington Mutual, Inc.

WASHINGTON MUTUAL, INC.
Certification of the Chief Financial Officer

Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, **Thomas W. Casey**, the Chief Financial Officer of Washington Mutual, Inc., does hereby certify that this report on Form 10-K fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that *the information contained in this report fairly presents, in all material respects, the financial condition and results of operations of Washington Mutual, Inc.*

Date: March 1, 2007

By: /s/ THOMAS W. CASEY

Thomas W. Casey

Executive Vice President and Chief Financial Officer
of Washington Mutual, Inc.

[Emphasis added.]

308. The statements contained in WaMu's January 17, 2007 release and those statements contained in the Company's 2006 Form 10-K, referenced above, were each materially false and misleading when made, and were known by Defendants to be false or were recklessly disregarded as such thereby, for the reasons stated herein.

309. **1Q:07 Results Announced.** On April 17, 2007, WaMu published a release announcing purported results for first quarter of 2007, the period ended March 31, 2007. This release stated, in part, the following:

Washington Mutual, Inc. (NYSE:WM) reported first quarter 2007 net income of \$784 million, or \$0.86 per diluted share, compared with net income of \$985 million, or \$0.98 per diluted share, in the first quarter of 2006, a period that included an \$85 million after tax partial settlement related to Home Savings goodwill litigation.

Based on these earnings and the company's strong financial position, the Board of Directors increased the cash dividend on the company's common stock for the 47th consecutive quarter to 55 cents per share.

1Q 2007 FINANCIAL SUMMARY

	Mar. 31, 2007	Dec. 31, 2006	Sept. 30, 2006
Interest Income			
(In millions)			
Loans held for sale	\$562	\$520	\$439
Loans held in portfolio	3,900	4,048	4,008
Available-for-sale securities	332	392	379
Trading securities	113	102	140
Other interest and dividend income	101	148	139
Total Interest Expenses	2,927	3,212	3,158
Provision for loan and lease losses	234	344	166
Net interest income including provisions for loan losses	\$1,847	\$1,654	\$1,781
Profitability Ratios			
Return on average common equity	% 12.99	% 16.03	% 11.47
Net interest margin	2.79	2.58	2.53
Efficiency ratio	58.13	62.87	62.09
Nonperforming assets/total assets	1.02	0.80	0.69
Tangible equity/total tangible assets	5.78	6.04	5.86

310. In addition to the foregoing, the April 17, 2007 release also quoted Defendant Killinger, in part, as follows:

Our Home Loans business was challenged during the first quarter by difficult market conditions, he added. Over the past 12 months, we have taken a number of prudent actions to reduce our exposure to the subprime mortgage industry. *These actions, along with a diversified business mix, limited our exposure to the mortgage market's downturn and position us well to expand and grow as market conditions improve.* [Emphasis added.]

With a number of competitors going out of business, we're now able to have better pricing, and the credit quality of the loans being originated thus far in '07 is significantly better than '06. ... *It's too early to declare victory, but we are seeing encouraging signs.*

311. **1Q:07 Form 10-Q.** On or about May 10, 2007, filed with the SEC the Company's 1Q:07 Form 10-Q, for the quarter ended March 31, 2007, signed and certified by Defendants Killinger and Casey. In addition to making substantially similar statements concerning the Company's operations, including expenses, costs and ratios, as had been

published previously in the Company's April 17, 2007 release, the 1Q:07 Form 10-Q also provided statements concerning the Company's Significant Accounting Policies and the Basis of its Accounting Presentation, in part, as follows:

Note 1: Summary of Significant Accounting Policies

Basis of Presentation

The accompanying Consolidated Financial Statements are unaudited and include the accounts of Washington Mutual, Inc. and its subsidiaries ("Washington Mutual", the "Company", "we", "us" or "our"). ***The Company's financial reporting and accounting policies conform to accounting principles generally accepted in the United States of America ("GAAP"), which include certain practices of the banking industry.*** All significant intercompany transactions and balances have been eliminated in preparing the consolidated financial statements. [Emphasis added.]

312. The Company's 1Q:07 Form 10-Q also contained representations which attested to the purported effectiveness and sufficiency of the Company's controls and procedures, as follows:

Controls and Procedures

Disclosure Controls and Procedures

The Company's management, with the participation of the Company's Chief Executive Officer and Chief Financial Officer, has evaluated the effectiveness of the Company's disclosure controls and procedures as of the end of the period covered by this report. Based on such evaluation, the Company's Chief Executive Officer and Chief Financial Officer have concluded that, ***as of the end of such period, the Company's disclosure controls and procedures are effective in recording, processing, summarizing and reporting, on a timely basis, information required to be disclosed by the Company*** in the reports that it files or furnishes under the Securities Exchange Act of 1934.

Management reviews and evaluates the design and effectiveness of the Company's disclosure controls and procedures on an ongoing basis, which may result in the discovery of deficiencies, and improves its controls and procedures over time, correcting any deficiencies, as needed, that may have been discovered.

Changes in Internal Control Over Financial Reporting

*Management reviews and evaluates the design and effectiveness of the Company's internal control over financial reporting on an ongoing basis, which may result in the discovery of deficiencies, some of which may be significant. Management changes its internal control over financial reporting as needed to maintain its effectiveness, correcting any deficiencies, as needed, in order to ensure the continued effectiveness of the Company's internal control over financial reporting. **There have not been any changes in the Company's internal control over financial reporting during the first quarter of 2007 that have materially affected, or are reasonably likely to materially affect, the Company's internal control over financial reporting....*** [Emphasis added.]

313. In addition to the foregoing, the Company's 1Q:07 Form 10-Q also contained certifications by Defendants Killinger and Casey, that attested to the purported accuracy and completeness of the Company's financial and operational reports, as follows:

WASHINGTON MUTUAL, INC. Certification of the Chief Executive Officer

Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, **Kerry K. Killinger**, the Chief Executive Officer of Washington Mutual, Inc., does hereby certify that this report on Form 10-Q fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that *the information contained in this report fairly presents, in all material respects, the financial condition and results of operations of Washington Mutual, Inc.*

Date: May 10, 2007

By: /s/ KERRY K. KILLINGER
Kerry K. Killinger
Chairman and Chief Executive Officer
of Washington Mutual, Inc.

WASHINGTON MUTUAL, INC. Certification of the Chief Financial Officer

Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, **Thomas W. Casey**, the Chief Financial Officer of Washington Mutual, Inc., does hereby certify that this report on Form 10-Q fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that *the information contained in this*

report fairly presents, in all material respects, the financial condition and results of operations of Washington Mutual, Inc.

Date: May 10, 2007

By: /s/ THOMAS W. CASEY

Thomas W. Casey

Chief Financial Officer of Washington Mutual, Inc. [Emphasis added.]

314. The statements contained in Washington Mutual's April 17, 2007 release and those statements contained in the Company's 1Q:07 Form 10-Q, referenced above, were each materially false and misleading when made, and were known by Defendants to be false or were recklessly disregarded as such thereby, for the reasons stated herein.

315. **Q:07 Results Announced.** On July 18, 2007, WaMu published a release announcing purported results for the second quarter of 2007, the period ended June 30, 2007. This release stated, in part, the following:

WaMu (NYSE:WM) announced today that second quarter 2007 earnings per share increased 16 percent from a year ago. **Continued strong performance** led to net income of \$830 million, or \$0.92 per diluted share, compared with net income of \$767 million, or \$0.79 per diluted share, in the second quarter of 2006. Second quarter net income was also up from \$784 million, or \$0.86 per share, in the prior quarter.

* * *

Based on the quarter's solid performance and the company's strong financial position, the Board of Directors increased the cash dividend on the company's common stock for the 48th consecutive quarter to 56 cents per share.

2Q 2007 FINANCIAL SUMMARY

	<u>Jun. 30, 2007</u>	<u>Mar. 31, 2007</u>	<u>Dec. 31, 2006</u>
Interest Income			
(In millions)			
Loans held for sale	\$421	\$562	\$520
Loans held in portfolio	3,786	3,900	4,048
Available-for-sale securities	351	332	392
Trading securities	108	113	102

Other interest and dividend income	82	101	148
Total Interest Expenses	2,714	2,927	3,212
Provision for loan and lease losses	372	234	344
Net interest income including provisions for loan losses	\$1,662	\$1,847	\$1,654
Profitability Ratios			
Return on average common equity	% 13.74	% 12.99	% 16.03
Net interest margin	2.90	2.79	2.58
Efficiency ratio	56.38	58.13	62.87
Nonperforming assets/total assets	1.29	1.02	0.80
Tangible equity/total tangible assets	6.07	5.78	6.04

316. **2Q:07 Form 10-Q.** On or about August 9, 2007, WaMu filed with the SEC the Company's 2Q:07 Form 10-Q, for the quarter ended June 30, 2007, signed and certified by Defendants Killinger and Casey. In addition to making substantially similar statements concerning the Company's operations, including expenses, costs and ratios, as had been published previously in the Company's July 18, 2007 release, the 2Q:07 Form 10-Q also provided statements concerning the Company's Significant Accounting Policies and the Basis of its Accounting Presentation, in part, as follows:

Note 1: Summary of Significant Accounting Policies

Basis of Presentation

The accompanying Consolidated Financial Statements are unaudited and include the accounts of Washington Mutual, Inc. and its subsidiaries ("Washington Mutual", the "Company", "we", "us" or "our"). ***The Company's financial reporting and accounting policies conform to accounting principles generally accepted in the United States of America ("GAAP"),*** which include certain practices of the banking industry. All significant intercompany transactions and balances have been eliminated in preparing the consolidated financial statements.

* * *

Recently Issued Accounting Standards Not Yet Adopted

In September 2006, the Financial Accounting Standards Board ("FASB") issued Statement No. 157, ***Fair Value Measurements***

1 (*“Statement No. 157”*) . *Statement No. 157 prescribes a definition*
 2 *of the term “fair value,” establishes a framework for measuring*
 3 *fair value and expands disclosure about fair value*
 4 *measurements. Statement No. 157 is effective for fiscal years*
 5 *beginning after November 15, 2007. We do not expect the*
 6 *application of Statement No. 157 to have a material effect on the*
 7 *Consolidated Statements of Income and the Consolidated*
 8 *Statements of Financial Condition.*

9 In February 2007, the FASB issued Statement No. 159, *The Fair*
 10 *Value Option for Financial Assets and Financial Liabilities*
 11 *(“Statement No. 159”). Statement No. 159 permits an instrument*
 12 *by instrument election to account for certain financial assets and*
 13 *liabilities at fair value. Statement No. 159 is effective for fiscal*
 14 *years beginning after November 15, 2007. We are currently*
 15 *evaluating the impact that Statement No. 159 will have on the*
 16 *Consolidated Statements of Income and the Consolidated*
 17 *Statements of Financial Condition. [Emphasis added.]*

18 317. The Company’s 2Q:07 Form 10-Q also contained representations which attested
 19 to the purported effectiveness and sufficiency of the Company’s controls and procedures, as
 20 follows:

21 **Controls and Procedures**

22 **Disclosure Controls and Procedures**

23 *The Company’s management, with the participation of the*
 24 *Company’s Chief Executive Officer and Chief Financial Officer,*
 25 *has evaluated the effectiveness of the Company’s disclosure*
 26 *controls and procedures as of the end of the period covered by*
 27 *this report. Based on such evaluation, the Company’s Chief*
 28 *Executive Officer and Chief Financial Officer have concluded that,*
 29 *as of the end of such period, the Company’s disclosure controls*
 30 *and procedures are effective in recording, processing,*
 31 *summarizing and reporting, on a timely basis, information*
 32 *required to be disclosed by the Company in the reports that it files*
 33 *or furnishes under the Securities Exchange Act of 1934.*

34 *Management reviews and evaluates the design and effectiveness*
 35 *of the Company’s disclosure controls and procedures on an*
 36 *ongoing basis, which may result in the discovery of deficiencies,*
 37 *and improves its controls and procedures over time, correcting any*
 38 *deficiencies, as needed, that may have been discovered.*

39 **Changes in Internal Control Over Financial Reporting**

*Management reviews and evaluates the design and effectiveness of the Company's internal control over financial reporting on an ongoing basis, which may result in the discovery of deficiencies, some of which may be significant. Management changes its internal control over financial reporting as needed to maintain its effectiveness, correcting any deficiencies, as needed, in order to ensure the continued effectiveness of the Company's internal control over financial reporting. **There have not been any changes in the Company's internal control over financial reporting during the second quarter of 2007 that have materially affected, or are reasonably likely to materially affect, the Company's internal control over financial reporting...*** [Emphasis added.]

