

THE HONORABLE MARSHA J. PECHMAN

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

THE FEDERAL DEPOSIT INSURANCE  
CORPORATION, as RECEIVER of  
WASHINGTON MUTUAL BANK,

Plaintiff,

v.

KERRY K. KILLINGER, STEPHEN J.  
ROTELLA, DAVID C. SCHNEIDER, LINDA  
C. KILLINGER, and ESTHER T. ROTELLA,

Defendants.

Case No.: 2:11-cv-00459 MJP

STIPULATED PROTECTIVE ORDER

NOTE ON MOTION CALENDAR:  
Tuesday September 6, 2011

Pursuant to Federal Rule of Civil Procedure 29 and in the interest of efficiency and judicial economy, in particular the avoidance of litigating ancillary discovery issues, the undersigned Plaintiff and Defendants do hereby stipulate and agree to this protective order and the procedures set forth herein for designating and protecting confidential commercial and/or proprietary information.

Plaintiff and Defendants stipulate as follows:

1. This Order shall apply to and govern all discovery taken under the Federal Rules of Civil Procedure, including depositions, documents, information or things disclosed or produced in response to requests for production of documents, answers to interrogatories, responses to requests for admissions, and other information that the disclosing party designates as "CONFIDENTIAL" furnished, directly or indirectly, by or on behalf of any party or any non-party in connection with the above-captioned litigation.

1           2.       When used in this Order, the phrase “disclosing party” shall refer to the parties to the  
2 above-captioned litigation or to non-parties who give testimony or produce documents or other  
3 material, and may also include a non-party (to the above-captioned litigation) who testified at  
4 deposition or produced documents or other materials in *In re Washington Mutual Inc. Securities,*  
5 *Derivative & ERISA Litigation*, No. 2:08-md-1919 MJP (W.D. Wash.) (the “MDL”) subject to the  
6 protective order entered in that case (the “MDL Disclosing Parties”).

7           3.       When used in this Order, the word “document” encompasses, but is not limited to,  
8 any type of document or testimony, including all documents or things described in Federal Rule of  
9 Evidence 1001(1)–(4) and/or Rule 34(a)(1)(A) or (B).

10          4.       The disclosing party who designates any material “CONFIDENTIAL” (sometimes  
11 referred to herein as a “designating party”) bears the burden of establishing the “CONFIDENTIAL”  
12 status of such material in any situation in which the designation is at issue, and nothing in this Order  
13 shall be construed to alter such burden. The parties enter into and stipulate to this Order without  
14 prejudice to the rights of any party to assert or contest the “CONFIDENTIAL” status of any material  
15 as set forth below.

16          5.       A disclosing party may designate as “CONFIDENTIAL” any trade secret or other  
17 confidential research, design, development, financial or commercial information, as such terms are  
18 used in Rule 26(c)(1)(G) and any applicable case law interpreting Rule 26(c)(1)(G). In addition, a  
19 disclosing party may designate as “CONFIDENTIAL,” subject to any challenges that a party may  
20 make under this Order, non-public personal information or other information for which applicable  
21 federal or state law requires confidential treatment, including, but not limited to, confidential  
22 material related to bank customers, such as documents containing a customer’s account number,  
23 credit card number, personal identification number, account balance, information relating to a  
24 deposit account, loan, or borrower relationship and loan application materials, and documents or  
25 information that contain the customer’s name, address, social security number, date of birth or other  
26 similar identifying information. In addition, a disclosing party may designate as  
27 “CONFIDENTIAL” non-public documents or information related in any way to the regulation or  
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1 supervision of Washington Mutual Bank, in whatever form, whether preliminary or final, including,  
2 but not limited to, reports of examination or inspection, regulatory correspondence, reports, orders,  
3 workpapers, memoranda, or agreements by, from or with the FDIC, OTS, or any other federal or  
4 state regulatory authority. In addition, a disclosing party may designate as “CONFIDENTIAL” non-  
5 public documents or information related in any way to the receivership of the Bank, including, but  
6 not limited to, any information on loss or estimates of such loss on the Bank’s assets.

