

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re

WASHINGTON MUTUAL, INC., et al.,
Debtors.

BROADBILL INVESTMENT CORP.,
Plaintiff

v.

WASHINGTON MUTUAL, INC., et al.,
Defendant.

Chapter 11

Case No. 08-12229 (MFW)

(Jointly Administered)

Adv. Proc. No. 10-50911 (MFW)

**MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANT'S MOTION TO DISMISS**

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Washington Mutual, Inc. ("WMI") respectfully submits this Memorandum of Law in support of its motion, dated May 17, 2010 (the "Motion"), for an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Rules") and Rules 7012 and 7009 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), dismissing the complaint (the "Complaint") filed by Broadbill Investment Corp. ("Broadbill").¹

PRELIMINARY STATEMENT

Broadbill is a purported holder of certain litigation tracking warrants that, upon the occurrence of certain contingencies, grant the holder the right to purchase WMI common stock. Broadbill is seeking a declaratory judgment from the Court that: (a) the warrant holders have allowed claims against, and not equity interests in, WMI; and (b) WMI breached the agreement governing the warrants. Based upon the prevailing agreements, and applicable law, the Complaint must be dismissed as a matter of law.

First, Broadbill does not have standing to seek the relief requested. Pursuant to the Amended Agreement, as defined below, an individual warrant holder may not sue or commence an action against WMI on account of the warrants unless: (a) such holder has given written notice to WMI of the substance of any dispute; (b) holders of at least twenty-five percent (25%) of the issued and outstanding warrants have given written notice to WMI of their support for the institution of a proceeding to resolve such dispute; (c) such holder has given written notice of the dispute and support thereof to the appointed warrant agent; and (d) the warrant agent failed or refused to act within thirty (30) days of receipt of notice. Then, and only then, may a holder have the right to

¹ Pursuant to the parties' agreement, WMI's time to respond to the Complaint was extended from May 12, 2010 to May 17, 2010.

commence litigation to enforce any rights pursuant to the Amended Agreement. Quite simply, because it has failed to satisfy the prerequisites of the Amended Agreement and failed to plead that it maintains standing to commence the instant action, Broadbill lacks standing and is precluded from commencing the litigation, and dismissal of the Complaint in this adversary proceeding is warranted.

Second, in the event that this Court somehow allowed Broadbill standing to proceed with its claim, such claim would not be ripe because the warrant holders are still unable to exercise the warrants. In the Third Circuit, if an action is based upon a contingency, it cannot be ripe. Here, the cause of action is in fact based upon a contingency – the occurrence of a “trigger” event, as defined in the Amended Agreement, allowing for the exercise of the warrants. Broadbill simply cannot show that the trigger for the exercise of the warrants occurred. Consequently, any claim on account of the warrants, were such a claim to exist, would not be ripe.

Third, pursuant to the Amended Agreement, warrant holders have no right to participate directly in any recovery from the subject litigation, the Anchor Litigation, as defined below. The Amended Agreement expressly provides that any recovery from the Anchor Litigation shall be controlled by a former subsidiary of WMI. Warrant holders are only entitled to purchase shares of WMI common stock upon the occurrence of the trigger events and the exercise of the warrants. Because the warrant holder have no direct right to the proceeds, the relief that Broadbill requests – direct entitlement to the proceeds of the subject litigation – cannot be granted.

Finally, Broadbill’s Complaint must be dismissed to the extent it seeks a declaration that the LTWs are not equity securities. There can be no doubt that the

litigation tracking warrants constitute equity securities as defined in section 101(16) of title 11 of the United States Code (the “Bankruptcy Code”). 11 U.S.C. § 101(16). The plain language and legislative history of section 101(16) make clear that equity securities include warrants to purchase a corporation’s common stock. Moreover, the courts have consistently ruled that warrants constitute equity interests. The warrants at issue here are based upon the warrant holders’ equity interests in a company acquired by WMI, and under the warrant agreement, would enable the warrant holders to acquire greater equity in WMI. Thus, the warrants plainly constitute both equity interests and equity securities, not claims, and Broadbill’s request for a ruling inconsistent with this conclusion must be dismissed.²

Based on these reasons, as will be set forth further below, clear authority from this and other jurisdictions warrants entry of an order dismissing the Complaint with prejudice and without leave to replead.

FACTUAL BACKGROUND

I. The Debtors And The Chapter 11 Cases

On September 26, 2008 (the “Commencement Date”), WMI and WMI Investment Corp. (“WMI Investment,” and together with WMI, the “Debtors”), each commenced with the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”) a voluntary case pursuant to chapter 11 of the Bankruptcy Code. On October 3, 2008, the Bankruptcy Court entered an order pursuant to Bankruptcy Rule 1015(b) authorizing the joint administration of the Debtors’ chapter 11 cases. As of the

² And to the extent that the warrant holders assert claims arising from the purchase or sale of the warrants, the Debtors reserve their right to seek subordination of such claims as is proper under section 510(b) of the Bankruptcy Code.

date hereof, the Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

WMI, a holding company incorporated in the State of Washington, is the direct parent of WMI Investment, which served as an investment vehicle for WMI and holds a variety of securities. WMI Investment is incorporated in the State of Delaware.

Prior to the Commencement Date, WMI operated as a savings and loan holding company that owned Washington Mutual Bank (“WMB”) and, indirectly, such bank’s subsidiaries, including Washington Mutual Bank fsb (“WMBfsb”). WMI owns all of the outstanding stock of WMB, and WMI also has certain non-banking, non-debtor subsidiaries. Like all savings and loan holding companies, WMI was subject to regulation by the Office of Thrift Supervision (the “OTS”). WMB and WMBfsb, in turn, like all depository institutions with federal thrift charters, were subject to regulation and examination by the OTS. In addition, WMI’s banking and nonbanking subsidiaries were overseen by various federal and state authorities, including the Federal Deposit Insurance Corporation (the “FDIC”).