318. The Company's 2Q:07 Form 10-Q again contained certifications by Defendants Killinger and Casey, that attested to the purported accuracy and completeness of the Company's financial and operational reports, as follows:

**WASHINGTON MUTUAL, INC.
Certification of the Chief Executive Officer**

Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, **Kerry K. Killinger**, the Chief Executive Officer of Washington Mutual, Inc., does hereby certify that this report on Form 10-Q fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that ***the information contained in this report fairly presents, in all material respects, the financial condition and results of operations of Washington Mutual, Inc.***

Date: August 9, 2007

By: /s/ KERRY K. KILLINGER
Kerry K. Killinger
Chairman and Chief Executive Officer
of Washington Mutual, Inc

**WASHINGTON MUTUAL, INC.
Certification of the Chief Financial Officer**

Pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, **Thomas W. Casey**, the Chief Financial Officer of Washington Mutual, Inc., does hereby certify that this report on Form 10-Q fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that ***the information contained in this report fairly presents, in all material respects, the financial condition and results of operations of Washington Mutual, Inc.***

1 Date: August 9, 2007

2 By: /s/ THOMAS W. CASEY

3 Thomas W. Casey

4 *Executive Vice President and*

5 *Chief Financial Officer of Washington Mutual, Inc.* [Emphasis added.]

6 319. The statements contained in the Company's July 18, 2007, release and those
7 statements contained in its 2Q:07 Form 10-Q, referenced above, were each materially false and
8 misleading when made, and were known by Defendants to be false or were recklessly
9 disregarded as such thereby, for the reasons stated herein.

10 320. On September 10, 2007, Killinger spoke at the Lehman Brothers 2007 Financial
11 Services Conference and assured investors that WaMu had positioned itself "to be successful in
12 what is rapidly becoming a challenging business environment." His presentation included a
13 Powerpoint slide that indicated that 82% of WaMu's loans, including its subprime portfolio, had
14 loan-to-value ratios of less than 80%. WaMu announced its closure of Long Beach Mortgage
15 just two days later.

16 321. Speaking at the Lehman Brothers Conference, Defendant Killinger persisted in
17 providing inaccurate information that did not reflect the Company's exposure to subprime-
18 related losses. Defendant Killinger said:

19 As a policy, we don't provide interim updates to our earnings
20 drivers between our quarterly earnings calls. However, the near-
21 perfect storm in the housing and capital markets I spoke about will
22 impact our second half performance and I want to give you my
23 insights into what that may look like. Of course, we will be
24 updating our earnings drivers during our third quarter earnings call
25 next month. Given a weakening housing market, we do expect to
26 see:

o A continuation of the increase in nonperforming loans which
could lead to a higher level of charge-offs in the coming quarters.

o As a result of this, and in support of our loan portfolio growth, we expect that our loan loss provisioning for the year could be approximately \$500 million greater than the full-year guidance we gave in July of \$1.5 to \$1.7 billion.

See Current Report (Form 8-K) (Sept. 10, 2007) at Ex. 99.1.

322. Just as the July guidance was inaccurate, Defendant Killinger's September estimate at the Lehman Brothers' conference grossly understated the Company's loan loss exposure. In just a month's time, the Company increased the loan loss provisioning by nearly 30%, or up to between \$2.7 and \$2.9 billion. *Washington Mutual, Inc. Prepared Remarks for Third Quarter 2007 Earnings Conference Call*, Oct. 17, 2007.

323. **3Q:07 Results Announced.** On October 17, 2007, WaMu published a release announcing purported results for the third quarter of 2007, for the period ended September 30, 2007. This release stated, in part, the following:

**WaMu Reports Third Quarter Earnings Per Share of \$0.23
Declares Cash Dividend of 56 Cents**

WaMu (NYSE:WM) announced today third quarter 2007 net income of \$210 million, or \$0.23 per diluted share, compared with net income of \$748 million, or \$0.77 per diluted share, in the third quarter of 2006. The company attributed the decline to a weaker housing market and disruptions in the capital markets.

* * *

The company also announced its Board of Directors declared a quarterly cash dividend on the company's common stock of 56 cents per share.

324. Regarding the performance of its business, the October 17, 2007, release also reported on the Company's financial performance in part, as follows:

3Q 2007 FINANCIAL SUMMARY

	<u>Sept. 30, 2007</u>	<u>Jun. 30, 2007</u>	<u>Mar. 31, 2007</u>
Interest Income			
(In millions)			
Loans held for sale	\$248	\$421	\$562
Loans held in portfolio	3,992	3,786	3,900
Available-for-sale securities	392	351	332
Trading securities	108	108	113
Other interest and dividend income	116	82	101
 Total Interest Expenses	 2,842	 2,714	 2,927
Provision for loan and lease losses	967	372	234
Net interest income including provisions for loan losses	\$1,047	\$1,662	\$1,847
 Profitability Ratios			
Return on average common equity	%3.45	%13.74	%12.99
Net interest margin	2.86	2.90	2.79
Efficiency ratio	63.42	56.38	58.13
Nonperforming assets/total assets	1.65	1.29	1.02
Tangible equity/total tangible assets	5.61	6.07	5.78

Press Release, *WaMu Reports Third Quarter Earnings Per Share of \$0.23*, Oct. 17, 2007.

325. The October 17, 2007, release reported the following with respect to the Company's Home Loans Group:

	<u>Sept. 30, 2007</u>	<u>Jun. 30, 2007</u>	<u>Sept. 30, 2006</u>
Home Loans Group			
(In millions)			
Net interest income	\$183	\$215	\$276
Provisions for loan and lease losses	323	101	84
Noninterest income	184	391	314
Noninterest expense	554	548	528
 Loan volume	 \$26,434	 \$35,857	 \$41,241
Average loans	43,737	43,312	45,407

326. According to the October 17, 2007, release, the Home Loans Group's losses were "[p]artially offset" by strong results from MSR valuation...."

327. In addition to the foregoing, the October 17, 2007, release also quoted Defendant Killinger, in part, as follows:

“We’re disappointed with our third quarter results but they reflect the increasingly difficult market conditions that are challenging the banking industry,” said WaMu Chairman and Chief Executive Officer Kerry Killinger. “Despite these challenges, our Retail Banking, Card Services and Commercial businesses delivered *good operating performance* during the quarter, *and we continued to adapt our Home Loans business to meet market conditions.*” Killinger added that the company remains focused on executing its long-term growth plans. [Emphasis added.]

328. The statements made by Defendants and contained in the Company’s October 17, 2007, release were materially false and misleading when made, and were known by Defendants to be false at that time or were recklessly disregarded as such thereby for the reasons stated herein.

329. **4Q:07 Results Announced.** On January 17, 2008, WaMu announced a fourth quarter 2007 net loss of \$1.87 billion. The Company attributed the loss to the \$1.6 billion after-tax charge to writedown Home Loans segment and the housing market weakness. Press Release, *WaMu Reports Fourth Quarter Net Loss Per Share of \$2.19, Reflecting Previously Announced After-Tax Charge to Writedown Home Loans Goodwill of \$1.6 Billion and Elevated Loan Loss Provisioning*, Jan. 17, 2008.

330. Despite these losses Killinger stated, “The substantial infusion of new capital, dividend reduction, significant expense reductions, and the *major change in our home loans business all combine to further fortify WaMu's strong capital and liquidity position.* *Id.*”

331. Regarding the performance of the Company’s business, the January 17, 2008, release also reported:

4Q 2007 FINANCIAL SUMMARY

	Dec. 31, 2007	Sept. 30, 2007	Jun. 30, 2007
Interest Income			
(In millions)			
Loans held for sale	\$160	\$248	\$421
Loans held in portfolio	4,156	3,992	3,786
Available-for-sale securities	380	392	351
Trading securities	101	108	108
Other interest and dividend income	79	116	82
Total Interest Expenses	2,829	2,842	2,714
Provision for loan and lease losses	1,534	967	372
Net interest income including provisions for loan losses	\$513	\$1,047	\$1,662
Profitability Ratios			
Return on average common equity	%(32.64)	%3.45	%13.74
Net interest margin	2.85	2.86	2.90
Efficiency ratio	122.13	63.42	56.38
Nonperforming assets/total assets	2.17	1.65	1.29
Tangible equity/total tangible assets	6.67	5.61	6.07

332. On February 29, 2008, the Company filed its annual report for the fiscal year ended December 31, 2007 and then amended the filing on May 22, 2008. The Company's Annual Report contained representations which attested to the purported effectiveness and sufficiency of the Company's controls and procedures, as follows:

The Company's management, with the participation of the Company's Chief Executive Officer and Chief Financial Officer, has evaluated the effectiveness of the Company's disclosure controls and procedures as of the end of the period covered by this report. Based on such evaluation, the Company's Chief Executive Officer and Chief Financial Officer have concluded that, as of the end of such period, the Company's disclosure controls and procedures are effective in recording, processing, summarizing and reporting, on a timely basis, information required to be disclosed by the Company in the reports that it files or furnishes under the Securities Exchange Act of 1934.

Management reviews and evaluates the design and effectiveness of the Company's disclosure controls and procedures on an

ongoing basis, which may result in the discovery of deficiencies, and improves its controls and procedures over time, correcting any deficiencies, as needed, that may have been discovered.

Management reviews and evaluates the design and effectiveness of the Company's internal control over financial reporting on an ongoing basis, which may result in the discovery of deficiencies, some of which may be significant. Management changes its internal control over financial reporting as needed to maintain its effectiveness, correcting any deficiencies, as needed, in order to ensure the continued effectiveness of the Company's internal control over financial reporting. There have not been any changes in the Company's internal control over financial reporting during the fourth quarter of 2007 that have materially affected, or are reasonably likely to materially affect, the Company's internal control over financial reporting.

333. These public filings contained certifications by Defendants Killinger and Casey:

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the Company and in the capacities indicated on February 29, 2008.

Date: February 29, 2008

By: /s/ KERRY K. KILLINGER

Kerry K. Killinger

Chairman and Chief Executive Officer of Washington Mutual, Inc.

Director (Principal Executive Officer)

By: /s/ THOMAS W. CASEY

Thomas W. Casey

Executive Vice President of Washington Mutual, Inc. Chief

Financial Officer (Principal Financial Officer)

334. The statements made by Defendants and contained in the Company's January 18, 2008, release and subsequent public filings were materially false and misleading when made, and were known by Defendants to be false at that time or were recklessly disregarded as such thereby for the reasons stated herein.

335. **1Q:08 Results Announced.** On April 15, 2008, WaMu announced a first quarter net loss of \$1.14 billion. Amidst these staggering losses Defendant Killinger announced, "[W]e

1 *have taken decisive actions to withstand this period of unprecedented credit losses, while*
 2 *maintaining strong liquidity ...”* Press Release, *Washington Mutual, Inc., WaMu Closes \$7*
 3 *Billion Equity Issuance, Strengthening Capital Position*, Apr. 15, 2008 (emphasis added). At
 4 this juncture the Company announced plans to exit wholesale lending and close all freestanding
 5 home loan offices.