7 6. In designating material as “CONFIDENTIAL,” a disclosing party shall make such a  
8 designation only as to material that it in good faith believes is confidential.

9 7. Any party or non-party receiving any non-public material from a disclosing party,  
10 regardless of whether such material is designated as “CONFIDENTIAL,” shall use that material  
11 solely for the purpose of conducting this litigation and not for any other purpose whatsoever.

12 8. In the absence of written permission from the disclosing party, or an order of the  
13 Court, material designated as “CONFIDENTIAL” may be disclosed only to the following persons:

14 (a) The named parties and the attorneys working on the above-captioned litigation on  
15 behalf of any party, including attorneys consulting with or advising any party to the above-captioned  
16 litigation, in-house attorneys, paralegals, and staff, stenographic and clerical employees and  
17 contractors working under the direct supervision of such counsel;

18 (b) Any expert or consultant who is expressly retained by any attorney described in  
19 Paragraph 8(a) to assist in the above-captioned litigation, with disclosure only to the extent  
20 reasonably necessary to perform such work;

21 (c) Any fact witness, including named parties, and including attorneys for such fact  
22 witness, provided, however, that the witness (i) shall not retain any documents marked as  
23 “CONFIDENTIAL,” and (ii) shall be informed, prior to being shown materials marked as  
24 “CONFIDENTIAL” that he/she is being shown such materials solely for use in this Action; and

25 (d) The Court, jury, court personnel, court reporters, and other persons connected with  
26 the Court.

1           9.       The persons described in Paragraphs 8(a)–(c) shall have access to  
2 “CONFIDENTIAL” material only after they have been made aware of the provisions of this Order  
3 (including, without limitation, Paragraph 7). Counsel retaining or representing the persons described  
4 in Paragraph 8(b) shall require that such persons manifest their assent to be bound by the provisions  
5 of this Order by signing a copy of the annexed “ACKNOWLEDGMENT.” Counsel shall retain  
6 copies of the signed “ACKNOWLEDGMENT” forms until the completion of the above-captioned  
7 litigation. Any person receiving “CONFIDENTIAL” material is enjoined from disclosing that  
8 material to any other person, except in conformance with this Order.

9           10.      A list shall be maintained by counsel for the parties hereto of the names of all persons  
10 (except for persons described in Paragraphs 8(a), (b) & (d)) to whom any “CONFIDENTIAL”  
11 material is disclosed, or to whom the information contained therein is disclosed. Upon a good faith  
12 showing by a party that this Order has been violated, the Court may review such lists if necessary  
13 and appropriate to address or resolve the purported violation.

14           11.      MDL Disclosing Parties that elect, in lieu of re-producing documents that the MDL  
15 Disclosing Parties produced in the MDL, to allow the Parties to access and use the MDL documents  
16 for purposes of this lawsuit may provide their consent to do so subject to the terms of this Stipulated  
17 Protective Order by signing a consent substantially in the form provided in the annexed  
18 “CONSENT.”

19           12.      This Court shall retain jurisdiction over this Order, including any proceedings relating  
20 to performance under or compliance with the Order. Individuals who receive “CONFIDENTIAL”  
21 material shall be subject to this Order and to the jurisdiction of this Court concerning this Order.

22           13.      The recipient of any “CONFIDENTIAL” material that is provided under this Order  
23 shall maintain such material in a secure and safe area and shall exercise the same standard of due and  
24 proper care with respect to the storage, custody, use and/or dissemination of such material as is  
25 exercised by the recipient with respect to its own proprietary material. “CONFIDENTIAL” material  
26 shall not be copied, reproduced, summarized, extracted or abstracted, except to the extent that such  
27 copying, reproduction, summarization, extraction or abstraction is reasonably necessary for the  
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1 conduct of this lawsuit. All such copies, reproductions, summarizations, extractions, and  
2 abstractions shall be subject to the terms of the Order.