On September 25, 2008, the OTS, by order number 2008-36, closed WMB, appointed the FDIC as receiver for WMB (the “FDIC Receiver”), and advised that the FDIC Receiver was immediately taking possession of WMB’s assets (the “Receivership”). Immediately after its appointment as receiver, the FDIC Receiver sold substantially all the assets of WMB, including the stock of WMBfsb, to JPMorgan Chase Bank, National Association (“JPMC”) pursuant to that certain Purchase and Assumption Agreement, Whole Bank, dated as of September 25, 2008 (the “Purchase and Assumption Agreement”).

II. The Litigation Tracking Warrants & the Anchor Litigation

This adversary proceeding is tangentially related to that certain litigation styled *Anchor Savings Bank, FSB v. United States* (the “Anchor Litigation”), Case No. 95-39C (Fed. Cl.), pending before the Honorable Lawrence J. Block in the United States Court of Federal Claims (the “Federal Claims Court”), commenced by Anchor Savings Bank, FSB (“Anchor Savings Bank”) against the United States of America (the “Government”). Therein, Anchor Savings Bank has alleged that the Government’s passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (“FIRREA”) breached Anchor Savings Bank’s supervisory merger contracts with the Government, which allowed Anchor Savings Bank to treat supervisory goodwill as regulatory capital.³

At the time of the Government’s alleged breach, Anchor Savings Bank was a publicly traded savings and loan institution. In 1993, Anchor Savings Bank formed a publicly-traded holding company, Anchor Bancorp, Inc. (“Anchor Bancorp”), and Anchor Savings Bank became a wholly-owned subsidiary of Anchor Bancorp. Shortly after the commencement of the Anchor Litigation, Anchor Bancorp was acquired by Dime Bancorp, Inc. (“Dime Bancorp”).

On December 22, 2000 (the “Record Date”), for no consideration, pursuant to that certain Warrant Agreement, dated December 21, 2000 (the “Warrant

³ In the late 1980’s, Anchor Savings Bank acquired four failing financial institutions at the behest and under the supervision of federal thrift regulators. Pursuant to the acquisition agreement, the government allowed Anchor Savings Bank to account for “supervisory goodwill” as a capital asset, which counted towards Anchor Savings Bank’s regulatory capital requirements. When FIRREA was enacted, substantially all of Anchor Savings Bank’s supervisory goodwill no longer counted as a capital asset. As a result, Anchor Savings Bank became a severely undercapitalized financial institution and was forced to make radical operational changes to avoid being seized and liquidated by regulators. Wash. Mut., Inc., Current Report (Form 8-K), at 1-3 (Mar. 12, 2003).

Agreement”), Dime Bancorp distributed litigation tracking warrants (the “LTWs”) to its then current shareholders. The LTWs were registered pursuant to a registration statement, dated October 20, 2000 (as amended on December 15, 2000, the “Registration Statement”). Pursuant to the Warrant Agreement, each stockholder of record on the Record Date would receive one LTW for each share of Dime Bancorp common stock that such stockholder owned on the Record Date. Dime Bancorp distributed the LTWs “in an effort to pass along the potential value of [Dime Bancorp’s] claim against the government to [Dime Bancorp’s] existing shareholders in the form of tradeable securities.” Registration Statement, at 1.

On January 4, 2002, WMI merged with and acquired Dime Bancorp. Thereafter, on January 7, 2002, Dime Savings Bank merged with and into WMB, with WMB as the surviving institution. Pursuant to that certain Amended and Restated Warrant Agreement, dated January 7, 2002 (as amended, the “Amended Agreement”), referenced by Broadbill in paragraph 3 of the Complaint and attached hereto as Exhibit A, WMI succeeded to Dime Bancorp’s rights and obligations with respect to the LTWs. Amended Agreement, Recitals. Section 6.3 of the Amended Agreement provides, in relevant part, that “[WMB] will retain sole and exclusive control of the [Anchor] Litigation and retain 100% of any recovery from the [Anchor] Litigation.” Amended Agreement, § 6.3.

In addition, as a result of the Dime Bancorp – WMI merger, each holder of an LTW (collectively, the “LTW Holders”) is entitled to receive, upon the exercise of an LTW, WMI common stock. *Id.* The trigger for the right to purchase WMI common stock (the “Trigger”) requires the occurrence of *all* of the following: (i) actual receipt of

cash or property pursuant to a final non-appealable judgment in or a final settlement of the Anchor Litigation; (ii) a determination by WMB of the amount of the adjusted recovery (after certain reductions); and (iii) the receipt of all regulatory approvals necessary to issue the WMI shares upon exercise of the LTWs. Amended Agreement, § 1.1. Although the LTWs are convertible into shares of WMI common stock, the LTWs are not exercisable *unless and until* the Trigger events occur and the period to exercise the LTWs commences. *Id.* at § 1.1.

Upon the occurrence of the Trigger, each LTW Holder would receive the *right to purchase* such LTW Holders' pro rata portion of an amount of WMI common stock equal to the adjusted Anchor Litigation recovery divided by the product of WMI's adjusted stock price multiplied by the number of LTWs issued or reserved for issuance on the Record Date. Registration Statement, at 3. As of the date hereof, despite the contrary statements in the Complaint, none of the Trigger events have occurred, as there is still no final judgment in the Anchor Litigation.

The Pending Anchor Litigation

Following a trial, the Federal Claims Court concluded that FIRREA breached the Government's supervisory goodwill contracts with Anchor Savings Bank. The Federal Claims Court then conducted a trial on what damages, if any, would be awarded. By opinion, dated March 14, 2008, the Federal Claims Court held that Anchor Savings Bank was entitled to recover lost profits and other damages. On July 17, 2008, an amended judgment was entered in favor of Anchor Savings Bank in the amount of approximately \$356 million. On September 9, 2008, the Government appealed to the

United States Court of Appeals for the Federal Circuit (the “Court of Appeals”). On September 22, 2008, Anchor Savings Bank cross-appealed.

On March 10, 2010, the Court of Appeals affirmed the Federal Claims Court’s ruling in part, but remanded the case and instructed the Federal Claims Court to examine its damages calculation in light of the Court of Appeals’ opinion. The case is now pending before the Federal Claims Court. No final order awarding damages has been issued and, upon information and belief, no recovery has been received by WMB.

