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**PLAINTIFFS' REPLY TO JPMORGAN'S MEMORANDUM IN OPPOSITION  
TO PLAINTIFFS' AMENDED MOTION FOR CERTIFICATION  
UNDER 28 U.S.C. § 1292(b)**

COME NOW, Plaintiffs American National, et. al. ("Plaintiffs"), and file this Reply to the Memorandum of Points and Authorities of Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. in Opposition to Plaintiffs' Amended Motion for Certification under 28 U.S.C. § 1292(b) ("Memorandum").<sup>1</sup> Plaintiff files this Reply to address factual and legal mistakes in the Memorandum.

**1. JPMC mischaracterizes the Plaintiffs' Petition**

Defendants JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. ("JPMC") apparently wish that the Plaintiffs had sued the FDIC, because JPMC insists on mischaracterizing the Plaintiffs' Petition as "repeatedly alleging the FDIC's central role in a scheme to bring down WMB for purposes of arranging a sweetheart deal for JPMC." (Memorandum at 5). In addition, JPMC misleadingly asserts that "at the core of this proceeding" is the FDIC's Whole Bank Purchase and Assumption agreement ("P&A agreement") and that "plaintiffs' claims are based on the [P&A agreement]." (Memorandum at 15). JPMC's ultimate theory is described in a footnote in the Memorandum: "plaintiffs' claims seek to determine 'rights with respect to the assets' of WMB and 'relate[e] to' acts of the FDIC as receiver for WMB." (Memorandum at 19, n. 8). Although JPMC's contentions may constitute its theory of the case, the contentions do not accurately reflect the Plaintiffs' Petition. JPMC's theories of defense are irrelevant

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<sup>1</sup> An Order issued by the Southern District of Texas does not appear to be part of the file for the District of Columbia. Plaintiffs filed Motions for Reconsideration of Order Denying Remand and for Written Findings of Fact or, in the Alternative, For Certification Under 28 U.S.C. § 1292(b) [Doc. 47] on September 9, 2009. The Order Transferring Case [Doc. 48] was entered that day. On September 11, 2009, the Southern District of Texas Court issued an Order denying Plaintiffs' Motion for Reconsideration (but not addressing Plaintiffs' Motion for Certification Under 28 U.S.C. § 1292(b)). See Exhibit A. That document was designated as Document 49 by the Clerk of the Southern District of Texas.

for purposes of a “well-pleaded complaint” analysis. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 811 (1988) (“the well-pleaded complaint rule . . . focuses on claims, not theories”).

The Petition speaks for itself. Not surprisingly, JPMC fails to reference any of the “core” allegations upon which the Plaintiffs base their claims—claims of tortious interference with existing contract, breach of a confidentiality agreement, and unjust enrichment. The Plaintiffs therefore iterate the actual claims:

- “In September of 2008, motivated by greed and unrestrained by moral or legal boundaries, the Defendants exploited a perceived liquidity crisis in the banking industry to improperly and illegally take advantage of the financial difficulties of Washington Mutual[.]” (Plaintiffs’ Original Petition, ¶ 20)
- JPMC misused “access to government regulators to gain non-public information in order to gain a competitive advantage and wrongfully influence government policy and actions.” (Plaintiffs’ Original Petition, ¶ 32)
- “JPMC deceptively gained access to Washington Mutual’s confidential financial records through the use of “plants” and “moles” engaged in corporate espionage at Washington Mutual.” (Plaintiffs’ Original Petition, ¶ 32)
- “JPMC misused the wrongfully obtained confidential information of Washington Mutual to bargain and work with federal regulators for the seizure and sale of Washington Mutual’s assets.” (Plaintiffs’ Original Petition, ¶ 32)
- “JPMC leaked false and harmful information to news media, which incited depositors to make withdrawals from their Washington Mutual accounts.” (Plaintiffs’ Original Petition, ¶ 32)
- “JPMC obstructed Washington Mutual’s efforts to sell itself in a fair bidding process.” (Plaintiffs’ Original Petition, ¶ 32)
- “JPMC exerted improper influence over government regulators to prematurely seize Washington Mutual, a solvent and liquid bank, and to sell assets of Washington Mutual without an adequate or fair bidding process.” (Plaintiffs’ Original Petition, ¶ 32)