3 14. Disclosing parties shall designate “CONFIDENTIAL” material as follows:

4 (a) In the case of documents, interrogatory answers, responses to requests to admit, and  
5 the information contained therein, designation shall be made, as appropriate under the terms of this  
6 Stipulation and Order, by placing the following legend on each page of any such document:  
7 “CONFIDENTIAL,” or where this is not practicable, by informing the Parties of the designation in  
8 writing at the time of production. In the event that a disclosing party inadvertently fails to stamp or  
9 otherwise designate a document or other material as “CONFIDENTIAL” at the time of its  
10 production, that disclosing party may stamp or otherwise designate the document or other material as  
11 “CONFIDENTIAL” at any reasonable time thereafter. The delay in designating a document as  
12 “CONFIDENTIAL” shall not, in and of itself, be deemed to have effected a waiver of any of the  
13 protections of this Order. However, the foregoing provision shall not apply to any documents or  
14 material that had already been made publicly available prior to the designation.

15 (b) “CONFIDENTIAL” material may be used in depositions. Designation of the portion  
16 of the deposition transcript (including exhibits) that contains “CONFIDENTIAL” material shall be  
17 made by a statement to such effect on the record in the course of the deposition or, upon review of  
18 such transcript, by the disclosing party or counsel for the disclosing party to whose  
19 “CONFIDENTIAL” material the deponent has had access, which shall be so designated within  
20 twenty-one (21) days after the final deposition transcript is received. In the interim, the entire  
21 deposition transcript, including exhibits, shall be deemed “CONFIDENTIAL.” Documents that have  
22 been designated “CONFIDENTIAL” that are used as deposition exhibits retain their confidential  
23 status and do not need to be re-designated.

24 (c) Any “CONFIDENTIAL” material produced in a non-paper media (e.g., videotape,  
25 audiotape, computer disc, etc.) may be designated as such by labeling the outside of such non-paper  
26 media as “CONFIDENTIAL” and producing this material in a sealed envelope. In the event a  
27 receiving party generates any electronic copy, “hard copy,” transcription, or printout from any such  
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1 designated non-paper media, such party must treat each copy, transcription, or printout as  
2 “CONFIDENTIAL” pursuant to the terms of this Order.

3           15.     Nothing in this Order shall be taken as indicating that any information is in fact  
4 “CONFIDENTIAL” or entitled to confidential treatment. No party shall be obligated to challenge  
5 the propriety of a “CONFIDENTIAL” designation at the time made, and a failure to do so shall not  
6 preclude a subsequent challenge thereto, nor shall a party that has designated materials or  
7 information as “CONFIDENTIAL” contend that any delay by another party in objecting to the  
8 designating party’s “CONFIDENTIAL” designation in any way (a) lends support to the designating  
9 party’s “CONFIDENTIAL” designation or (b) invalidates or diminishes in any way the objecting  
10 party’s challenge of the “CONFIDENTIAL” designation for any such materials or information. In  
11 the event that any party disagrees at any stage of these proceedings with such designation, counsel  
12 for such party shall notify counsel for the disclosing party in writing (the “Notice”). The objecting  
13 party shall identify each particular document bearing a designation to which it objects and shall  
14 specify the reason(s) for the objection, provided that the party challenging the “CONFIDENTIAL”  
15 designation may identify multiple documents by Bates number (whether in a range of consecutive  
16 numbers or otherwise) in its Notice when the reason or reasons for challenging the  
17 “CONFIDENTIAL” designation apply in the same manner to the documents identified in the Notice.  
18 Within seven (7) calendar days of the receipt of the Notice, counsel for the parties (and any non-  
19 party involved) shall promptly schedule a date and time to meet and confer to attempt resolve such  
20 dispute in good faith on an informal basis consistent with the requirement to confer in good faith  
21 under Rule 26(c)(1) and Rule 37(a)(1). If the dispute cannot be resolved, the party that designated  
22 the materials in question as “CONFIDENTIAL” may request appropriate relief from the Court, and  
23 the objecting party may also request any relief from the Court that it deems appropriate (which shall  
24 have first been raised no later than during the parties’ meet and confer session(s)) in its opposition to  
25 the designating party’s motion or other proposed method of seeking relief from the Court. The  
26 materials in question shall retain their “CONFIDENTIAL” status until the Court rules on any such  
27 motion so long as the party that designated the materials in question as “CONFIDENTIAL” seeks  
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1 relief from the Court within: (i) thirty (30) days of the date the parties initially met and conferred, if  
2 the disagreement pertains to fewer than ten documents; or (ii) forty-five (45) days of the date the  
3 parties initially met and conferred, if the disagreement pertains to ten or more documents. The  
4 parties (and any non-party involved) may agree to extend the time for the disclosing party to apply to  
5 the Court for relief. If the designating party does not apply to the Court for a ruling on the  
6 designation of discovery material as “CONFIDENTIAL” within the time period prescribed herein or  
7 agreed to by the parties, the discovery material will no longer be deemed “CONFIDENTIAL.” The  
8 designating party may request a telephonic hearing with respect to the “CONFIDENTIAL” status of  
9 materials in compliance with Local Rule 7(i). Nothing in this Order shall alter the burden on the  
10 disclosing party to establish the “CONFIDENTIAL” status of information it has so designated.