III. The Debtors’ Proposed Plan

On March 26, 2010, the Debtors filed their proposed chapter 11 reorganization plan (as amended May 16, 2010, the “Plan”). The Debtors attached to the Plan a proposed global settlement agreement, by and among WMI, JPMC, the FDIC, and others, which agreement incorporated the terms and provisions of the understanding between the parties and announced to the Bankruptcy Court on March 12, 2010 (the “Global Settlement Agreement”). Thereafter, on May 16, 2010, the Debtors filed an amended Plan, which reflected, among other things, amendments to the terms of the Global Settlement Agreement.

Section 2.13(b) of the Global Settlement Agreement provides, in pertinent part, that (i) WMI and the FDIC shall be deemed to have sold, transferred and assigned, as of September 26, 2008, to JPMC any and all right, title, and interest they may have in the Anchor Litigation, free and clear of any liens, claims, interests, and encumbrances, including, without limitation, any liens, claims, interests, and encumbrances of LTW Holders as set forth in the Amended Agreement, other than the liens, claims, interests, and encumbrances, if any, of JPMC, and (ii) WMI and the FDIC shall be deemed to have

waived and released any and all rights and claims associated with the claims, causes of action, damages, liabilities, and recoveries associated with the Anchor Litigation.

Pursuant to Section 25.1 of the Plan, as of the effective date of the Plan, the LTWs, which are equity interests, are deemed extinguished, cancelled, and of no force and effect, and the LTW Holders shall receive no distribution on account thereof. Plan, § 25.1. Section 26.1 further provides that holders of WMI common stock shall receive no distribution under the Plan and the shares of WMI common stock similarly shall be deemed extinguished, cancelled, and of no force and effect. Plan, § 26.1.

IV. The Broadbill Action

On April 12, 2010, Broadbill, purportedly a beneficial holder and owner of an unspecified number and amount of LTWs, commenced this adversary proceeding against WMI (the “Broadbill Action”), seeking, among other things, declaratory relief that (i) the sale and transfer of control over, and the recovery from, the Anchor Litigation to JPMC constitute a breach and default under Section 6.3 of the Amended Agreement, which gives rise to a claim in favor of the holders of LTWs for WMI’s failure to provide the LTW holders with the proceeds from such sale and transfer; (ii) if WMI’s existing common stock is to be extinguished or cancelled, Section 4.4 of the Amended Agreement mandates that the LTW holders have claims against WMI in the amount of the net proceeds of the Anchor Litigation; (iii) the LTWs do not constitute either stock warrants, equity securities or equity interests in WMI; and (iv) the LTWs represent the “right to payment” of value and are “claims” against WMI’s estate. (Compl. ¶ 4-5.)

ARGUMENT

Broadbill’s complaint fails to state a claim upon which relief can be granted and thus cannot survive dismissal under Rule 12(b)(6) and Bankruptcy Rules

7012 and 7009. In order for a plaintiff to survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citations omitted). In determining whether a complaint states a plausible claim for relief, the Court need not accept legal conclusions contained in the complaint as true. *McTernan v. City of York, Pennsylvania*, 577 F.3d 521, 530 (3d Cir. 2009) (citing *Iqbal*, 129 S.Ct. at 1949). In *Iqbal*, the Supreme Court made clear that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements” are insufficient to survive a motion to dismiss. *Iqbal*, 129 S.Ct. at 1949. See also *Mervyn’s LLC v. Lubert-Adler Group IV, LLC (In re Mervyn’s Holdings, LLC)*, Case No. 08-11586 (KG), 2010 WL 908490, at *3 (Bankr. D. Del. Mar. 12, 2010) (“Legal conclusions are not entitled to the presumption of truth”) (citing *Iqbal*, 129 S.Ct. at 1949, and granting defendants’ motion to dismiss).

A court need not credit a complaint’s “bald assertions” or “legal conclusions” when deciding a motion to dismiss. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997) (quoting *Glassman v. Computervision Corp.*, 90 F.3d 617, 628 (1st Cir. 1996)). Nor should the Court “accept as true unsupported conclusions and unwarranted inferences.” *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997); see also *Doug Grant, Inc. v. Greater Bay Casino Corp.*, 232 F.3d 173, 184 (3d Cir. 2000) (same). The Court may consider matters of public record even if they do not appear on the face of the Complaint. *Children’s Seashore House v. Waldman*, 197 F.3d 654, 662 (3d Cir. 1999) cert. denied, 530 U.S. 1275 (2000).

Applying the above standards, Broadbill's complaint should be dismissed because Plaintiff has failed to plead any facts that would entitle it to relief from WMI. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (explaining that "conclusory or 'bare-bones' allegations will no longer survive a motion to dismiss To prevent dismissal, all civil complaints must now set out 'sufficient factual matter' to show that the claim is facially plausible.") (quoting and citing *Iqbal*, 129 S.Ct. at 1948-49).

I. BROADBILL LACKS STANDING TO BRING ANY CAUSE OF ACTION IN CONNECTION WITH THE LTWs

Where an agreement expressly defines the requirements for commencement of an action, and where a party fails to satisfy those requirements, such party lacks standing to commence an adversary proceeding. *See In re Enron Corp.*, 302 B.R. 463 (Bankr. S.D.N.Y. 2003) (explaining that the governing agreement expressly required majority consent and written demand prior to commencement of suit, and granting motion to dismiss for plaintiffs' lack of standing); *see also Beal Sav. Bank v. Sommer*, 865 N.E.2d 1210, 1211 (N.Y. 2007) (affirming dismissal, under New York law, on the basis that, pursuant to the agreement entered into by consortium, which required collective action, individual member did not have standing to unilaterally commence a suit for breach of contract).⁴

Section 6.2 of the Amended Agreement sets forth the requirements necessary to be satisfied before an LTW Holder may seek to assert or enforce any claim with respect to the LTW. Specifically, Section 6.2 provides as follows:

⁴ The Amended Agreement is governed by New York law. Amended Agreement, § 7.4.