- “In gaining access to Washington Mutual’s confidential records, JPMC and Dimon falsely promised that JPMC would maintain the secrecy of Washington Mutual financial information.” (Plaintiffs’ Original Petition, ¶ 58)
- “JPMC . . . disclosed [Washington Mutual’s confidential] information as it saw fit to news media, government regulators, and investors, in such way as promoted its scheme.” (Plaintiffs’ Original Petition, ¶ 58)
- “JPMC used its insider status to aggressively gather confidential information from Washington Mutual, which it then analyzed in order to accurately estimate the value of WMB deposits, mortgage portfolio and other assets in order to make a detailed and profitable prearranged bid to the FDIC for the purchase of those assets.” (Plaintiffs’ Original Petition, ¶ 58)
- “In September of 2008, the Defendants shared the confidential information with outside investors.” (Plaintiffs’ Original Petition, ¶ 61)
- “Defendants willfully and intentionally interfered with Plaintiffs’ bond contracts by inducing WMI and WMB to breach the contracts.” (Plaintiffs’ Original Petition, ¶ 91)
- “Defendants made WMI’s and WMB’s performance under the bond contracts impossible, more burdensome, difficult and expensive by executing its scheme to strip away the source of revenue from which WMI and WMB were to meet their obligations under the bond contracts.” (Plaintiffs’ Original Petition, ¶ 92)
- “The Defendants violated the confidentiality agreement . . .” (Plaintiffs’ Original Petition, ¶ 98)
- “The failure of Defendants to pay for the benefits they received . . . occurred only because the Defendants used fraud, duress, and took undue advantage by way of false pretenses, deceit, breached trust, and broken promises . . .” (Plaintiffs’ Original Petition, ¶ 103).

None of the Plaintiffs’ causes of action rely on claims of FDIC wrongdoing. Even if one assumes that FDIC performed its role as receiver for Washington Mutual Bank without flaw, the Plaintiffs’ claims would remain absolutely viable. Moreover, Plaintiffs seek no assets that concern the P&A agreement.

2. **JPMC cannot prevent this Court and the District of Columbia Court of Appeals from reviewing federal subject matter jurisdiction**

JPMC arrogantly suggests that neither this Court nor the Court of Appeals for the District of Columbia has authority to review whether this Court has subject matter jurisdiction. JPMC is mistaken.

This Court and the Court of Appeals have plenary power to consider subject matter jurisdiction. Federal law is well-established and clear that “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c). The question of subject matter jurisdiction is fundamental, and is the question “the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.” *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900); *accord Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

JPMC cites a number of inapt and/or unpublished cases that deal with appellate review of transfer orders under 28 U.S.C. § 1404. However, the Texas Court’s Venue Transfer Order was based upon 12 U.S.C. § 1821(d)(6)(A), not 28 U.S.C. § 1404. Moreover, the Court’s venue ruling was secondary to findings relating to the applicability of FIRREA, the intervention by the FDIC, and subject matter jurisdiction. 12 U.S.C. § 1821(d)(6)(A) provides that a person with a “claim” subject to the FIRREA receivership claim process, following disallowance of the claim, may

file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United

States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

JPMC's cases are not applicable because the fundamental legal issue in this appeal—applicability of FIRREA and the jurisdictional reach of the FDIC's receivership process—is the basis of subject matter jurisdiction and venue. None of JPMC's cases or arguments addresses the uniquely interconnected relationship between subject matter jurisdiction and venue, where the issue sought to be appealed is whether a cause of action constitutes a "claim" subject to FIRREA. *See Heaton v. Monogram Credit Card Bank of Georgia*, 297 F.3d 416, 421 (5<sup>th</sup> Cir. 2002) (noting the jurisdictional significance of the FDIC's motion to intervene).