11 16. Nothing contained in this Order shall be construed to limit any party’s right to use or  
12 offer in Court any “CONFIDENTIAL” information, except that no “CONFIDENTIAL” information  
13 shall be used or offered in Court or filed in the public record absent the consent of the disclosing  
14 party or permission of the Court.

15 17. Documents containing “CONFIDENTIAL” material shall not be filed with the Court  
16 unless the filing party reasonably believes it is reasonably necessary to do so for purposes of trial,  
17 motions or other Court matters. In the event that any “CONFIDENTIAL” material is filed, such  
18 material, and any pleadings, motions or other papers filed with the Court disclosing any such  
19 material, shall be filed in compliance with Rule 26(c) and Local Rule 5(g). In such instance:

20 (a) The party submitting the material shall submit to the Court a motion to seal or a  
21 stipulation and proposed order pursuant to Local Rule 5(g)(3) prior to or contemporaneous with the  
22 filing of the “CONFIDENTIAL” material and shall adhere to all requirements in Local Rule 5(g)(4)  
23 for filing such material under seal.

24 (b) If the disclosing party is not the party filing the motion to seal, then the disclosing  
25 party shall make the showing required by Local Rule 5(g)(2) in its response to the motion, which  
26 shall be filed in accordance with the schedule for motions seeking protective orders pursuant to  
27 Local Rule 7(d)(2)(C).

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1 (c) Any motion to seal filed under any subsection of this Paragraph 17 shall be noted for  
2 consideration no earlier than the fourth Friday after filing and service of the motion. The Clerk of  
3 the Court shall maintain the “CONFIDENTIAL” materials under seal until the Court rules on the  
4 motion to seal, subject to the provisions of the following Paragraph 18.

5 18. In the event the Court denies a motion to seal documents labeled  
6 “CONFIDENTIAL,” the Clerk of the Court shall leave the documents under seal for a period of  
7 three (3) business days after the date of the Court’s denial of the motion to seal. If the filing party  
8 initially designated the documents “CONFIDENTIAL,” then within that three (3) day period, the  
9 filing party may, at its option, file replacement documents that do not contain “CONFIDENTIAL”  
10 material or any reference to “CONFIDENTIAL” material, in which case the documents initially filed  
11 under seal shall not be considered by the Court and shall remain under seal. If the filing party does  
12 not file replacement documents within the time period prescribed by this Paragraph, the material  
13 shall be filed unsealed in the Court file.

14 19. In the event that any “CONFIDENTIAL” material is used in any Court proceeding in  
15 connection with this litigation, it shall not lose its “CONFIDENTIAL” status through such use, and  
16 the parties shall take all steps reasonably required to protect its confidentiality during such use. In  
17 particular, while a motion to seal is pending and before the Court has ruled, no party shall make use  
18 in open court of any documents that are subject to that motion to seal without the consent of the  
19 designating party or the permission of the Court.