All rights of action in respect of the Warrants will be vested in the respective Holders; *provided, however*, that no Holder will have the right to enforce, institute or maintain any suit, action or proceeding against the Company to enforce, or otherwise act in respect of, the Warrants, *unless (a) such Holder has previously given written notice to the Company of the substance of such dispute, and Holders of at least 25% of the issued and outstanding Warrants have given written notice to the Company of their support for the institution of such proceeding to resolve such dispute, (b) such Holder has previously given written notice to the Warrant Agent of the substance of such dispute and of the support for the institution of such proceeding and (c) the Warrant Agent has not instituted appropriate proceedings with respect to such dispute within 30 days following the date of such written notice to the Warrant Agent*, it being understood and intended that the Warrant Agent has no obligation to institute proceedings and that no one or more Holders will have the right in any manner whatsoever to affect, disturb or prejudice the rights of any other Holders, or to obtain or to seek to obtain priority or preference over any other Holders or to enforce any rights of the Holders, except in the manner described in this Section 6.2 for the equal and ratable benefit of all Holders. Except as described above, no Holder will have the right to enforce, institute or maintain any suit, action or proceeding to enforce, or otherwise act in respect of, the Warrants.

Amended Agreement, § 6.2 (emphasis added).

Broadbill has not pled and the Complaint is devoid of any facts to establish that Broadbill has satisfied, or even attempted to satisfy, any of these agreed upon prerequisites to the instant action. In paragraph 8 of the Complaint, Broadbill alleges that it is a beneficial holder and owner of LTWs. (Compl. ¶ 8.) However, nowhere in the Complaint does Broadbill allege that it holds the number of issued LTWs required to proceed in a solitary manner under the 25% percentage of ownership threshold set forth in Section 6.2. Moreover, the Complaint does not assert that: (1) Broadbill gave notice to WMI of the substance of the dispute or that other Holders of at least 25% of the issued and outstanding LTWs gave notice to WMI of their support for

the institution of such proceeding; (2) Broadbill had previously given written notice to the Warrant Agent of the substance of such dispute and of the support for the institution of such proceeding; or (3) the Warrant Agent had not instituted appropriate proceedings with respect to such dispute within 30 days following the date of such written notice. Consequently, Broadbill lacks standing and dismissal of this Complaint is warranted.

II. BROADBILL'S CLAIM FOR "BREACH" IS UNRIPE

In the event that the claims Broadbill asserts are not dismissed out of hand, and WMI submits that they should be, the claims would not be ripe because Broadbill has failed to plead that the LTW Holders are able to exercise the LTWs. In the Third Circuit, to determine whether an action is ripe, courts must consider the following three elements and determine that all are met: "the 'adversity of the interest' between the parties to the action, the 'conclusiveness' of the declaratory judgment and 'the practical help, or utility' of the declaratory judgment." *Travelers Ins. Co. v. Obusek*, 72 F.3d 1148, 1154 (3d Cir. 1995) (citations omitted). If an action is based on a contingency, it cannot be ripe. *See id.* (explaining the adversity of interest element).

As of the date hereof, the exercise of the LTWs remains contingent. Pursuant to the Amended Agreement, and as stated above, the conditions for the Trigger, and the potential exercise of the LTWs, are: the receipt by WMB of any cash payment on account of a final judgment in the Anchor Litigation; a determination by WMB of the amount of the adjusted litigation recovery to be used in calculating any distribution to holders of the LTWs; and receipt of all regulatory approvals necessary to issue the shares of WMI common stock to be issued upon the exercise of the LTWs. Broadbill has not pled that any of these events occurred – nor could it. Furthermore, it is indisputable that the Anchor Litigation is still pending, and that there has been no actual recovery based

upon a final judgment or otherwise. As these events are conditions precedent to the exercise of the LTWs that still have not yet occurred, Broadbill's claim is not ripe.

Even if Broadbill's alleged claim were ripe, contrary to Broadbill's contention, neither WMI nor its board of directors are required under the Amended Agreement to allow an unsecured claim in favor of the LTW Holders. Broadbill argues that, pursuant to Section 4.4 of the Amended Agreement, "WMI and its Board of Directors must allow an unsecured claim in WMI's chapter 11 case in favor of the LTW Holders in an amount equal to the net proceeds of the Anchor Litigation." (Compl. ¶ 30.). Section 4.4 of the Amended Agreement does not contain any such mandate. In fact, Section 4.4 of the Amended Agreement provides as follows:

If any event occurs as to which the foregoing provisions of this Article IV are not strictly applicable, or if strictly applicable, would not, in good faith judgment of the [Board], fairly and adequately protect the purchase rights of the Holders of the Warrants in accordance with the essential intent and principles of such provisions, *then the Board may make*, without the consent of the Holders, such adjustments to the terms of this Article IV, in accordance with such essential intent and principles, as will be reasonably necessary, in the good faith opinion of such Board, to protect such rights as aforesaid.

Amended Agreement, § 4.4 (emphasis added). As a plain reading of Section 4.4 indicates, neither WMI nor its board of directors is required to take any action upon the occurrence of events that might adversely affect the purchase rights of LTW Holders. Rather, the language expressly provides that any such action is discretionary. Section 4.4 simply does not require WMI to rewrite the Amended Agreement and give the LTW

Holders anything more than the right to purchase common equity upon the occurrence of the Trigger. Accordingly, Broadbill's reliance on Section 4.4 is misplaced.⁵

III. THE LTW HOLDERS DO NOT HAVE A RIGHT TO PARTICIPATE IN ANY RECOVERY FROM THE ANCHOR LITIGATION

Furthermore, the LTW Holders contractually have no right to participate directly in any recovery from the Anchor Litigation. Pursuant to Section 6.3 of the Amended Agreement, “[WMB] will retain sole and exclusive control of the [Anchor] Litigation and retain 100% of any recovery from the [Anchor] Litigation.” Amended Agreement, § 6.3. This language expressly precludes a claim by Broadbill, or any LTW Holder, for payment “of the net proceeds received for the sale or transfer of the Anchor Litigation” The Registration Statement further provides that LTW Holders “have no voting rights, *no liquidation preferences*, and no rights to dividends or distributions other than the right to exercise [their] LTWs to purchase shares of [WMI] common stock, based on the valuation formula, after the occurrence of the trigger.” Registration Statement, at 5 (emphasis added).