3. **Absence of federal question jurisdiction due to overextension of FIRREA is a controlling issue**

"District courts have substantial discretion in deciding whether to certify a question for interlocutory appeal[.]" *Marriott v. County of Montgomery*, 426 F. Supp. 2d 1, 13 (N.D.N.Y. 2006); see *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 162 (E.D.N.Y. 1999) ("The legislative history, congressional design and case law indicate that district court judges retain unfettered discretion to deny certification of an order for interlocutory appeal even where the three legislative criteria of section 1292(b) appear to be met.") (citations omitted).

The controlling appellate issue here is the jurisdictional reach of FIRREA over claims that are not administratively reviewable under FIRREA's claim review process. The Texas Court erroneously concluded that FIRREA applied to the Plaintiffs' case. This error formed the basis of the FDIC's improper intervention and the erroneous

finding of federal question jurisdiction under 12 U.S.C. § 1819(b)(2)(B) (“all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States”). From that error flowed the improper transfer of venue to the District of Columbia based on 12 U.S.C. § 1821(d)(6)(A). JPMC’s focus on the Texas Court’s decision regarding intervention as being merely “discretionary” ignores the dangers of manipulating federal jurisdiction by the mere intervention in state court by the FDIC. *Bank One Texas National Association v. Morrison*, 26 F.3d 544, 547 (5th Cir. 1994) (“federal jurisdiction should not be manipulated by the FDIC’s simple intervention in a given case”).

Likewise without merit is JPMC’s assertion that “at the core of this proceeding is an ‘agreement’ the FDIC ‘made under the statute.’” (Memorandum at 15). This misconstrues the Plaintiffs’ claims, and cannot support permissive intervention. The Texas Court’s Transfer Order makes its basis clear—its erroneous conclusion that the Plaintiffs’ causes of action were “claims” subject to FIRREA. Otherwise, there would not be a basis for transfer under 12 U.S.C. § 1821(d)(6)(A) (providing venue for judicial review of FDIC claim disallowance). JPMC’s other contentions are likewise specious and cannot be a basis for the Texas Court ruling.

For example, JPMC’s argument regarding a purported interest by the FDIC in “indemnification pursuant to the P&A Agreement,” is without factual basis. In the indemnity provision at issue, FDIC expressly refuses to indemnify the Defendants for “claims arising from any action or inaction” of the Defendants that were “taken in a

manner constituting bad faith, gross negligence or willful misconduct.”<sup>2</sup> It is clear that JPMC engaged in precisely this misconduct in the instant case. Not surprisingly, the FDIC has never suggested that the indemnity provision is enforceable or that it must indemnify JPMC for damages from the Plaintiffs’ claims. The mere existence of an indemnity provision in a P&A agreement will not support intervention. *See Bank One, Tex., Nat’l Assoc. v. Elms*, 764 F.Supp. 85, 89 (N.D.Tex.1991) (indemnity obligation insufficient to support intervention of FDIC).

**4. Plain language and reasonable statutory construction bars application of FIRREA to claims against non-receivership parties**

JPMC offers nothing new relating to FIRREA. JPMC continues to mischaracterize the nature of the Plaintiffs’ lawsuit. It offers no analysis of FIRREA. JPMC wholly fails to address *Auction Co. v. FDIC*, 141 F.3d 1198 (D.C. Cir. 1998), the controlling law in this Circuit, and the case that most definitively addresses the interpretive problem between 12 U.S.C. § 1821(d)(6) and (d)(13)(D) that exists in this case. In addition, JPMC ignores the serious constitutional issue that follows from its erroneous interpretation of FIRREA.