6
 7 336. Regarding the performance of the Company’s business, the April 15, 2008,
 8 release also reported:

9 1Q 2008 FINANCIAL SUMMARY

	Mar. 31, 2008	Dec. 31, 2007	Sept. 30, 2007
Interest Income			
(In millions)			
Loans held for sale	\$87	\$160	\$248
Loans held in portfolio	3,954	4,156	3,992
Available-for-sale securities	357	380	392
Trading securities	116	101	108
Other interest and dividend income	77	79	116
Total Interest Expenses	2,416	2,829	2,842
Provision for loan and lease losses	3,511	1,534	967
Net interest income including provisions for loan losses	\$(1,336)	\$513	\$1,047
Profitability Ratios			
Return on average common equity	%(23.27)	%(32.64)	%3.45
Net interest margin	3.05	2.85	2.86
Efficiency ratio	57.49	122.13	63.42
Nonperforming assets/total assets	2.87	2.17	1.65
Tangible equity/total tangible assets	6.40	6.67	5.61

18
 19 337. **1Q:08 Form 10-Q.** On or about May 12, 2008, WaMu filed with the SEC the
 20 Company’s Form 10-Q for the quarter ended March 31, 2008. In addition to making
 21 substantially similar statements concerning the Company’s operations, including expenses, costs
 22 and ratios, as had been published previously in the Company’s April 15, 2008, release, the Form
 23
 24
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10-Q also provided statements concerning the Company's Significant Accounting Policies and the Basis of its Accounting Presentation, in part, as follows:

The Company's management, with the participation of the Company's Chief Executive Officer and Chief Financial Officer, has evaluated the effectiveness of the Company's disclosure controls and procedures as of the end of the period covered by this report. Based on such evaluation, the Company's Chief Executive Officer and Chief Financial Officer have concluded that, as of the end of such period, the Company's disclosure controls and procedures are effective in recording, processing, summarizing and reporting, on a timely basis, information required to be disclosed by the Company in the reports that it files or furnishes under the Securities Exchange Act of 1934.

Management reviews and evaluates the design and effectiveness of the Company's disclosure controls and procedures on an ongoing basis, which may result in the discovery of deficiencies, and improves its controls and procedures over time, correcting any deficiencies, as needed, that may have been discovered.

Management reviews and evaluates the design and effectiveness of the Company's internal control over financial reporting on an ongoing basis, which may result in the discovery of deficiencies, some of which may be significant. Management changes its internal control over financial reporting as needed to maintain its effectiveness, correcting any deficiencies, as needed, in order to ensure the continued effectiveness of the Company's internal control over financial reporting. *There have not been any changes in the Company's internal control over financial reporting during the first quarter of 2008 that have materially affected, or are reasonably likely to materially affect, the Company's internal control over financial reporting.*

338. This public filing contained a certification by Defendant Casey:

Pursuant to the requirements of the Securities Exchange Act of 1934, the Company has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized on May 12, 2008.

By: /s/ THOMAS W. CASEY

Thomas W. Casey

Executive Vice President and Chief Financial Officer

339. The statements made by Defendants and contained in the Company's April 15, 2008, release and subsequent public filings were materially false and misleading when made, and

were known by Defendants to be false at that time or were recklessly disregarded as such thereby for the reasons stated herein.

340. **2Q:08 Results Announced.** On or about July 22, 2008, WaMu announced a net loss of \$3.3 billion for the second quarter of 2008. Defendant Killinger responded to the losses and stated, “[W]e are continuing to execute on a comprehensive plan designed to ensure that we have strong capital and liquidity, an appropriately-sized expense base and a strong, profitable retail franchise.” Press Release, *WaMu Reports Significant Build-Up of Reserves Contributing to Second Quarter Net Loss of \$3.3 Billion*, July 22, 2008 (emphasis added).

341. Regarding the performance of its business, the July 22, 2008, release also reported:

2Q 2008 FINANCIAL SUMMARY

	<u>Jun. 30, 2008</u>	<u>Mar. 31, 2008</u>	<u>Dec. 31, 2007</u>
Interest Income			
(In millions)			
Loans held for sale	\$52	\$87	\$160
Loans held in portfolio	3,604	3,954	4,156
Available-for-sale securities	335	357	380
Trading securities	117	116	101
Other interest and dividend income	94	77	79
Total Interest Expenses	1,906	2,416	2,829
Provision for loan and lease losses	-----5,913-----	-----3,511-----	-----1,534-----
Net interest income including provisions for loan losses	\$(3,617)	\$(1,336)	\$513
Profitability Ratios			
Return on average common equity	%(69.25)	%(23.27)	%(32.64)
Net interest margin	3.22	3.05	2.85
Efficiency ratio	84.11	57.49	122.13
Nonperforming assets/total assets	3.62	2.87	2.17
Tangible equity/total tangible assets	7.79	6.40	6.67

1 342. The statements made by WaMu and contained in the Company's July 22, 2008,
2 release were materially false and misleading when made, and were known by Defendants to be
3 false at that time or were recklessly disregarded as such thereby for the reasons stated herein.

4 **B. Defendants Knew or Should Have Known That WaMu Stock Was an Imprudent**
5 **Investment.**

6 343. Given the facts described above, WaMu, and based on their positions within the
7 Company, the individual Defendants, and in particular Defendants Killinger, Casey, Cathcart,
8 Woods, and Longbrake among others, knew that WaMu stock was an imprudent investment for
9 the Plan because of, among other things, the Company's: (a) over-reliance on the origination,
10 securitization, purchase and sale of subprime mortgage loans and other risky mortgage loan
11 products such as "negative amortization" loans; (b) lax underwriting policies for mortgage loans
12 and related loan products; (c) participation in the systematic manipulation of the loan origination
13 and property appraisal processes; (d) failure to implement and maintain risk management control
14 processes; and (e) failure to properly account for its subprime lending and related business
15 operations, all of which caused WaMu's financial statements to be misleading and which
16 artificially inflated the value of shares of WaMu stock and the WaMu Company Stock Fund in
17 the Plan, and which ultimately led to the collapse of the Company.
18
19

20 344. In addition, Defendants, as top executives and high-level officers at WaMu, knew or
21 should have known of several "red flags" that should have caused them to adequately investigate the
22 risks the Plan faced as a result of its huge investment in WaMu stock.

23 345. The red flags that Defendants knew or should have known about include the following:

- 24 • On July 26, 2005, the *Wall Street Journal* warned that "[m]ortgage lenders are
25 continuing to loosen their standards, despite growing fears that relaxed lending
26 practices could increase risks for borrowers and lenders in overheated housing

1 markets:" WaMu admitted to loosening its lending standards and acknowledged
2 that "[t]here's been a growing awareness over the past six to nine months that the
3 risks are starting to increase with the very, very rapid price escalation we have
4 seen";

- 5 • On September 25, 2006, *Reuters* reported that "rising delinquencies and forecasts
6 of a deepening deterioration in housing have prompted big investors, including
7 hedge funds, to bet against the securities since late 2005";
- 8 • On October 4, 2006, the Federal Reserve and other banking agencies issued their
9 final guidelines: *Interagency Guidance on Nontraditional Mortgage Product*
10 *Risks* in response to the loosened underwriting standards and general lax risk
11 management practices of subprime lenders;
- 12 • In early December, 2006, Ownit Mortgage Solutions, Inc. closed its doors and
13 filed for Chapter 11 bankruptcy just a few weeks later;
- 14 • On December 20, 2006, the *Center for Responsible Lending* issued a report
15 predicting the worst foreclosure crisis in the modern mortgage market;
- 16 • On January 3, 2007, *Consumer Affairs* warned that "as the housing market slows
17 to a crawl, many subprime lenders are collapsing faster than homes made of
18 substandard materials, and the signs point to even more pain in the housing
19 market as a result";
- 20 • On March 11, 2007, the *New York Times* reported that more than two dozen
21 subprime mortgage lenders had failed or filed for bankruptcy;
- 22 • On April 2, 2007, New Century Financial Corp., the largest U.S. subprime lender
23 at the time, filed for Chapter 11 bankruptcy;
- 24 • On May 11, 2007, the *Huang v. Washington Mutual Inc.*, complaint was filed
25 against WaMu. Plaintiff Huang alleges that he witnessed a colleague remove
26 unfavorable data from a "SuperScore Scorecard Monitoring" default-risk report to
produce false results for federal banking examiner. The actions were allegedly
reported to Defendant Killinger and other management at the Company;
- On August 6, 2007, American Home Mortgage filed for Chapter 11 bankruptcy;
- On August 9, 2007, French bank BNP Paribas froze three of its funds exposed to
United States subprime mortgages, blaming "a complete evaporation of liquidity";

- 1 • On August 16, 2007, Countrywide Financial Corporation, the largest U.S.
2 mortgage lender, narrowly avoided bankruptcy by taking out an emergency loan
3 of \$11 billion from a group of banks;
- 4 • On August 31, 2007, President Bush announced a limited bailout of U.S.
5 homeowners unable to pay the rising costs of their debts;
- 6 • On August 31, 2007, Ameriquist, the largest subprime lender in the United States
7 in 2005, announced it was going out of business; and
- 8 • On September 14, 2007, WaMu announced that it was closing Long Beach
9 Mortgage, a subprime unit of the Company.

10 346. Even after the Company's reported losses on October 17, 2007, additional "red
11 flags" were revealed, which would have caused a reasonable fiduciary to adequately investigate
12 the prudence of investing Plan assets in Company stock. These additional red flags include the
13 following:

- 14 • Between October 18 and October 22, 2007, four analysts downgraded WaMu
15 stock;
- 16 • On November 1, 2007, the New York Attorney General sued First American and
17 its subsidiary for conspiring with WaMu to inflate real estate appraisals;
- 18 • On November 9, 2007, the Company reported that non-performing loans were up
19 126.3% year-over-year and that on a relative basis, non-performing loans surged
20 from 0.69% of total assets to 1.65% of total assets during the same period;
- 21 • On December 10, 2007, WaMu announced that it intended to: (1) discontinue all
22 remaining lending through its subprime mortgage channel; (2) close
23 approximately 190 of 336 home loan centers and sales offices; (3) Close nine
24 Home Loans processing and call centers; (4) eliminate approximately 2,600
25 Home Loans positions, or about 22 percent of its Home Loans staff; (5) eliminate
26 approximately 550 corporate and other support positions; and (6) close WaMu
Capital Corp., its institutional broker-dealer business, as well as its mortgage
banker finance warehouse lending operation;
- On December 20, 2007, the *Seattle Post-Intelligencer* reported that WaMu had
confirmed that the SEC had launched an inquiry regarding its lending practices;

- 1 • On December 22, 2007, the *Economist* estimated subprime defaults would reach a
2 level between \$200-300 billion;
- 3 • On January 11, 2008, Bank of America made an agreement to bail out
4 Countrywide for \$7.16 per share, approximately 16% of its value of \$44.55 per
5 share less than a year before;
- 6 • On April 8, 2008, WaMu announced that it had entered into definitive agreements
7 to raise an aggregate of \$7 billion through direct sale of equity securities, which
8 resulted in a nearly 50% dilution to shares of WaMu stock;
- 9 • On April 11, 2008, a Goldman Sachs analyst stated that the Company might still
10 face another \$23 billion in mortgage-related losses;
- 11 • On June 24, 2008, a Lehman Brothers analyst reported that WaMu would have to
12 set aside as much as \$30 billion for credit losses through 2011, including
13 residential mortgages, multi-family mortgages, commercial loans and credit card
14 loans;
- 15 • On June 2, 2008, the Company said that it would strip Defendant Killinger of his
16 title of chairman;
- 17 • On June 8, 2008, a UBS AG analyst report stated that WaMu continued to
18 underestimate its losses on home loans, and that WaMu “will not demonstrate
19 meaningful profitability until late 2010 or later,” and total losses to the Company
20 may reach a staggering \$27 billion;
- 21 • On July 22, 2008, WaMu reported losses of \$3.3 billion for the second quarter of
22 2008, or a diluted loss per share of \$6.58, which were “far worse than Wall Street
23 was anticipating.” David Ellis, *Washington Mutual Loses \$3.3 Billion*, CNN
24 Money.com, July 22, 2008;
- 25 • On September 7, 2008, Defendant Killinger was ousted as CEO and replaced by
26 Alan Fishman, former chief executive of Independence Community Bank of New
York, which was sold two years ago to Sovereign Bancorp. Also on this date, the
U.S. government took control of mortgage giants Fannie Mae and Freddie Mac;
- By September 8, 2008, the OTS had tightened its oversight of WaMu's risk-
management and compliance operations and required it to submit a detailed
multiyear business plan;
- On September 15, 2008, Standard & Poor's cut WaMu's credit rating to junk-bond
status;

- 1 • On September 18, 2008, the OTS cut its risk rating on WaMu again, classifying it
2 as a troubled bank;
- 3 • From September 14-19, 2008, Lehman Brothers filed for bankruptcy protection,
4 Merrill Lynch was rescued by Bank of America, and the federal government took
5 over insurer American International Group. WaMu's shares sank to \$2.01;
- 6 • On September 25, 2008, after massive withdrawals by depositors, the FDIC
7 seized WaMu and arranged a fire-sale of its assets and deposits to JPMorgan
8 Chase, NA in the largest bank failure in U.S. history; and
- 9 • On September 26, 2008, WaMu filed for Chapter 11 bankruptcy protection.