Broadbill argues, however, that Section 6.3 of the Amended Agreement was breached when control over, and any recovery from, the Anchor Litigation was lost due to the seizure of WMB by the FDIC and the consequent sale of its assets to JPMC.⁶ Specifically, Broadbill contends that, upon the FDIC's sale to JPMC pursuant to the Purchase and Assumption Agreement, WMI should have “taken the necessary steps to

⁵ Moreover, if the claim is based on the treatment of the warrants in the plan, the time and place for contesting such treatment is in an objection to plan confirmation, not a separate lawsuit.

⁶ According to Broadbill, Section 6.3 of the Amended Agreement “exists to protect the LTW Holders from the sale or transfer of the Anchor Litigation which would eliminate or avoid the occurrence of a Trigger and thereby frustrate the intent and purpose of the LTWs and the Agreements.” Broadbill does not provide any basis for this inference, and the language of section 6.3 does not support such an inference.

consummate a Trigger.” (Compl. ¶ 22.) Nothing in Section 6.3, however, imposes such duties on WMI, and Broadbill’s fanciful suggestion otherwise should be rejected as a matter of law.

In sum, because the terms of the Amended Agreement do not provide LTW Holders with a claim against WMI for any recovery that may be awarded in the pending Anchor Litigation, dismissal of the Complaint is appropriate.

**IV. THE LTWs ARE EQUITY SECURITIES
AND THUS CONSTITUTE EQUITY INTERESTS**

Notwithstanding that the LTW Holders are not entitled to assert claims based upon a potential recovery from the Anchor Litigation, Broadbill’s request for a declaratory judgment that the LTW Holders have “claims” must be denied because the LTWs are, as a matter of law, equity securities, and the LTWs therefore possess nothing more than equity interests. This request fails as a matter of law because, under the Bankruptcy Code, there can be no doubt that the LTWs constitute equity securities.

The Bankruptcy Code defines an “equity security” as:

(A) share in a corporation, whether or not transferable or denominated “stock”, or similar security;

(B) interest of a limited partner in a limited partnership; or

(C) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B) of this paragraph.

11 U.S.C. § 101(16). The legislative history of section 101(16) expressly indicates that Congress intended for the definition of equity security to include “a warrant or right to subscribe to an equity security,” but to exclude “a security, such as a convertible debenture, that is convertible into equity security, but has not been converted.” S. REP.

95-989, 1978 U.S.C.C.A.N. 5787. Accordingly, “only a right to convert is not included in the definition of ‘equity security’ A right to purchase however, is within the definition provided in the Bankruptcy Code.” *In re Am. W. Airlines, Inc.*, 179 B.R. 893, 897 (Bankr. D. Ariz. 1995) (citations and quotation marks omitted). In excluding convertible debentures from the meaning of “equity security,” Congress thus intended only to carve out debt securities that are convertible to equity securities.

By contrast, “[s]tock options, as rights to purchase securities, are equity securities.” *In re Lawton*, 261 B.R. 774, 777 (Bankr. M.D. Fla. 2001) (citations omitted). Likewise, a warrant that provides for the purchase of a company’s stock, falls well within the meaning of equity security. *See Duel Glass v. Search Fin. Servs., Inc. (In re Search Fin. Servs. Acceptance Corp.)*, Case No. 39832129RCM11, 2000 WL 256889, at *2-4 (N.D. Tex. Mar. 7, 2000) (determining that warrants to purchase corporation’s stock were equity securities, and affirming bankruptcy court’s ruling that such warrants were equity interests); *see also In re Baldwin-United Corp., D.H.*, 52 B.R. 549, 552 (Bankr. S.D. Ohio 1985) (holding that, unlike “a guaranteed right to a cash payment in the future,” claims to exercise the stock option portion of a stock option plan “are properly classified as equity security interests”). In distinguishing between “claims” and “equity interests,” the Court of Appeals for the Third Circuit has stated that “[e]quity investment brings not a right to payment, but a share of ownership in the debtor’s assets—a share that is subject to all of the debtor’s payment obligations.” *In re Insilco Techs., Inc.*, 480 F.3d 212, 218 (3d Cir. 2007).

Here, the Amended Agreement expressly provides that each LTW “represents the right to purchase shares or a portion of a share of Common Stock.”

Amended Agreement, Recitals. The Amended Agreement further provides that each LTW “will, upon exercise thereof and subject to adjustment as provided [in the Amended Agreement], entitle the [LTW] Holder thereof to purchase the number of shares of [WMI] Common Stock” determined by the terms of the Amended Agreement. *Id.* at § 3.1. Accordingly, there can be no doubt that the LTWs qualify as “equity securities” under the Bankruptcy Code.

Broadbill alleges that the LTWs do not satisfy the legal requirements for stock purchase warrants, equity securities, or equity interests, on the purported basis that, “because the aggregate value of shares issuable pursuant to the LTWs does not change upon a change in value of WMI’s common stock, the LTW’s do not contain the hallmark characteristic of equity – equity risk.” (Compl. ¶ 33.) Broadbill cites no authority for this dubious proposition that equity shares do not qualify as equity securities if they are awarded to a holder in numbers based on external factors.

Broadbill also alleges that the Dime Bancorp board of directors did not intend for the LTWs to be stock purchase warrants, equity securities, or equity interests. Broadbill pleads no facts to support this conclusory assertion and therefore on this motion to dismiss must be ignored. *See Fowler*, 578 F.3d at 210 (explaining that “conclusory or ‘bare-bones’ allegations will no longer survive a motion to dismiss . . . To prevent dismissal, all civil complaints must now set out ‘sufficient factual matter’ to show that the claim is facially plausible.”) (quoting and citing *Iqbal*, 129 S.Ct. at 1948-49). Moreover, based upon the plain language of the Amended Agreement, it is evident that the LTWs are equity interests regardless of the subjective mindset of the board of

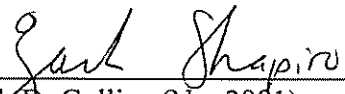
directors. Accordingly, Broadbill's naked assertion that the intent behind the distribution of the LTWs was to confer something other than equity interests is baseless.

Based on the foregoing reasons, there is no basis for the relief requested in the Complaint.

CONCLUSION

WHEREFORE WMI respectfully requests entry of an order dismissing the Complaint with prejudice and without leave to replead.