20 20. If “CONFIDENTIAL” material is disclosed to any person other than in the manner  
21 authorized by this Order, the person or party responsible for the disclosure must seasonably bring all  
22 pertinent facts relating to such disclosure to the attention of counsel for the disclosing party and,  
23 without prejudice to any other rights and remedies of the parties or non-parties, make every effort to  
24 prevent further disclosure by it or by the person who was the recipient of such material.

25 21. Nothing in this Order shall preclude any parties or non-parties to the lawsuit or their  
26 attorneys (a) from showing a document or part of a document designated as “CONFIDENTIAL” to  
27 an individual who either prepared the document or is identified on the face of the document as an  
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1 addressee or copy addressee, or (b) from disclosing or using, in any manner or for any purpose, any  
2 material or documents from the disclosing party's own files which the disclosing party itself has  
3 designated as "CONFIDENTIAL."

4 22. In the event any receiving party having possession, custody or control of any  
5 "CONFIDENTIAL" material receives a subpoena, request for production of documents, or other  
6 process or order to produce such material in another, unrelated legal proceeding, from a non-party to  
7 the above-captioned litigation, such receiving party shall:

8 (a) give prompt written notice of the subpoena, request for production of documents, or  
9 other process or order to counsel for the disclosing party that designated the material as  
10 "CONFIDENTIAL";

11 (b) furnish counsel for that disclosing party with a copy of said subpoena, request for  
12 production of documents, or other process or order; and

13 (c) cooperate with respect to all reasonable and legitimate procedures sought to be  
14 pursued by the disclosing party whose interests may be affected.

15 The disclosing party asserting the "CONFIDENTIAL" treatment shall have the burden of  
16 defending against such subpoena, process or order. The party receiving the subpoena, request for  
17 production of documents, or other process or order shall be entitled to comply with it except to the  
18 extent the disclosing party asserting the "CONFIDENTIAL" treatment is successful in obtaining an  
19 order modifying or quashing the subpoena, request for production of documents, or other process or  
20 order, provided, however, that the party receiving the subpoena, request for production of  
21 documents, or other process shall await the disposition of any motion to quash or motion for a  
22 protective order timely filed by the disclosing party before producing any "CONFIDENTIAL"  
23 information in response to the subpoena, request for production of documents, or other process or  
24 order.

25 23. The inadvertent production in the course of discovery in the above-captioned  
26 litigation of any documents or material (whether designated as "CONFIDENTIAL" or not) shall not  
27 be deemed to waive whatever attorney-client privilege, work product protection or other privilege or  
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1 immunity that would otherwise attach to those documents or material produced or to other  
2 documents or material, so long as the disclosing party notifies the other party or parties of the claim  
3 of privilege or other protection or immunity. Upon receipt of such notice, all other parties shall  
4 (regardless of whether they agree with the disclosing party's claim of privilege or protection)  
5 promptly:

6 (a) destroy or segregate all copies of the inadvertently produced documents or material in  
7 such party's possession, custody, or control, and notify the disclosing party that it has done so; and

8 (b) notify the disclosing party that reasonable steps have been taken to retrieve and/or  
9 destroy the inadvertently produced documents or material from other persons to whom such  
10 documents or material have been provided, if any, consistent with Rule 26(b)(5)(B). Pursuant to  
11 Federal Rule of Evidence 502(d), the inadvertent production of Confidential material in this  
12 proceeding shall not constitute a waiver of any applicable privilege, protection or prohibition from  
13 disclosure of that Confidential material in any other federal or state proceeding. Compliance with  
14 this Paragraph 23 does not, and shall not be deemed to, constitute agreement that the claimed  
15 document or material is in fact privileged or entitled to protection or immunity.

16 24. The parties shall comply with their ethical and legal obligations concerning the actual  
17 or apparent inadvertent production of privileged or protected information, including by notifying  
18 promptly a disclosing party when appropriate.