10 347. Given the size of the Plan's investment in WaMu stock, the turmoil faced by the
11 subprime and high-risk loan market, and the precipitous decline in the price of WaMu stock,
12 prudent Plan fiduciaries would have fully investigated the risks faced by the Company, carefully
13 monitored the Plan's investment in Company stock and taken appropriate actions to protect the
14 Plan's participants. Instead, the action taken by the PIC -- to implement a 20% cap on WaMu
15 Stock effective October 1, 2008 -- was too little too late to protect Plan participants from the
16 enormous losses. Indeed, Defendants disregarded sound business practices and failed to
17 implement risk management processes despite the numerous warnings from industry observers
18 and regulators regarding the risks of subprime and high-risk loans and looming trouble in credit
19 markets.

20 348. Further compounding the problem and losses to the Plan, several Defendants,
21 including Defendant Killinger, downplayed the risks faced by the Company, both to the market
22 and directly to Plan participants, thereby falsely assuring participants that their retirement
23 savings in WaMu stock were not imperiled.

24 349. Defendants' failure to disclose the true risks posed to the Plan as a result of its
25 investment in WaMu stock, through among other imprudent acts, illegal business and accounting
26

1 practices, and incomplete and inaccurate communications regarding the risks faced by the
2 Company, resulted in the Plan purchasing and holding huge amounts of unduly risky Company
3 stock at inflated prices.

4 350. Prudent fiduciaries of the Plan would not have ignored the numerous red flags
5 described above and would not have allowed the risk of loss to the Plan's participants and
6 beneficiaries to increase to unacceptable levels. Unfortunately, the Defendants did exactly that
7 and for all intents and purposes wiped out a significant portion of the Plan's assets.

8 351. As a result of the Defendants' knowledge of and implication in creating and
9 maintaining public misconceptions concerning the Company's true financial condition, any
10 generalized warnings of market and diversification risks that Defendants made to the Plan's
11 participants regarding the Plan's investment in WaMu stock did not effectively inform the Plan's
12 participants of the past, immediate, and future dangers of investing in Company stock.

13 352. Even in the wake of government inquiries and complaints, Defendants failed to
14 conduct an appropriate investigation into whether WaMu stock was a prudent investment for the
15 Plan and failed to provide the Plan's participants with information regarding WaMu's risky
16 business plan so that participants could make informed decisions regarding their investments in
17 Company stock in the Plan.

18 353. An adequate investigation by Defendants would have revealed to a reasonable
19 fiduciary that investment by the Plan in WaMu stock, under these circumstances, was imprudent.
20 A prudent fiduciary acting under similar circumstances would have acted to protect participants
21 against unnecessary losses and would have made different investment decisions.
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1 354. Because Defendants knew or should have known that WaMu stock was not a
2 prudent investment option for the Plan, they had an obligation to protect the Plan and its
3 participants from unreasonable and entirely predictable losses incurred as a result of the Plan's
4 continued investment in Company stock.

5 355. Accordingly, it was imprudent for the Plan's fiduciaries to continue offering
6 WaMu stock as a Plan investment option, to continue holding WaMu stock in the Plan, and
7 continue to make new investments in Company stock during the Class Period.
8

9 356. WaMu stock was an imprudent investment for the Plan as it posed an inordinate
10 risk of significant loss, and this risk is not one that should have been borne by the participants
11 and beneficiaries of the Plan. The Plan's fiduciaries disregarded the Company's deteriorating
12 and dreadful financial circumstances when it came to managing the Plan's investment in WaMu
13 stock, and were unwilling or unable to act prudently to rescue the Plan's investments. Under the
14 circumstances, the continued investment of millions of dollars of participants' retirement savings
15 in WaMu stock was reckless and imprudent, and contrary to the best interests of the Plan's
16 participants and beneficiaries, and an abuse of their discretion as fiduciaries.
17

18 357. Defendants had available to them several different options for satisfying their
19 duties, including:
20

- 21 • making disclosures to co-fiduciaries;
- 22 • making appropriate public disclosures as necessary;
- 23 • discontinuing or limiting further investment in WaMu stock under the Plan;
- 24 • consulting independent fiduciaries regarding appropriate measures to take in order
25 to prudently and loyally serve the participants and beneficiaries of the Plan;
- 26 • divesting the Plan of Company stock; and/or

- resigning as fiduciaries of the Plan to the extent that, as a result of their employment by WaMu, they could not loyally serve the Plan and its participants in connection with the Plan's acquisition and holding of WaMu stock.

358. Despite the availability of these and other options, Defendants failed to take any meaningful action to protect participants from losses as a result of the Plan's investment in WaMu stock.

C. Defendants Failed to Provide Plan Participants, Beneficiaries, and Co-Fiduciaries with Complete and Accurate Information about the True Risks of Investment in WaMu Stock in the Plan

359. ERISA mandates that plan fiduciaries have a duty of loyalty to the plan and its participants which includes the duty to speak truthfully to the plan and its participants when communicating with them. A fiduciary's duty of loyalty to plan participants under ERISA includes an obligation not to materially mislead, or knowingly allow others to materially mislead, plan participants and beneficiaries. *See, e.g., Wayne v. Pacific Bell*, 238 F.3d 1048, 1055 (9th Cir. 2001) (ERISA fiduciaries have a duty to not actively misinform); *Baker v. American Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995) (fiduciaries have an affirmative duty to provide participants with information material to the participants' circumstances, even when the participant has not specifically asked for the information) (*citing Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993)).

360. During the Class Period, WaMu and Defendant Killinger made direct and indirect communications to Plan participants through numerous Company publications and the Company intranet, and other public statements regarding the financial health of the Company.

1 361. The Company regularly communicated with employees, including participants in
2 the Plan, about the performance, future financial and business prospects of the Company and
3 Company stock which was, far and away, the single largest asset of the Plan.

4 362. These communications included, but were not limited to, direct statements to
5 employees in Company-wide communications, SEC filings, annual reports, and press releases
6 that were incorporated by reference into Plan documents and Plan-related materials and directed
7 to participants through the SPD and the Plan's Form S-8, and, thus, were Plan communications
8 undertaken in a fiduciary capacity. These communications by WaMu assured the participants
9 that the Company was not unduly exposed to risks related to subprime lending, and that the
10 Company's risk management practices were appropriate. Defendant Killinger touted WaMu's
11 stability: "In total we currently have approximately \$50 billion in highly reliable excess liquidity
12 ... [a]s a result, we are not dependent on the capital markets for commercial paper or unsecured
13 debt to fund our business ... This level of capital should position us to withstand the higher
14 provisioning outlook for 2008 ... we exceed all of the well-capitalized banking ratios by a
15 meaningful margin." *See Killinger: We Have Strong Capital Cushion*, May 23, 2008, available at
16 wamu.net. These statements were made when in fact the extent of the risks faced by the
17 Company were unduly minimized and the extent of the Company's risk management practices
18 were overstated.

19 363. WaMu, Defendant Killinger and the PAC Defendants failed to disclose facts that
20 would have apprised the Plan's participants of the risks presented by Company stock that, in
21 turn, would have allowed them to conclude that their exposure to Company stock through the
22 Plan should be reduced, or that Company stock was not a prudent retirement investment.
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1 364. Defendants, as the Plan's fiduciaries, knew or should have known certain basic
 2 facts about the characteristics and behavior of the Plan's participants, well-recognized in the
 3 401(k) literature and the trade press, concerning investment in company stock, including that:

4 (a) Out of loyalty, employees tend to invest in company stock;

5 (b) Employees tend to over-extrapolate from recent returns, expecting high
 6 returns to continue or increase going forward;

7 (c) Employees tend not to change their investment option allocations in the
 8 plan once made;

9 (d) No qualified retirement professional would advise rank and file employees
 10 to invest more than a modest amount of retirement savings in company stock, and many
 11 retirement professionals would advise employees to avoid investment in company stock
 12 entirely;
 13

14 (e) Lower income employees tend to invest more heavily in company stock
 15 than more affluent workers, though they are at greater risk; and
 16

17 (f) Even for risk-tolerant investors, the risks inherent to company stock are
 18 not commensurate with its rewards.

19 Bridgitte C. Mandrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k)*
 20 *Participation and Savings Behavior*, 116 Q. J. Econ. 4, 1149 (2001); *see also* Nellie Liang &
 21 Scott Weisbenner, *Investor Behavior and the Purchase Of Company Stock in 401(k) Plans: The*
 22 *Importance of Plan Design, Board of Governors for the Federal Reserve System Finance and*
 23 *Economics Discussion Series*, No. 2002 36 (2002).

24 365. Even though Defendants knew or should have known these facts, and even though
 25 Defendants knew of the high concentration of the Plan's funds in Company stock during the
 26

1 Class Period, Defendants failed to take any meaningful ameliorative action to protect the Plan
 2 and its participants from their heavy investment in an imprudent retirement vehicle, WaMu
 3 stock.

4 366. In addition, Defendants failed to provide participants and beneficiaries, and the
 5 market as a whole, with complete and accurate information regarding the true financial condition
 6 of the Company. As such, participants in the Plan could not appreciate the true risks presented
 7 by investments in Company stock and therefore could not make informed decisions regarding
 8 their investments in Company stock in the Plan.

10 367. Specifically, Defendants failed to provide the Plan's participants with complete
 11 and accurate information regarding the Company's unduly large and risky exposure to subprime
 12 and other highly risky loans, its involvement in the illegal appraisal-inflation scheme, the true
 13 impact of those improper business and accounting practices on the Company's financial
 14 condition, and the dire circumstances such practices have created for the Company and the
 15 Plan's investment in WaMu stock. To the contrary, Defendants downplayed the Company's
 16 exposure. For example, Plan participants were assured that "most of WaMu's chargeoffs are
 17 contained to a limited group of high-risk loans ... and [the Company] took further steps to
 18 reduce market risk." *See Killinger Talks WaMu with Analysts in New York*, Jan. 31, 2008,
 19 available at wamu.net. As such, the Plan's participants were not informed of the true risks of
 20 investing their retirement assets in the Plan in WaMu stock.