Dated: Wilmington, Delaware
May 17, 2010



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Exhibit A

Amended Agreement

2003 AMENDED AND RESTATED

WARRANT AGREEMENT

Dated as of

March 11, 2003

between

WASHINGTON MUTUAL, INC.

and

MELLON INVESTOR SERVICES LLC,

as the Warrant Agent

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THIS 2003 AMENDED AND RESTATED WARRANT AGREEMENT, dated as of March 11, 2003 (this "*Agreement*"), between Washington Mutual, Inc (the "*Company*"), successor by merger to DIME BANCORP, INC., a Delaware corporation ("*Dime*") and Mellon Investor Services LLC, a New Jersey limited liability company (the "*Warrant Agent*"), successor to EQUISERVE TRUST COMPANY, N.A. and EQUISERVE LIMITED PARTNERSHIP, as Warrant Agent ("*Equiserve*"), amends and restates the Warrant Agreement, dated as of December 21, 2000, between Dime and Equiserve, as previously amended and restated by the parties hereto.

RECITALS

A. The Board of Directors of Dime authorized a distribution of one Litigation Tracking Warrant™ (a "*Warrant*") for each share of Dime's common stock, par value \$0.01 per share (the "*Dime Common Stock*"), outstanding as of the Close of Business (as defined below) on the Record Date (as defined below). Each Warrant represents the right to purchase shares or a portion of a share of Dime's common stock (subject to adjustment as provided herein), upon the terms and subject to the conditions herein set forth.

B. The Board of Directors of Dime also authorized the issuance of Warrants to holders of outstanding Dime Convertible Securities (as defined herein) who exercise or convert such Dime Convertible Securities at any time and from time to time before the occurrence of the Trigger (as defined herein).

C. On January 4, 2002, Dime merged with and into the Company (the "*Merger*") and the Company succeeded to Dime's rights and obligations with respect to the Warrants. As a result of the Merger, Warrant holders will be entitled to receive, if and when the Warrants are exercised and in accordance with the terms of this Agreement, for each Warrant they hold, shares of Washington Mutual common stock (the "*Common Stock*").

D. In order to issue Warrants to holders of options to purchase Common Stock, which options were previously Dime Convertible Securities prior to the Merger, who exercise or convert such options at any time and from time to time before the occurrence of the Trigger, and to set forth the terms of the Warrants following the Merger, the Company has determined to enter into this Agreement with the Warrant Agent.

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, the parties agree as follows:

ARTICLE I

Defined Terms

1.1 Definitions. As used in this Agreement, except as otherwise expressly provided or unless the context otherwise requires:

"*Adjusted Litigation Recovery*" means an amount equal to 85% of the amount obtained from the following equation: (a) the Amount Recovered minus (b) the sum of the following: (i) the total of all expenses incurred by or on behalf of the Bank and the Company in

pursuing the Litigation and obtaining the Amount Recovered (whether incurred before or after the date hereof), including, without limitation, fees and expenses of counsel, witnesses, experts and consultants, (ii) the total of all expenses incurred by the Company in connection with the creation, issuance and trading of the Warrants, including, without limitation, legal, financial advisory and accounting fees, the fees and expenses of the Warrant Agent and printing and registration costs (whether incurred before or after the date hereof) and (iii) an amount equal to the Amount Recovered, less the expenses described in the preceding clauses (i) and (ii), multiplied by the combined highest federal, New York State and New York City income tax rates applicable to financial institutions in the year (or years) in which the amount of the damages (in whole or in part) is fixed or determinable (after taking into account the effect of the deductibility of such taxes for federal and state income tax purposes).

"Adjusted Stock Price" means the average of the daily Closing Prices of a share of Common Stock for the thirty consecutive Trading Days ending on and including the Determination Date; *provided*, that if the context in which this defined term is used is with respect to securities other than shares of Common Stock, then *"Adjusted Stock Price"* means the average of the daily Closing Prices of a unit of such securities for the thirty consecutive Trading Days ending on and including the Determination Date minus the Exercise Price determined for such securities in the manner described in Section 4.3; and *provided, further* that if the context in which this defined term is used is with respect to property other than publicly traded securities, then *"Adjusted Stock Price"* means the Fair Market Value of the amount of such property distributable in respect of one share of Common Stock.

"Amount Recovered" means the aggregate amount of any cash payment and the Fair Market Value of any property or assets actually received by the Bank pursuant to a final, nonappealable judgment in or final settlement of the Litigation (including any post-judgment interest actually received by the Bank on any Amount Recovered).

"Assistant Secretary" means any assistant secretary or person of similar title of the Company.

"Bank" means Washington Mutual Bank, FA, a federal association or any successor thereto.

"Board" means the Board of Directors of the Company or any committee thereof duly authorized to act on behalf of such Board of Directors.

"Business Day" means a day other than a Saturday, Sunday or other day on which commercial banks in the State of New York or the State of Washington are authorized or required by law to close.

"Close of Business" on any given date means 5:00 P.M., Western time, on such date; *provided, however*, that if such date is not a Business Day it will mean 5:00 P.M., Western time, on the next succeeding Business Day.

"Closing Price" on any day means the closing sale price regular way (with any relevant due bills attached) of a share of Common Stock on such day, or in case no such sale takes place on such day, the average of the reported closing bid and asked prices regular way

(with any relevant due bills attached) of a share of Common Stock, in each case on the NYSE Composite Tape (or any successor composite tape reporting transactions on national securities exchanges), or, if the Common Stock is not listed or admitted to trading on the NYSE, on the principal national securities exchange on which the Common Stock is listed or admitted to trading (which will be the national securities exchange on which the greatest number of shares of Common Stock has been traded during the five consecutive Trading Days ending on and including the Determination Date), or, if not listed or admitted to trading on any national securities exchange, the average of the closing bid and asked prices regular way (with any relevant due bills attached) of a share of Common Stock on the over-the-counter market on the day in question as reported by NASDAQ, or a similar generally accepted reporting service, or if not so available as determined in good faith by the Board, on the basis of such relevant factors as it in good faith considers appropriate.

“*Combination*” means an event in which the Company consolidates with, merges with or into, or sells all or substantially all its property and assets to another Person.