*Auction Co.* interprets the term “claim” in § 1821(d)(13)(D)(ii) (“any claim relating to any act or omission of such institution or the Corporation as receiver,”) as having the same meaning as in § 1821(d)(6). Under this reasonable plain language reading, claims that are subject to § 1821(d)(13)(D) include only those claims that are administratively reviewable by the FDIC as receiver pursuant to (d)(6). The overwhelming body of FIRREA caselaw supports this rule. *Auction* at 1201; *Team Bank*

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<sup>2</sup> See P&A agreement, Article XII, section 12.1(a)(7), p. 25, attached as Exhibit 1 to Declaration of Edward John "Jack" O'Neill, Jr., submitted with the Response of Intervenor-Defendant FDIC-Receiver in Opposition to Plaintiffs' Motion for Remand (Doc. 17).

*v. Barfield*, 145 F.R.D. 69, 70 (N.D. Tex. 1992); *Bank One v. Elms*, 764 F. Supp. 85 (remanding after improper FDIC intervention); *FDIC v. McFarland*, 243 F.3d 876, 887 (5th Cir. 2001) (“When the FDIC relinquishes ownership, the procedures governing its role as a receiver no longer apply”); *Rosa v. RTC*, 938 F.2d 383, 393 (3d Cir. 1991) (claims against a successor bank that is not in receivership are not subject to the jurisdictional bar of 12 U.S.C. § 1821(d)(13)(D)); *Hudson United Bank v. Chase Manhattan Bank of Connecticut, N.A.*, 43 F.3d 843, 849 (3d Cir. 1994) (interpreting Section 1821(d)(13)(D) to have “concurrent scope” to “avoid the possibility . . . that Sec. 1821(d)(13)(D) could become an independent and outright bar of jurisdiction rather than a mere exhaustion requirement if Sec. 1821(d)(13)(D) were to have broader reach than the administrative claims procedures”).

JPMC focuses its efforts on recasting the Plaintiffs’ Petition and manufacturing meritless technical arguments against the Courts’ plenary authority. JPMC is silent on the merits of the Court’s subject matter jurisdiction arguments because the plain language of FIRREA and the case law demonstrates that FIRREA does not offer any defense to JPMC, which is merely a purchaser of assets from the FDIC. *See O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994); (matters “left unaddressed” in FIRREA are presumably left subject to the disposition provided by state law); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1988) (the enabling legislation of FSLIC and the Bank Board, predecessors to FDIC, does not preempt state law), and 489 U.S. at 589 (Justice Blackmun, concurring) (there is no “sound policy justification” for using the doctrine of exhaustion of administrative remedies as a basis for preempting state law).

The cases cited by JPMC fail to support its mistaken theory that FIRREA immunizes JPMC from damages because JPMC happened to execute a purchase and assumption agreement with the FDIC. *See FDIC v. McFarland*, 243 F.3d at 887 n.42 (“it would be absurd for us to interpret section 1821(d)(13)(D) as assignable to the current holder []. The claim procedures articulated in 12 U.S.C. 1821(d)(5)-(11) are predicated on the FDIC’s possession of the property in question. When the FDIC relinquishes ownership, the procedures governing its role as a receiver no longer apply to the property.”).

JPMC submits *Rosa v. RTC*, 938 F.2d 383, 391-92 (3d Cir. 1991) as authority, but the case directly contradicts JPMC’s mistaken position. *Rosa* considered claims against a bank that had obtained assets from the RTC, but itself was not in receivership. The court held that although 12 U.S.C. § 1821(d)(13)(D) applied to two financial institutions that were under RTC receivership, the statute did not apply to a third financial institution that was not under receivership, despite the fact that the institution obtained assets from the RTC pursuant to a purchase and assumption agreement:

We do not believe [claims against the non-receivership bank] fall under [§1821(d)(13)(D)(i)] because they seek neither payment from nor a determination of rights with respect to the assets of a depository institution for which RTC has been appointed receiver. Rather, those claims seek payment from the assets of [the non-receivership bank], which, for our purposes, is not a depository institution for which RTC has been appointed receiver. Nor does [§1821(d)(13)(D)(ii)] bar these claims. This is so because we construe the ‘relating’ language of that clause to refer to claims against the very institution whose acts are challenged, which must be an institution for which RTC has been appointed receiver. Similarly, the claims against [the non-receivership bank] do not relate to acts or omissions of RTC “as receiver.”