23 368. Defendant Killinger in particular (as well as other top-ranking officers of the
 24 Company and the Company itself) communicated directly with employees/Plan participants
 25 regarding the Company's subprime market exposure but aggressively and falsely downplayed
 26

1 the risks that this exposure presented to the Company. For example, Defendant Killinger assured
 2 employees that WaMu was “well-positioned with strong liquidity and capital to support long-
 3 term growth.” *See Killinger gives Company Update to Wall Street*, Sept. 10, 2007, available at
 4 wamu.net. Through the WaMu intranet Defendant Killinger sent employees personally-styled
 5 reassuring notes, such as one stating: “Our retail and small business banking efforts are paying
 6 off. Our card services and commercial groups are vital and continue to do well. Our brand is
 7 valuable and strong. Our core businesses continue to perform ...” *See A Note from Kerry*, Jan.
 8 18, 2008, available at wamu.net.

10 369. WaMu and Defendant Killinger, and on information and belief, certain other
 11 Defendants, knew all (in the case of the Company) or a large portion of the truth about the
 12 Company’s financial condition and in particular about the risks posed to the Company by its
 13 exposure to risky and hard to value investments, especially those which exposed the Company to
 14 subprime and other high-risk loans, as detailed previously. On information and belief, these
 15 Defendants with a greater knowledge of the risks posed by the Plan’s investment in Company
 16 stock failed to disclose this information to their co-fiduciaries who served on the PIC and the
 17 PAC, and were empowered by the documents governing the Plan and ERISA to protect the Plan
 18 and its participants and beneficiaries by eliminating or limiting investment in Company stock,
 19 selling Company stock, and making appropriate disclosures to the Plan’s participants and
 20 beneficiaries.
 21 beneficiaries.

23 **D. Defendants Suffered From Conflicts of Interest**

24 370. As ERISA fiduciaries, Defendants are required to manage the Plan’s investments,
 25 including the investment in WaMu stock, solely in the interest of the participants and
 26 beneficiaries, and for the exclusive purpose of providing benefits to participants and their

1 beneficiaries. This duty of loyalty requires fiduciaries to avoid conflicts of interest and to
 2 resolve them promptly when they occur.

3 371. Conflicts of interest abound when a company that invests plan assets in company
 4 stock founders. This is because as the situation deteriorates, plan fiduciaries are torn between
 5 their duties as officers and directors for the company on the one hand, and to the plan and plan
 6 participants on the other. As courts have made clear “[w]hen a fiduciary has dual loyalties, the
 7 prudent person standard requires that he make a careful and impartial investigation of all
 8 investment decisions.” *Martin v. Feilen*, 965 F.2d 660, 670 (8th Cir. 1992) (citation omitted).
 9 Here, Defendants breached this fundamental fiduciary duty.

11 372. Defendants failed to investigate whether to take appropriate and necessary action
 12 to protect the Plan, and instead, chose the interests of the Company over the Plan by continuing
 13 to offer WaMu stock as a Plan investment option, and maintain investment in WaMu stock in the
 14 Plan. Moreover, while certain Defendants, including Killinger, Casey, and Cathcart, dumped
 15 shares they personally held, they did nothing to protect the Plan from losses due to the Plan’s
 16 imprudent investment in WaMu stock.

18 **VII. THE RELEVANT LAW UNDER ERISA**

19 373. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil
 20 action may be brought by a participant for relief under ERISA § 409, 29 U.S.C. § 1109.

21 374. ERISA § 409(a), 29 U.S.C. § 1109(a), “Liability for Breach of Fiduciary Duty,”
 22 provides, in pertinent part:
 23

24 [A]ny person who is a fiduciary with respect to a plan who
 25 breaches any of the responsibilities, obligations, or duties imposed
 26 upon fiduciaries by this subchapter shall be personally liable to
 make good to such plan any losses to the plan resulting from each
 such breach, and to restore to such plan any profits of such

1 fiduciary which have been made through use of assets of the plan
 2 by the fiduciary, and shall be subject to such other equitable or
 3 remedial relief as the court may deem appropriate, including
 removal of such fiduciary.

4 375. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes individual participants to
 5 seek equitable relief from Defendants, including, without limitation, injunctive relief and, as
 6 available under applicable law, constructive trust, restitution, and other monetary relief.

7 376. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B), provides, in
 8 pertinent part, that a fiduciary shall discharge his duties with respect to a plan solely in the
 9 interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to
 10 participants and their beneficiaries, and with the care, skill, prudence, and diligence under the
 11 circumstances then prevailing that a prudent man acting in a like capacity and familiar with such
 12 matters would use in the conduct of an enterprise of a like character and with like aims.

14 377. These fiduciary duties under ERISA §§ 404(a)(1)(A) and (B) are referred to as the
 15 duties of loyalty, exclusive purpose and prudence and are the “highest known to the law.” *Chao*
 16 *v. Hall Holding Co.*, 285 F.3d 415, 426 (6th Cir. 2002). They entail, among other things:

18 (a) The duty to conduct an independent and thorough investigation into, and to
 19 continually monitor, the merits of all the investment alternatives of a plan, including in this
 20 instance the WaMu Company Stock Fund, which invested in WaMu stock, to ensure that each
 21 investment is a suitable option for the plan;

22 (b) The duty to avoid conflicts of interest and to resolve them promptly when they
 23 occur. A fiduciary must always administer a plan with an “eye single” to the interests of the
 24 participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan
 25 sponsor; and
 26

(c) The duty to disclose and inform, which encompasses: (1) a negative duty not to misinform; (2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries.

378. ERISA § 405(a), 29 U.S.C. § 1105(a), “Liability for Breach by Co-Fiduciary,” provides, in pertinent part:

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

379. Co-fiduciary liability is an important part of ERISA’s regulation of fiduciary responsibility. Because ERISA permits the fractionalization of the fiduciary duty, there may be, as in this case, several ERISA fiduciaries involved in a given issue, such as the role of company stock in a plan. In the absence of co-fiduciary liability, fiduciaries would be incentivized to limit their responsibilities as much as possible and to ignore the conduct of other fiduciaries. The result would be a setting in which a major fiduciary breach could occur, but the responsible party could not easily be identified. Co-fiduciary liability obviates this. Even if a fiduciary merely knows of a breach, a breach he had no connection with, he must take steps to remedy it:

[I]f a fiduciary knows that another fiduciary of the plan has committed a breach, and the first fiduciary knows that this is a breach, the first fiduciary must take reasonable steps under the circumstances to remedy the breach. . . . [T]he most appropriate steps in the circumstances may be to notify the plan sponsor of the breach, or to proceed to an appropriate Federal court for instructions, or bring the matter to the attention of the Secretary of Labor. The proper remedy is to be determined by the facts and circumstances of the particular case, and it may be affected by the relationship of the fiduciary to the plan and to the co-fiduciary, the duties and responsibilities of the fiduciary in question, and the nature of the breach.

1974 U.S.C.C.A.N. 5038, 1974 WL 11542, at 5080.

380. Plaintiffs therefore bring this action under the authority of ERISA § 502(a)(2) for relief under ERISA § 409(a) to recover losses sustained by the Plan arising out of the breaches of fiduciary duties by the Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a).

VIII. ERISA § 404(C) DEFENSE INAPPLICABLE

381. ERISA § 404(c) is an affirmative defense that provides a limited exception to fiduciary liability for losses that result from participants' exercise of control over investment decisions. In order for § 404(c) to apply, participants must in fact exercise "independent control" over investment decisions, and the fiduciaries must otherwise satisfy the numerous procedural and substantive requirements of ERISA § 404(c), 29 U.S.C. § 1104(c), and the regulations promulgated under it.

382. ERISA § 404(c) does not apply here for several reasons.

383. First, ERISA § 404(c) does not and cannot provide any defense to the fiduciaries' imprudent decision to select and continue offering WaMu stock as an investment option in the Plan as this is not a decision that was made or controlled by the participants. *See* Final Reg. Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans) ("Final

1 404(c) Reg.”), 57 Fed. Reg. 46906-01, 1992 WL 277875, at *46924 n.27 (Oct. 13, 1992)
 2 (codified at 29 C.F.R. pt. 2550) (noting that “the act of limiting or designating investment
 3 options which are intended to constitute all or part of the investment universe of an ERISA
 4 § 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or
 5 express plan language, is not a direct or necessary result of any participant direction of such
 6 plan”).

8 384. Secondly, even as to participant-directed investment in WaMu stock, ERISA
 9 § 404(c) does not apply because Defendants failed to ensure effective participant control by
 10 providing complete and accurate material information to participants regarding WaMu stock.
 11 *See* 29 C.F.R. § 2550.404c-1(b)(2)(i)(B) (the participant must be provided with “sufficient
 12 information to make informed decisions”). As a consequence, participants in the Plan did not
 13 have informed control over the portion of the Plan’s assets that were invested in WaMu stock as
 14 a result of their investment directions, and the Defendants remain entirely responsible for losses
 15 that result from such investment.

17 385. Third, in order to be a § 404(c) plan that provides a participant or beneficiary with
 18 an opportunity to exercise control over the assets in his account, an identified plan fiduciary (or a
 19 person or persons designated by the plan fiduciary to act on his behalf) must provide participants
 20 and beneficiaries, in the case of plans that provide an employer stock investment alternative, “a
 21 description of the procedures established to provide for the confidentiality of information relating
 22 to the purchase, holding and sale of employer securities, and the exercise of voting, tender and
 23 similar rights by participants and beneficiaries, and the name, address and phone number of the
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1 plan fiduciary responsible.” 29 C.F.R. § 2550.404c-1(b)(2)(B)(1)(vii). On information and
 2 belief, no such information was provided to Plan participants.

3 386. Because ERISA § 404(c) does not apply here, the Defendants’ liability to the
 4 Plan, the Plaintiffs and the Class (as defined below) for losses caused by the Plan’s investment in
 5 WaMu stock is established upon proof that such investments were or became imprudent and
 6 resulted in losses in the value of the assets in the Plan during the Class Period.
 7

8 **IX. DEFENDANTS’ INVESTMENT IN COMPANY STOCK IS NOT ENTITLED TO**
 9 **A PRESUMPTION OF PRUDENCE**

10 387. Some courts have applied a presumption of prudence to decisions by plan
 11 fiduciaries to invest plan assets in company stock in plans that qualify as “ESOPs” under the
 12 Internal Revenue Code and rules of the Department of the Treasury promulgated thereunder.
 13 The presumption is based on the dual purpose of an ESOP to allow employee ownership on the
 14 one hand, and save for retirement on the other. *Moench v. Robertson*, 62 F.3d 553, 569, 571 (3d
 15 Cir. 1995) (explaining dual purpose of ESOP plans and adopting presumption of prudence to
 16 balance these concerns). “A plaintiff may then rebut this presumption of reasonableness by
 17 showing that a prudent fiduciary acting under similar circumstances would have made a different
 18 investment decision.” *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995). The Ninth Circuit
 19 has twice declined to adopt the presumption of prudence. *In re Syncor ERISA Litig.*, 516 F.3d
 20 1095, 1102 (9th Cir. 2008).
 21

22 388. Here, even if, contrary to Ninth Circuit precedent, the presumption were applied,
 23 the presumption is overcome by the facts alleged here, including, among other averments:
 24

- 25 • A precipitous stock price decline from over 99% during the Class Period;

- The FDIC's seizing WaMu's banking unit on September 25, 2008, followed by WaMu filing for bankruptcy on September 26, 2008;
- The Company's seriously deteriorating financial condition as well as Defendants' conflicted status as discussed in detail herein;
- Serious, if not gross, mismanagement evidenced by, among other things;
 - the Company's over-reliance on the origination, securitization and sale of subprime mortgage loans and other risky mortgage loan products such as "negative amortization" loans;
 - the Company's lax underwriting policies for mortgage loans and related loan products;
 - the Company's participation in the systematic manipulation of the loan origination and property appraisal processes;
 - the Company's failure to implement and maintain risk management control processes;
 - the Company's failure to properly account for its subprime lending and related business operations;
 - expanding subprime mortgage origination even after widely-recognized market conditions had already slowed revenue growth and exponentially increased the risk of defaults and loan losses;
 - dishonest, misleading, and illegal actions as set forth above that caused the price of WaMu stock to be artificially inflated;
 - Defendants' conflicts of interest by which they held the Company's interests above those of Plan participants through their failure to take prompt and effective action to prevent further loss of participants' retirement savings; and
 - the artificial inflation of WaMu stock as a result of improper accounting practices and misrepresentations regarding the Company's financial condition.