“*Determination Date*” means the 30th calendar day before the date on which the Bank receives the total amount of the Amount Recovered unless such date is not a Trading Day, in which case the Determination Date will be the next succeeding Trading Day. If the Amount Recovered is payable by the United States Government in installments, the Determination Date will be the 30th calendar day before the date on which the Bank receives the last installment of the Amount Recovered unless such date is not a Trading Day, in which case the Determination Date will be the next succeeding Trading Day.

“*Dime Exchange Ratio*” means 1.1232, which is the “Exchange Ratio” as defined and calculated in accordance with Section 2.5(b) of the Agreement and Plan of Merger, dated as of June 25, 2001, by and between the Company and Dime.

“*Exchange Act*” means the Securities Exchange Act of 1934, as amended.

“*Fair Market Value*” means the fair market value of the relevant property on the Determination Date as determined in good faith by the Board, on the basis of such factors as it in good faith considers appropriate.

“*Holder*” means the duly registered holder of a Warrant under the terms of this Agreement.

“*Litigation*” means the Bank’s case against the United States Government in the United States Court of Federal Claims entitled Anchor Savings Bank, FSB v. United States, No. 95-39C, filed on January 13, 1995.

“*NASDAQ*” means the stock market and automated quotation system operated by the National Association of Securities Dealers, Inc.

“*NYSE*” means the stock exchange operated by The New York Stock Exchange, Inc.

“*Officer*” means the Chief Executive Officer, the President, any Senior Executive Vice President or any Executive Vice President of the Company.

“*Person*” means any individual, corporation, partnership, joint venture, limited liability company, association, joint-stock company, trust, unincorporated organization, government or any agency or political subdivision thereof or any other entity.

“*Record Date*” means December 22, 2000.

“*SEC*” means the Securities and Exchange Commission.

“*Secretary*” means the secretary of the Company.

“*Securities Act*” means the Securities Act of 1933, as amended.

“*Trading Day*” means a date on which the NYSE or NASDAQ (or any successor thereto) is open for the transaction of business.

“*Trigger*” means the occurrence of all of the following events: (a) receipt by the Bank of the Amount Recovered in full, (b) determination by the Bank of the amount of the Adjusted Litigation Recovery and (c) receipt of all regulatory approvals necessary to issue the shares of Common Stock to be issued upon the exercise of the Warrants, including without limitation, the effectiveness of a registration statement relating to the issuance of the Warrant Shares under the Securities Act.

“*Warrant Shares*” means the shares of Common Stock of the Company issued and received upon exercise of the Warrants.

1.2 Other Definitions.

<u>Term</u>	<u>Defined in Section</u>
“ <i>Agent Members</i> ”	2.2(c)
“ <i>Certificate Register</i> ”	2.4
“ <i>Certificated Warrants</i> ”	2.2(a)
“ <i>Common Stock</i> ”	Recitals
“ <i>Company</i> ”	Recitals
“ <i>Dime</i> ”	Recitals
“ <i>Dime Common Stock</i> ”	Recitals
“ <i>Dime Convertible Securities</i> ”	2.1(a)
“ <i>DTC</i> ”	2.2(b)
“ <i>Exercise Notice</i> ”	3.2
“ <i>Exercise Price</i> ”	3.1
“ <i>Global Warrant</i> ”	2.2(b)
“ <i>Maximum Number of Warrants</i> ”	2.1(b)
“ <i>Merger</i> ”	Recitals
“ <i>Number of Shortfall Shares</i> ”	3.7(b)

“Registrar”	3.7(a)
“Successor Company”	4.2(b)
“Successor Warrant Agent”	5.6
“Termination Date”	3.3
“Termination Notice”	3.3
“Transfer Agent”	3.5
“Warrant”	Recitals
“Warrant Agent”	Recitals
“Warrant Certificate”	2.1(a)
“Warrant Exercise Period”	3.2(b)

ARTICLE II

Warrant Certificates

2.1 Issuance of Warrant Certificates. (a) At any time and from time to time before the Trigger occurs, the Company may instruct the Warrant Agent in writing to issue, in accordance with its instructions and the provisions of this Article 2, one or more Warrant Certificates, in substantially the form of Exhibit A hereto (a “*Warrant Certificate*”), evidencing Warrants to holders of stock options of the Company that were outstanding on the Record Date as options to purchase Dime Common Stock (all options to purchase Dime Common Stock outstanding as of the Record Date, the “*Dime Convertible Securities*”) to such holders who exercise or convert such Dime Convertible Securities into shares of Common Stock and Warrants in accordance with the terms and conditions of such Dime Convertible Securities.

(b) The maximum number of Warrants (the “*Maximum Number of Warrants*”) that may be issued hereunder is equal to 112,975,597 (the sum of (i) the number of shares of Dime Common Stock that were outstanding on the Record Date plus (ii) the number of Warrants issuable to holders of Dime Convertible Securities had all Dime Convertible Securities been exercised immediately before the Record Date).

2.2 Form and Dating. The Warrant Certificates will be substantially in the form of Exhibit A, hereto. The Warrants may have such notations, legends or endorsements as the Company may deem appropriate, which do not affect the rights, duties or responsibilities of the Warrant Agent, and as are not inconsistent with the provisions hereof or as may be required by law, stock exchange or stock market rule, agreements to which the Company is subject, if any, or usage (*provided that* any such notation, legend or endorsement is in a form acceptable to the Company). Each Warrant will be dated the date of its countersignature.

(a) Certificated Warrants. The Warrants may be issued in definitive form represented by a physical Warrant Certificate (such certificate and all other certificates representing physical delivery of Warrants in definitive form being called “*Certificated Warrants*”).

(b) Global Warrant. The Warrants may be issued in the form of one or more fully registered global certificates with the global securities legend set forth in Exhibit A hereto (the “*Global Warrant*”), which will be registered on the records of the Warrant Agent on behalf

of beneficial owners of Warrants and in the name of the Depository Trust Company (“DTC”) or a nominee of DTC, duly executed by the Company and countersigned by the Warrant Agent as hereinafter provided. The number of Warrants represented by Global Warrants may from time to time be increased or decreased by adjustments made on the records of the Warrant Agent and DTC or its nominee as hereinafter provided. Except as provided in Section 2.5, owners of beneficial interests in a Global Warrant will not be entitled to receive physical delivery of Certificated Warrants.