*Rosa*, 938 F.2d at 394.

Regarding due process, JPMC mistakenly contends that that extension of the FIRREA to Plaintiffs' state law claims does not deprive the Plaintiffs of their due process rights to obtain damages against JPMC for its wrongful conduct. In making this argument, JPMC assumes that Plaintiffs' state law claims against JPMC—tortious interference with contract, breach of confidentiality agreement and unjust enrichment—are Constitutionally equivalent to the recovery that Plaintiff could obtain through the FDIC receivership process. This logic is seriously flawed for many reasons.

First, FIRREA by its own terms makes no provision for payment of any amount based on "claims against third parties." It hardly comports with due process to require a litigant to overcome meaningless administrative hurdles by requiring a claimant to file a proof of claim that would be automatically denied. In addition, such an interpretation would be directly contrary to the primary purpose of FIRREA, which is to eliminate unnecessary litigation. See *Rosa*, at 396 ("The primary purpose underlying FIRREA's exhaustion scheme is to allow [the FDIC] to perform its statutory function of promptly determining claims so as to quickly and efficiently resolve claims against a failed institution without resorting to litigation.") (Citing H.R. Rep. No. 101-54(I), 101st Cong., 1st Sess. 418-19, reprinted in 1989 U.S. Code Cong. & Admin. News 86, 214-15).

Second, any de novo judicial review of claims brought against the receivership based on the tort liability of a third party would be tenuous, at best. JPMC has offered no reason why a court could be expected to conclude that a claim against a third party would be collectible against the assets of an FDIC receivership. Further, there is no provision for obtaining jurisdiction over the tortfeasor as part of such a de novo action. Questions regarding the procedural aspects of joining the third party wrongdoer to the receivership

suit would exist. Third, in the Plaintiffs' case, its claims against JPMC are fundamentally different than any that it could assert against the WMB. Plaintiffs' claims against JPMC allege tortious conduct and seek tort damages. Plaintiffs' claims against WMB are contract claims and seek contract damages. The nature of the claims and the damages sought are fundamentally different. Finally, any recovery as a result of an action appealing a denial of a claim in receivership, assuming one could be had, would be limited in size to the plaintiff's statutory allotment under FIRREA. In most cases, payment from the receiver would be less than a lawsuit directly against the original wrongdoer.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on October 26, 2009 a copy of the this document was filed with the Court's ECF filing system, which will provide electronic notification of its filing to all counsel who have appeared in this action, including the following counsel of record:

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# **EXHIBIT A**

**UNITED STATES DISTRICT COURT**  
SOUTHERN DISTRICT OF TEXAS

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

AMERICAN NATIONAL INSURANCE §  
COMPANY, *et al*, §

Plaintiffs, §

VS. §

CIVIL ACTION NO. G-09-44 §

FDIC, AS RECEIVER FOR §  
WASHINGTON MUTUAL BANK, §  
HENDERSON, NEVADA, *et al*, §

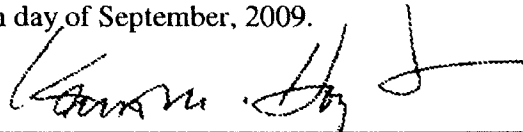
Defendants. §

**ORDER**

Before the Court is the plaintiffs' motion seeking reconsideration of the Court's September 3, 2009, Order denying remand of the action to state court [Inst. No. 46]. The Court carefully considered this case at the outset. The matter does not turn on facts but on a question of law. Therefore, the plaintiffs' motion for reconsideration is Denied. *See* [TRANSFER ORDER].

It is so Ordered.

SIGNED at Houston, Texas this 11th day of September, 2009.



Kenneth M. Hoyt  
United States District Judge