389. The imprudence of continued investment by Defendants in WaMu stock during the Class Period under the circumstances present here is recognized in Department of Labor regulations:

[B]ecause every investment necessarily causes a plan to forgo other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.

29 C.F.R. § 2509.94-1. Defendants had available to them investment alternatives to WaMu stock that had either a higher rate of return with risk commensurate to WaMu stock or an expected rate of return commensurate to WaMu stock but with less risk.

390. Based on these circumstances, and the others alleged herein, it was imprudent and an abuse of discretion for Defendants to continue to make and maintain investment in WaMu stock, and, effectively, to not adequately protect the Plan from significant losses as a result of such investment during the Class Period.

X. CAUSES OF ACTION

A. Count I: Failure to Prudently and Loyalily Manage the Plan and Its Assets

391. Plaintiffs incorporate by this reference the paragraphs above.

392. This Count alleges fiduciary breach against: the PIC Defendants and the HR Committee Defendants (the “Prudence Defendants”); this Count further alleges liability against JPMCNA by virtue of its assumption of WaMu’s Plan-related liability and its status as WaMu’s successor-in-interest.

393. As alleged above, during the Class Period the Prudence Defendants and WaMu were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

394. As alleged above, the scope of the fiduciary duties and responsibilities of the Prudence Defendants and WaMu included, on information and belief, managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, and with the care, skill, diligence, and prudence required by ERISA. As such, the PIC was directly responsible for, among other things, selecting prudent investment options and eliminating imprudent options. The HR Committee was responsible for overseeing the management of the Plan's trust fund and periodically reviewing the performance of the funds and investment managers. The HR Committee exercised such authority when it requested a complete evaluation of fund performance and expenses to ensure that participants continue to have an appropriate range of investment choices. As alleged previously, WaMu decided to offer Company stock as an investment option to Plan participants and had the duty to monitor the suitability of the Trust acquiring and holding WaMu stock. Additionally, WaMu exercised *de facto* authority and control with respect to the *de jure* responsibilities of the Prudence Defendants, making itself fully responsible for the prudent and loyal fulfillment of the *de jure* responsibilities assigned by the governing documents to the other Prudence Defendants, without relieving them of any such responsibility. In carrying out these responsibilities, the Prudence Defendants and WaMu were required to evaluate the merits of the Plan's investments on an ongoing basis and take all necessary steps to ensure that the Plan's assets were invested prudently.

395. Yet, contrary to their duties and obligations under ERISA, the Prudence Defendants and WaMu failed to loyally and prudently manage the assets of the Plan. Specifically, during the Class Period, these Defendants and WaMu knew or should have known that WaMu common stock no longer was a suitable and appropriate investment for the Plan, but

1 was, instead, a highly speculative and risky investment in light of the Company's serious
 2 mismanagement, dire financial circumstances, and the imminent risk of collapse of WaMu stock
 3 as a result thereof. Nonetheless, during the Class Period, these Defendants and WaMu continued
 4 to offer WaMu stock as an investment option for participant contributions. They did so despite
 5 evidence that the Company was overexposed to the risks of subprime lending and other high-risk
 6 loans, including rapidly increasing defaults and corresponding loan losses, and that the price of
 7 WaMu stock was artificially inflated as a result of the failure of the Defendants and WaMu to
 8 provide complete and accurate information to Plan participants and the market generally.
 9

10 396. The Prudence Defendants and WaMu were obliged to prudently and loyally
 11 manage all of the Plan's assets. However, their duties of prudence and loyalty were especially
 12 significant with respect to Company stock because: (a) company stock is a particularly risky and
 13 volatile investment, even in the absence of company misconduct; and (b) participants tend to
 14 underestimate the likely risk and overestimate the likely return of investment in company stock.
 15 In view of this, the Prudence Defendants and WaMu were obliged to have in place a regular,
 16 systematic procedure for evaluating the prudence of investment in Company stock.
 17

18 397. Moreover, the Prudence Defendants and WaMu failed to conduct an appropriate
 19 investigation of the merits of continued investment in WaMu stock even in light of the losses, the
 20 Company's highly risky and inappropriate practices, and the particular dangers that these
 21 practices posed to the Plan. Such an investigation would have revealed to a reasonably prudent
 22 fiduciary the imprudence of continuing to make and maintain investment in WaMu stock under
 23 these circumstances.
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1 398. The decisions of the Prudence Defendants and WaMu with respect to the Plan's
 2 investment in WaMu stock described above, under the circumstances alleged herein, abused their
 3 discretion as ERISA fiduciaries in that a prudent fiduciary acting under similar circumstances
 4 would have made different investment decisions. Specifically, based on the above, a prudent
 5 fiduciary could not have reasonably believed that further and continued investment of the Plan's
 6 contributions and assets in WaMu stock was in keeping with the Plan settlor's expectations of
 7 how a prudent fiduciary would operate.

9 399. The Prudence Defendants and WaMu were obligated to discharge their duties
 10 with respect to the Plan with the care, skill, prudence, and diligence under the circumstances then
 11 prevailing that a prudent man acting in a like capacity and familiar with such matters would use
 12 in the conduct of an enterprise of a like character and with like aims. ERISA § 404(a)(1)(B),
 13 29 U.S.C. § 1104(a)(1)(B).

15 400. According to DOL regulations and case law interpreting this statutory provision, a
 16 fiduciary's investment or investment course of action is prudent if (a) he has given appropriate
 17 consideration to those facts and circumstances that, given the scope of such fiduciary's
 18 investment duties, the fiduciary knows or should know are relevant to the particular investment
 19 or investment course of action involved, including the role the investment or investment course
 20 of action plays in that portion of the plan's investment portfolio with respect to which the
 21 fiduciary has investment duties; and (b) he has acted accordingly.

23 401. Again, according to DOL regulations, "appropriate consideration" in this context
 24 includes, but is not necessarily limited to:

- 25 • A determination by the fiduciary that the particular investment or investment course
 26 of action is reasonably designed, as part of the portfolio (or, where applicable, that

portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action; and

- Consideration of the following factors as they relate to such portion of the portfolio: (a) The composition of the portfolio with regard to diversification; (b) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and (c) The projected return of the portfolio relative to the funding objectives of the plan.

402. Given the conduct of the Company as described above, the Prudence Defendants and WaMu could not possibly have acted prudently when they continued to invest the Plan's assets in WaMu stock because, among other reasons:

- The Prudence Defendants and WaMu knew of and/or failed to investigate the failures of the Company, including, but not limited to the following, which made the Company an extremely risky and imprudent investment for the Plan: (a) the Company's over reliance on subprime and other high-risk loan products; (b) the Company's participation in the systematic manipulation of the loan origination process; (c) the Company's failure to implement and maintain risk management control processes; and (d) the Company's failure to properly account for its subprime lending business operations;
- The risk associated with the investment in WaMu stock during the Class Period was far above and beyond the normal, acceptable risk associated with investment in company stock;
- This abnormal investment risk could not have been known by the Plan's participants, and the Prudence Defendants and WaMu knew that it was unknown to them (as it was to the market generally), because the fiduciaries never disclosed it;
- Knowing of this extraordinary risk, and knowing the Plan's participants did not know it, the Prudence Defendants and WaMu had a duty to avoid permitting the Plan or any participant from investing the Plan's assets in WaMu stock; and
- Further, knowing that the Plan was not a diversified portfolio, but was significantly invested in Company stock, the Prudence Defendants and WaMu had a heightened responsibility to divest the Plan of Company stock if it became or remained imprudent.

1 403. The fiduciary duty of loyalty entails, among other things, a duty to avoid conflicts
2 of interest and to resolve them promptly when they occur. A fiduciary must always administer a
3 plan with single-minded devotion to the interests of the participants and beneficiaries, regardless
4 of the interests of the fiduciaries themselves or the plan sponsor. Upon information and belief,
5 the compensation and tenure of the Prudence Defendants was tied to the performance of WaMu
6 stock and/or the publicly reported financial performance of WaMu. Fiduciaries laboring under
7 such conflicts, must, in order to comply with the duty of loyalty, make special efforts to assure
8 that their decision making process is untainted by the conflict and made in a disinterested
9 fashion, typically by seeking independent financial and legal advice obtained only on behalf of
10 the plan.
11

12 404. The Prudence Defendants and WaMu breached their duty to avoid conflicts of
13 interest and to promptly resolve them by, *inter alia*, failing to engage prudent independent
14 advisors who could make independent judgments concerning the Plan's investment in WaMu;
15 failing to notify appropriate federal agencies, including the DOL, of the facts and circumstances
16 that made WaMu stock an unsuitable investment for the Plan; failing to take such other steps as
17 were necessary to ensure that participants' interests were loyally and prudently served; with
18 respect to each of these above failures, doing so in order to avoid adversely impacting their own
19 compensation or drawing attention to WaMu's inappropriate practices; and by otherwise placing
20 their own and WaMu's improper interests above the interests of the participants with respect to
21 the Plan's investment in WaMu stock.
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1 405. As discussed above, in light of the Company's serious mismanagement and
2 improper business practices detailed above which ultimately led to the Company's collapse, the
3 actions taken by the PIC were too little too late to protect the Plan participants.

4 406. These Defendants breached their duty of prudence by knowing of, and in some
5 instances participating in, the imprudent acts, illegal business and accounting practices described
6 above while continuing to hold and purchase artificially inflated WaMu stock for the Plan.

7 407. Moreover, a fiduciary's duties of loyalty and prudence require it to disregard plan
8 documents or directives that it knows or reasonably should know would lead to an imprudent
9 result or would otherwise harm plan participants or beneficiaries. ERISA § 404(a)(1)(D),
10 29 U.S.C. § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow plan documents or
11 directives that would lead to an imprudent result or that would harm plan participants or
12 beneficiaries, nor allow others, including those whom they direct or who are directed by the plan,
13 to do so.

14 408. Thus, even to the extent that the Plan required the fiduciaries to offer WaMu stock
15 as an investment option, which Plaintiffs dispute, the Prudence Defendants and WaMu breached
16 their duty of prudence by continuing to offer WaMu stock as an investment option for participant
17 contributions in the Plan, when the Prudence Defendants and WaMu knew or should have known
18 that WaMu stock no longer was a prudent investment for participants' retirement savings.

19 409. As a consequence of the breaches of fiduciary duties by the Prudence Defendants
20 and WaMu alleged in this Count, the Plan suffered significant losses. If the Prudence
21 Defendants and WaMu had discharged their fiduciary duties to prudently invest the Plan's assets,
22 the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct
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and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly Plaintiffs and the other Class members, lost over 300 million dollars of retirement savings.

410. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2) & (a)(3), the Prudence Defendants, and JPMCNA (by virtue of its assumption of WaMu's Plan-related liability and its status as WaMu's successor-in-interest), are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

B. Count II: Failure to Monitor Fiduciaries

411. Plaintiffs incorporate by this reference the allegations above.

412. This Count alleges fiduciary breach against the following Defendants: JPMCNA (by virtue of its assumption of WaMu's Plan-related liability and its status as WaMu's successor-in-interest) and the HR Committee.

413. As alleged above, during the Class Period the HR Committee and WaMu were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

414. As alleged above, the scope of the fiduciary responsibilities of the HR Committee and WaMu included the responsibility to appoint, and remove, and thus, monitor the performance of other fiduciaries, as follows:

Monitoring Fiduciary	Monitored Fiduciary	Reference
WaMu	PIC and PAC Defendants	¶¶ 63-70
HR Committee	PIC and PAC Defendants	¶¶ 75-82

1 415. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries
2 are performing their fiduciary obligations, including those with respect to the investment and
3 holding of plan assets, and must take prompt and effective action to protect the plan and
4 participants when they are not.