19 25. Within sixty (60) days of the termination of litigation between the parties, including  
20 final appellate action or the expiration of time to appeal or seek further review, all non-public  
21 material produced by the parties, the OCC or any other government agency, regardless of whether it  
22 has been designated "CONFIDENTIAL," and all copies thereof, shall either be returned to  
23 the disclosing party or destroyed, except to the extent the receiving party is subject to a preservation  
24 obligation with respect to a pending claim or lawsuit, in which case the receiving party shall so  
25 notify the disclosing party before the expiration of the 60-day period and, if necessary and  
26 appropriate, seek a court order resolving any conflict between this paragraph and any other  
27 preservation obligation the receiving party may have. If destroyed, counsel shall certify the  
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1 destruction and provide a copy of the certification to the disclosing party. Counsel for each  
2 disclosing party shall be entitled to retain all pleadings, motion papers, legal memoranda,  
3 correspondence (including confidential documents attached to electronic correspondence) and work  
4 product provided that such material shall continue to be subject to the terms of this Agreement after  
5 termination of the litigation. Documents filed under seal on ECF shall remain under seal unless or  
6 until they are destroyed pursuant to this Court's document retention policy.

7 26. Except as specifically provided herein, the terms, conditions, and limitations of this  
8 Order shall survive the termination of the above-captioned litigation.

9 27. This Order is without prejudice to the right of any party or non-party to seek relief  
10 from the Court from any of the provisions contained herein.

11 28. This Order shall not be construed as waiving any right to assert a claim of privilege,  
12 relevance, overbreadth, burdensomeness or other grounds for not producing material called for, and  
13 access to all material (whether designated as "CONFIDENTIAL" or not) shall be only as provided  
14 by the discovery rules and other applicable law.

15 Dated this 6th day of September, 2011.

16 Respectfully submitted,

17 KERRY AND LINDA KILLINGER

18 By: /s/ Barry M. Kaplan  
19 One of Their Attorneys

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2  
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13  
14 **ORDER**

15 IT IS SO ORDERED.

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17 DATED: September 7, 2011.

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20 Marsha J. Pechman  
21 United States District Judge  
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**ACKNOWLEDGMENT**

I have been informed that on \_\_\_\_\_, 2011, the U.S. District Court for the Western District of Washington at Seattle entered a STIPULATED PROTECTIVE ORDER in *FDIC v. Kerry Killinger et al.*, Case No. 2:11-cv-00459 MJP. I have read the STIPULATED PROTECTIVE ORDER, I agree to abide by the obligations of the STIPULATED PROTECTIVE ORDER as they apply to me, and I voluntarily submit to the jurisdiction of the U.S. District Court for the Western District of Washington for purposes of any proceeding related to the STIPULATED PROTECTIVE ORDER, including my receipt or review of information that has been designated as “CONFIDENTIAL.”

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Printed Name)

\_\_\_\_\_  
(Title or Position)

\_\_\_\_\_  
(Company)

Dated: \_\_\_\_\_

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1 **CONSENT**

2 I am [POSITION] at [COMPANY NAME] and am authorized to sign this Consent on  
3 [COMPANY NAME's] behalf. [COMPANY NAME] produced documents and/or materials  
4 designated CONFIDENTIAL in *In re Washington Mutual Inc. Securities, Derivative & ERISA*  
5 *Litigation*, No. 2:08-md-1919 MJP (W.D. Wash.) (the "MDL") pursuant to the protective order  
6 entered in that case. Pursuant to this Consent, and subject to the Stipulated Protective Order in  
7 *FDIC v. Kerry Killinger et al.*, Case No. 2:11-cv-00459 MJP (W.D. Wash.) (the "FDIC Action"),  
8 [COMPANY NAME] agrees that the documents it produced in the MDL may be used for the  
9 purpose of conducting the FDIC Action. Counsel in the MDL Action are hereby authorized to make  
10 available or produce to parties in the FDIC Action and their counsel all documents that [COMPANY  
11 NAME] produced in the MDL.

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15 \_\_\_\_\_  
(Signature)

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18 \_\_\_\_\_  
(Printed Name)

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21 \_\_\_\_\_  
(Title or Position)

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24 \_\_\_\_\_  
(Company)

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26 Dated: \_\_\_\_\_  
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