5 416. The monitoring duty further requires that appointing fiduciaries have procedures
6 in place so that on an ongoing basis they may review and evaluate whether the “hands-on”
7 fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work
8 and the plan’s performance, and by ensuring that they have a prudent process for obtaining the
9 information and resources they need). In the absence of a sensible process for monitoring their
10 appointees, the appointing fiduciaries would have no basis for prudently concluding that their
11 appointees were faithfully and effectively performing their obligations to plan participants or for
12 deciding whether to retain or remove them.

13 417. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with
14 complete and accurate information in their possession that they know or reasonably should know
15 that the monitored fiduciaries must have in order to prudently manage the plan and the plan
16 assets, or that may have an extreme impact on the plan and the fiduciaries’ investment decisions
17 regarding the plan.

18 418. The HR Committee and WaMu breached their fiduciary monitoring duties by,
19 among other things: (a) failing, at least with respect to the Plan’s investment in Company stock,
20 to monitor their appointees, to evaluate their performance, or to have any system in place for
21 doing so, and standing idly by as the Plan suffered enormous losses as a result of their
22 appointees’ imprudent actions and inaction with respect to Company stock; (b) failing to ensure
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1 that the monitored fiduciaries appreciated the true extent of WaMu's highly risky and
 2 inappropriate business practices, and the likely impact of such practices on the value of the
 3 Plan's investment in WaMu stock; (c) to the extent any appointee lacked such information,
 4 failing to provide complete and accurate information to all of their appointees such that they
 5 could make sufficiently informed fiduciary decisions with respect to the Plan's assets; and
 6 (d) failing to remove appointees whose performance was inadequate in that they continued to
 7 make and maintain investments in WaMu stock despite their knowledge of practices that
 8 rendered WaMu stock an imprudent investment during the Class Period for participants'
 9 retirement savings in the Plan, and who breached their fiduciary duties under ERISA.
 10

11 419. As a consequence of the HR Committee and WaMu's breaches of fiduciary duty,
 12 the Plan suffered tremendous losses. If the HR Committee and WaMu had discharged their
 13 fiduciary monitoring duties as described above, the losses suffered by the Plan would have been
 14 minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary
 15 duty alleged herein, the Plan, and indirectly the Plaintiffs and the other Class members, lost over
 16 300 million dollars of retirement savings.
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18 420. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2)
 19 and (a)(3), the HR Committee and JPMCNA (by virtue of its assumption of WaMu's Plan-
 20 related liability and its status as WaMu's successor-in-interest) are liable to restore the losses to
 21 the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other
 22 equitable relief as appropriate.
 23

24 **C. Count III: Breach of Fiduciary Duty to Disclose Necessary Information to Co-**
 25 **Fiduciaries**

26 421. Plaintiffs incorporate by this reference the allegations above.

1 422. This Count alleges fiduciary breach against the following Defendants: JPMCNA
 2 (by virtue its assumption of WaMu's Plan-related liability and its status as WaMu's successor-in-
 3 interest) and Defendant Killinger.

4 423. Pursuant to the duties of prudence and loyalty which every ERISA fiduciary owes
 5 to the plans that he serves pursuant to ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A)
 6 and (B), such fiduciaries are required to disclose to their co-fiduciaries information that they
 7 know is unavailable to their co-fiduciaries, but that such co-fiduciaries need to protect the
 8 interests of the plan. *See Glaziers and Glassworkers Union Local No. 252 Annuity Fund v.*
 9 *Newbridge Securities*, 93 F.3d 1171 (3d Cir. 1996).
 10

11 424. The following fiduciaries of the Plan possessed non-public information during the
 12 Class Period about the risks posed by WaMu stock, which they knew could be used by other
 13 fiduciaries of the Plan (in particular the PIC Defendants and the PAC Defendants) to protect the
 14 Plan and its participants and beneficiaries: (1) WaMu, as the *de facto* fiduciary that exercised
 15 authority and control over the conduct of the HR Committee Defendants, the Investment
 16 Committee Defendants and the PAC Defendants; and (2) Defendant Killinger who was a *de facto*
 17 fiduciary as a result of his communications directed to Plan participants and his role as a Board
 18 member with responsibility for making final determinations with regard to HR Committee
 19 resolutions pertaining to, among other things, the Plan.
 20

21 425. The HR Committee Defendants, the PIC Defendants and the PAC Defendants
 22 should have sought information concerning the risks posed by an investment in Company stock
 23 as part of a thorough and careful investigation of the merits of investment in Company stock
 24 during the Class Period, but failed to do so. Nevertheless, those fiduciaries in possession of such
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1 knowledge, including but not limited to WaMu and Defendant Killinger, should have supplied
 2 that information to HR Committee Defendants, the PIC Defendants and the PAC Defendants
 3 voluntarily in the fulfillment of the fiduciary duties they owed to the Plan. Indeed, Defendant
 4 Killinger attended meetings of the HR Committee and failed to supply such information.

5 426. WaMu and Defendant Killinger profited from their breach of this duty.

6 427. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2)
 7 and (a)(3), JPMCNA (by virtue of its assumption of WaMu's Plan-related liability and its status
 8 as WaMu's successor-in-interest) and Defendant Killinger are liable to restore the losses to the
 9 Plan caused by their breaches of fiduciary duties alleged in this Count, to disgorge any profits
 10 made through their breach and to provide other equitable relief as appropriate.

11
 12 **D. Count IV: Breach of Fiduciary Duty – Failure to Provide Complete and Accurate**
 13 **Information to the Plan's Participants and Beneficiaries**

14 428. Plaintiffs incorporate by this reference the allegations above.

15 429. This Count alleges fiduciary breach against the Administration Committee
 16 Defendants, and Defendant Killinger (the "Communications Defendants"); this Count further
 17 alleges liability against JPMCNA by virtue of its assumption of WaMu's Plan-related liability
 18 and its status as WaMu's successor-in-interest.

19 430. At all relevant times, as alleged above, the Commuinciations Defendants and
 20 WaMu were fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).
 21 Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

22 431. At all relevant times, the scope of the fiduciary responsibility of WaMu and the
 23 PAC included the communications and material disclosures to the Plan's participants and
 24 beneficiaries. In addition, Defendant Killinger acted as a *de facto* communicating fiduciary as a
 25
 26

1 result of his extensive communications directly with employees/Plan participants regarding the
2 Company and its likely future prospects. Defendant Killinger knew that the employees'
3 retirement savings were invested significantly in WaMu stock in the Plan, his communications
4 concerned this investment, and, thus, concerned Plan benefits, and constituted acts of Plan
5 administration under ERISA.
6

7 432. The duty of loyalty under ERISA requires fiduciaries to speak truthfully to
8 participants, not to mislead them regarding the plan or plan assets, and to disclose information
9 that participants need in order to exercise their rights and interests under the plan. This duty to
10 inform participants includes an obligation to provide participants and beneficiaries of the plan
11 with complete and accurate information, and to refrain from providing false information or
12 concealing material information, regarding plan investment options so that participants can make
13 informed decisions with regard to the prudence of investing in such options made available under
14 the plan. This duty applies to all of the Plan's investment options, including investment in
15 WaMu stock.
16

17 433. Because investments in the Plan were not diversified (*i.e.* the Defendants and
18 WaMu chose to allow the Plan's assets to be invested heavily in WaMu stock), such investment
19 carried with it an inherently high degree of risk. This inherent risk made the Communications
20 Defendants' duty to provide complete and accurate information particularly important with
21 respect to WaMu stock.
22

23 434. The Communications Defendants and WaMu breached their duty to inform
24 participants by failing to provide complete and accurate information regarding WaMu's serious
25 mismanagement and improper business practices and public misrepresentations, and the
26

1 consequential artificial inflation of the value of WaMu stock, and, generally, by conveying
 2 incomplete information regarding the soundness of WaMu stock and the prudence of investing
 3 and holding retirement contributions in WaMu equity. These failures were particularly
 4 devastating to the Plan and its participants; a large percentage of the Plan's assets were invested
 5 in WaMu stock during the Class Period and, thus, losses in this investment had a significant
 6 impact on the value of participants' retirement assets.
 7

8 435. The Communications Defendants' omissions clearly were material to participants'
 9 ability to exercise informed control over their Plan accounts, as in the absence of the
 10 information, participants did not know the true risks presented by the Plan's investment in
 11 WaMu stock.
 12

13 436. The Communications Defendants' omissions and incomplete statements alleged
 14 herein were Plan-wide and uniform in that the Communications Defendants failed to provide
 15 complete and accurate information to any of the Plan's participants.
 16

17 437. The Communications Defendants were unjustly enriched by the fiduciary
 18 breaches described in this Count.
 19

20 438. As a direct and proximate result of the breaches of fiduciary duties alleged herein,
 21 the Plan, and indirectly the Plaintiffs and the Plan's other participants and beneficiaries, lost a
 22 significant portion of their retirement investment.
 23

24 439. Pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA § 409(a),
 25 29 U.S.C. § 1109(a), the Communications Defendants, and JPMCNA (by virtue of its
 26 assumption of Plan-related liability and its status as WaMu's successor in interest) are liable to
 restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count.

1 **E. Count V: Co-Fiduciary Liability**

2 440. Plaintiffs incorporate by this reference the allegations above.

3 441. This Count alleges co-fiduciary liability against the following Defendants: all
4 Defendants other than JPMCNA (the “Co-Fiduciary Defendants”), and alleges liability against
5 JPMCNA by virtue of its assumption of WaMu’s Plan-related liability and its status as WaMu’s
6 successor-in-interest.

7
8 442. As alleged above, during the Class Period the Co-Fiduciary Defendants and
9 WaMu were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de*
10 *facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both.
11 Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

12 443. As alleged above, ERISA § 405(a), 29 U.S.C. § 1105, imposes liability on a
13 fiduciary, in addition to any liability which he may have under any other provision, for a breach
14 of fiduciary responsibility of another fiduciary with respect to the same plan if he knows of a
15 breach and fails to remedy it, knowingly participates in a breach, or enables a breach. The Co-
16 Fiduciary Defendants breached all three provisions.

17
18 444. **Knowledge of a Breach and Failure to Remedy.** ERISA § 405(a)(3), 29 U.S.C.
19 § 1105, imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary
20 if, he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts
21 under the circumstances to remedy the breach. Each of the Co-Fiduciary Defendants knew of the
22 breaches by the other fiduciaries and made no efforts, much less reasonable ones, to remedy
23 those breaches. In particular, they did not communicate their knowledge of the Company’s
24 illegal and irresponsible activity to the other fiduciaries.
25
26

1 445. WaMu, through its officers and employees, engaged in highly risky and
 2 inappropriate business practices, withheld material information from the market, and profited
 3 from such practices, and, thus, knowledge of such practices is imputed to WaMu as a matter of
 4 law.

5 446. Because Defendants and WaMu knew of the Company's failures and
 6 inappropriate business practices, they also knew that the Prudence Defendants were breaching
 7 their duties by continuing to invest in Company stock. Yet, they failed to undertake any effort to
 8 remedy these breaches. Instead, they compounded them by downplaying the significance of
 9 WaMu's failed and inappropriate business practices, and obfuscating the risk that the practices
 10 posed to the Company, and, thus, to the Plan.

11 447. **Knowing Participation in a Breach.** ERISA § 405(a)(1), 29 U.S.C. § 1105(1),
 12 imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with
 13 respect to the same plan if he participates knowingly in, or knowingly undertakes to conceal, an
 14 act or omission of such other fiduciary, knowing such act or omission is a breach. WaMu
 15 knowingly participated in the fiduciary breaches of the Prudence Defendants in that it benefited
 16 from the sale or contribution of its stock at prices that were disproportionate to the risks for Plan
 17 participants. Likewise, the HR Committee and WaMu, the monitoring Defendants, knowingly
 18 participated in the breaches of the Prudence Defendants because, as alleged above, they had
 19 actual knowledge of the facts that rendered WaMu stock an imprudent retirement investment and
 20 yet, ignoring their oversight responsibilities, permitted the Prudence Defendants to breach their
 21 duties.
 22
 23
 24
 25
 26

1 448. **Enabling a Breach.** ERISA § 405(a)(2), 29 U.S.C. § 1105(2), imposes liability
 2 on a fiduciary if by failing to comply with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the
 3 administration of his specific responsibilities which give rise to his status as a fiduciary, he has
 4 enabled another fiduciary to commit a breach.

5 449. The failure of the HR Committee and WaMu to monitor the PIC and the PAC
 6 enabled those committees to breach their duties. WaMu's and Defendant Killinger's failure to
 7 provide critical information regarding the true risks faced by WaMu to the PIC, PAC and HR
 8 Committee enabled those committees to breach their duties.

9 450. As a direct and proximate result of the breaches of fiduciary duties alleged herein,
 10 the Plan, and indirectly the Plaintiffs and the Plan's other participants and beneficiaries, lost over
 11 300 million dollars of retirement savings.

12 451. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2)
 13 and (a)(3), the Co-Fiduciary Defendants are liable to restore the losses to the Plan caused by their
 14 breaches of fiduciary duties alleged in this Count and to provide other equitable relief as
 15 appropriate, and JPMCNA has the same liability by virtue of its assumption of Plan-related
 16 liability and its status as successor-in-interest to WaMu.

17 **F. Count VI: Knowing Participation in a Breach of Fiduciary Duty.**

18 452. Plaintiffs incorporate the allegations contained in the previous paragraphs of this
 19 Complaint as if fully set forth herein.

20 453. This Count is brought against JPMCNA (by virtue of its assumption of WaMu's
 21 Plan-related liability and its status as WaMu's successor-in-interest).

22 454. To the extent that WaMu is found not to have been fiduciary or to have acted in a
 23 fiduciary capacity with respect to the conduct alleged to have violated ERISA, WaMu knowingly
 24
 25
 26

1 participated in the breaches of those Defendants who were fiduciaries and acted in a fiduciary
 2 capacity and as such is liable for equitable relief as a result of participating in such breaches.

3 455. WaMu benefited from the breaches by discharging its obligations to make
 4 contributions to the Plan in amounts specified by the Plan, contributing WaMu stock to the Plan
 5 while the value of the stock was inflated as the result of WaMu's highly risky and improper
 6 business practices, and providing the market with materially misleading statements and
 7 omissions. Accordingly, JPMCNA may be required to disgorge this benefit by virtue of its
 8 assumption of Plan-related liability and its status as successor-in-interest to WaMu.
 9

10 **XI. CAUSATION**

11 456. The Plan suffered over 300 million dollars in principle losses alone because
 12 substantial assets of the Plan were imprudently invested or allowed to be invested by Defendants
 13 in WaMu stock during the Class Period, in breach of Defendants' fiduciary duties.
 14

15 457. The fiduciary Defendants are liable for losses to the portion of Plan's assets
 16 invested in WaMu stock as a result of participant contributions because they failed to take the
 17 necessary and required steps to ensure effective and informed independent participant control
 18 over the investment decision-making process, as required by ERISA § 404(c), 29 U.S.C.
 19 § 1104(c), and the regulations promulgated thereunder, and JPMCNA has the same liability by
 20 virtue of its assumption of Plan-related liability and its status as WaMu's successor-in-interest.
 21

22 458. The fiduciary Defendants and JPMCNA also are liable for losses that resulted
 23 from the fiduciary Defendants' decision to invest nearly all of the assets of the Company Stock
 24 Fund in WaMu stock rather than cash or other short-term investment options, as authorized by
 25 the Plan, and clearly prudent under the circumstances presented here.
 26

1 459. Had the fiduciary Defendants properly discharged their fiduciary and co-fiduciary
 2 duties, including the monitoring and removal of fiduciaries who failed to satisfy their ERISA-
 3 mandated duties of prudence and loyalty, eliminating WaMu stock as an investment alternative
 4 when it became imprudent, and divesting the Plan of WaMu stock when maintaining such an
 5 investment became imprudent, the Plan would have avoided some or all of the losses that it, and
 6 indirectly, the participants suffered.
 7

8 **XII. REMEDY FOR BREACHES OF FIDUCIARY DUTY**

9 460. The fiduciary Defendants breached their fiduciary duties in that they knew or
 10 should have known the facts as alleged above, and therefore knew or should have known that the
 11 Plan's assets should not have been invested in WaMu stock during the Class Period.

12 461. As a consequence of the fiduciary Defendants' breaches, the Plan suffered
 13 significant losses.
 14

15 462. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), authorizes a plan participant to bring
 16 a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires
 17 "any person who is a fiduciary ... who breaches any of the ... duties imposed upon fiduciaries ...
 18 to make good to such plan any losses to the plan...." Section 409 also authorizes "such other
 19 equitable or remedial relief as the court may deem appropriate...."
 20

21 463. With respect to calculation of the losses to the Plan, breaches of fiduciary duty
 22 result in a presumption that, but for the breaches of fiduciary duty, the Plan would not have made
 23 or maintained its investments in the challenged investment and, instead, prudent fiduciaries
 24 would have invested the Plan's assets in the most profitable alternative investment available to
 25 them. Alternatively, losses may be measured not only with reference to the decline in stock price
 26 relative to alternative investments, but also by calculating the additional shares of WaMu stock

1 that the Plan would have acquired had the Plan fiduciaries taken appropriate steps to protect the
 2 Plan. The Court should adopt the measure of loss most advantageous to the Plan. In this way,
 3 the remedy restores the Plan's lost value and puts the participants in the position they would have
 4 been in if the Plan had been properly administered.

5 464. Plaintiffs and the Class are therefore entitled to relief from the Defendants in the
 6 form of: (a) a monetary payment to the Plan to make good to the Plan the losses to the Plan
 7 resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial
 8 based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a);
 9 (b) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as
 10 provided by ERISA §§ 409(a), 502(a)(2) and (3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (3);
 11 (c) injunctive and other appropriate equitable relief pursuant to ERISA § 502(a)(3), 29 U.S.C.
 12 1132(a)(3), for knowing participation by a non-fiduciary in a fiduciary breach; (d) reasonable
 13 attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common
 14 fund doctrine, and other applicable law; (e) taxable costs and interest on these amounts, as
 15 provided by law; and (6) such other legal or equitable relief as may be just and proper.

16 465. Under ERISA, each Defendant is jointly and severally liable for the losses
 17 suffered by the Plan in this case.

18 **XIII. CLASS ACTION ALLEGATIONS**

19 466. **Class Definition.** Plaintiffs bring this action as a class action pursuant to Rules
 20 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of Plaintiffs and
 21 the following class of persons similarly situated (the "Class"):

1 467. All persons, other than Defendants, who were participants in or beneficiaries of
2 the Plan at any time between October 19, 2005, and September 26, 2008 and whose accounts
3 included investments in WaMu stock.

4 468. **Class Period.** The fiduciaries of the Plan knew or should have known at least by
5 October 19, 2005, that the Company's material weaknesses were so pervasive that WaMu stock
6 could no longer be offered as a prudent investment for a retirement plan.

7 469. **Numerosity.** The members of the Class are so numerous that joinder of all
8 members is impracticable. While the exact number of Class members is unknown to Plaintiffs at
9 this time, and can only be ascertained through appropriate discovery, Plaintiffs believe there are,
10 based on the Plan's Form 5500 for Plan year 2005, more than 70,000 members of the Class who
11 participated in, or were beneficiaries of, the Plan during the Class Period.

12 470. **Commonality.** Common questions of law and fact exist as to all members of the
13 Class and predominate over any questions affecting solely individual members of the Class.
14 Among the questions of law and fact common to the Class are:

15 (a) whether the fiduciary Defendants and former-Defendant WaMu each owed a
16 fiduciary duty to Plaintiffs and members of the Class;

17 (b) whether the fiduciary Defendants and former Defendant WaMu breached their
18 fiduciary duties to Plaintiffs and members of the Class by failing to act prudently and solely in
19 the interests of the Plan's participants and beneficiaries;

20 (c) whether the fiduciary Defendants and former Defendant WaMu violated ERISA;

21 (d) whether JPMCNA is liable for WaMu's breaches of fiduciary duty by virtue of its
22 assumption of Plan-related liability and/or its status as WaMu's successor-in-interest; and
23
24
25
26

1 (e) whether the Plan has suffered losses and, if so, what is the proper measure of
2 damages.

3 471. **Typicality.** Plaintiffs' claims are typical of the claims of the members of the
4 Class because: (a) to the extent Plaintiffs seek relief on behalf of the Plan pursuant to ERISA
5 § 502(a)(2), their claims on behalf of the Plan is not only typical to, but identical to a claim under
6 this section brought by any Class member; and (2) to the extent Plaintiffs seek relief under
7 ERISA § 502(a)(3) on behalf of themselves for equitable relief, that relief would affect all Class
8 members equally.
9

10 472. **Adequacy.** Plaintiffs will fairly and adequately protect the interests of the
11 members of the Class and have retained counsel competent and experienced in class action,
12 complex, and ERISA litigation. Plaintiffs have no interests antagonistic to or in conflict with
13 those of the Class.
14

15 473. **Rule 23(b)(1)(B) Requirements.** Class action status in this ERISA action is
16 warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the
17 Class would create a risk of adjudications with respect to individual members of the Class which
18 would, as a practical matter, be dispositive of the interests of the other members not parties to the
19 actions, or substantially impair or impede their ability to protect their interests.
20

21 474. **Other Rule 23(b) Requirements.** Class action status is also warranted under the
22 other subsections of Rule 23(b) because: (1) prosecution of separate actions by the members of
23 the Class would create a risk of establishing incompatible standards of conduct for Defendants;
24 (2) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby
25 making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect
26

1 to the Class as a whole; and (3) questions of law or fact common to members of the Class
 2 predominate over any questions affecting only individual members and a class action is superior
 3 to the other available methods for the fair and efficient adjudication of this controversy.

4 **XIV. PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs pray for:

6 A. A Declaration that each of the Defendants (except for JPMCNA) have breached
 7 their ERISA fiduciary duties to the participants;

8 B. A Declaration that JPMCNA is liable for WaMu's breaches of fiduciary duty;

9 C. A Declaration that the Defendants, and each of them, are not entitled to the
 10 protection of ERISA § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B);

11 D. An Order compelling the Defendants to make good to the Plan all losses to the
 12 Plan resulting from Defendants' breaches of their fiduciary duties, including losses to the Plan
 13 resulting from imprudent investment of the Plan's assets, and to restore to the Plan all profits the
 14 Defendants made through use of the Plan's assets, and to restore to the Plan all profits which the
 15 participants would have made if the Defendants had fulfilled their fiduciary obligations;

16 E. Imposition of a Constructive Trust on any amounts by which any Defendant was
 17 unjustly enriched at the expense of the Plan as the result of breaches of fiduciary duty;

18 F. Actual damages in the amount of any losses the Plan suffered, to be allocated
 19 among the participants' individual accounts in proportion to the accounts' losses;

20 G. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

21 H. An Order awarding attorneys' fees pursuant to the common fund doctrine,
 22 29 U.S.C. § 1132(g), and other applicable law; and

I. An Order for equitable restitution and other appropriate equitable and injunctive relief against the Defendants.

Dated: February 18, 2009.

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CERTIFICATE OF SERVICE

On February 18, 2009, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record:

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19 Executed this 18th day of February, 2009, in Seattle, Washington.

20 KELLER ROHRBACK L.L.P

21 By: _____ s/ Derek W. Loeser
22 Derek W. Loeser, WSBA # 30401