(c) Book-Entry Provisions. Members of, or participants in, DTC (“Agent Members”) will have no rights under this Agreement with respect to any Global Warrant held on their behalf with DTC or by the Warrant Agent or under such Global Warrant, and DTC may be treated by the Company, the Warrant Agent and any agent of the Company or the Warrant Agent as the absolute owner of such Global Warrant for all purposes whatsoever. Notwithstanding the foregoing, nothing herein will prevent the Company, the Warrant Agent or any agent of the Company or the Warrant Agent from giving effect to any written certification, proxy or other authorization furnished by DTC or impair, as between DTC and its Agent Members, the operation of customary practices of DTC governing the exercise of the rights of a holder of a beneficial interest in any Global Warrant.

2.3 Execution and Countersignature. (a) With respect to any Global Warrant to be issued hereunder, one Officer will sign, and the Secretary or any Assistant Secretary will attest, such Global Warrant. The Warrant Agent, upon the written instruction of the Company signed by an Officer, will countersign any Global Warrant certificate by manual or facsimile signature, and such Global Warrant will be registered in accordance with Section 2.2(b) hereof.

(b) With respect to all other Warrants, an Officer will sign, and the Company’s Secretary or any of its Assistant Secretaries will attest, the Warrant Certificates for the Company by manual or facsimile signature. The Warrant Agent will countersign and deliver the Warrant Certificates for original issue, in each case upon a written instruction of the Company signed by an Officer of the Company. Such instruction will specify (in addition to the number of Warrants) the date on which the original issue of Warrants is to be countersigned.

(c) If an Officer whose signature is on a Warrant Certificate no longer holds that office at the time the Warrant Agent countersigns the Warrant Certificate, the Warrant will be valid nevertheless. A Warrant will not be valid until an authorized signatory of the Warrant Agent manually countersigns the Warrant Certificate. The signature will be conclusive evidence that the Warrant Certificate has been countersigned under this Agreement.

(d) The Warrant Agent may appoint an agent reasonably acceptable to the Company to countersign the Warrant Certificates. Unless limited by the terms of such appointment, such agent may countersign Warrant Certificates whenever the Warrant Agent may do so. Each reference in this Agreement to countersignature by the Warrant Agent includes countersignature by such agent. Such agent will have the same rights as the Warrant Agent for service of notices and demands.

2.4 Certificate Register. The Warrant Agent will keep a register (the “Certificate Register”) of the Warrant Certificates and of their transfer and exchange which the Company

may examine upon reasonable written notice. The Certificate Register will show the names and addresses of the respective Holders and the date and number of Warrants evidenced on the face of each of the Warrant Certificates. The Company and the Warrant Agent may deem and treat the Person in whose name a Warrant Certificate is registered as the absolute owner of such Warrant Certificate and neither the Company nor the Warrant Agent will be affected by any notice to the contrary.

2.5 Transfer and Exchange.

(a) Transfer and Exchange of Certificated Warrants. When Certificated Warrants are presented to the Warrant Agent with a request to register the transfer or exchange of such Certificated Warrants, the Warrant Agent will register the transfer or make the exchange as requested; *provided*, that the Certificated Warrants surrendered for transfer or exchange have been duly endorsed or accompanied by a written instrument of transfer in form reasonably satisfactory to the Company and the Warrant Agent, duly executed by the Holder thereof or its attorney duly authorized in writing.

(b) Restrictions on Transfer of Certificated Warrants for a Beneficial Interest in a Global Warrant. Certificated Warrants may not be exchanged for a beneficial interest in a Global Warrant except upon satisfaction of the requirements set forth below. Upon receipt by the Warrant Agent of Certificated Warrants, duly endorsed or accompanied by appropriate instruments of transfer, in form satisfactory to the Warrant Agent, together with written instructions directing the Warrant Agent to make, or to direct DTC to make, an adjustment on its books and records with respect to such Global Warrants to reflect an increase in the number of Warrants represented by the Global Warrant, then the Warrant Agent will, and is hereby instructed to, cancel such Certificated Warrants and cause, or direct DTC to cause, the number of Warrants represented by the Global Warrant to be increased accordingly.

(c) Transfer and Exchange of Global Warrants. The transfer and exchange of beneficial interests in a Global Warrant will be effected through DTC, in accordance with this Agreement and the procedures of DTC.

(d) Restrictions on Transfer and Exchange of the Global Warrant. Notwithstanding any other provisions of this Agreement, Global Warrants may not be transferred as a whole except by DTC to a nominee of DTC or by a nominee of DTC to DTC or another nominee of DTC or by DTC or any such nominee to a successor depository or a nominee of such successor depository.

(e) Authentication and Distribution of Certificated Warrants. If at any time:

(i) DTC notifies the Company that DTC is unwilling or unable to continue as depository for Global Warrants and a successor depository for Global Warrants is not appointed by the Company within 90 calendar days after delivery of such notice;

(ii) DTC ceases to be a clearing agency registered under the Exchange Act; or

- (iii) the Company, in its sole discretion, notifies the Warrant Agent in writing that it elects to cause the issuance of Certificated Warrants under this Agreement;

then, the Company will execute, and the Warrant Agent, upon receipt of a written order of the Company signed by an Officer requesting the delivery of Certificated Warrants to the holders of beneficial interests in the Global Warrant, will countersign and deliver Certificated Warrants equal to the number of Warrants represented by Global Warrants, in exchange for such Global Warrants. Certificated Warrants issued in exchange for a beneficial interest in a Global Warrant will be registered in such names and in such authorized denominations as DTC, pursuant to instructions from its direct or indirect participants or otherwise, will instruct the Warrant Agent in writing. The Warrant Agent is hereby instructed to deliver such Certificated Warrants to the Persons in whose names such Warrants are so registered in accordance with the written instructions of DTC.

(f) Cancellation or Adjustment of Global Warrants. At such time as all beneficial interests in Global Warrants have either been exchanged for Certificated Warrants, redeemed, repurchased or canceled, such Global Warrant will be returned to DTC for cancellation or retained and canceled by the Warrant Agent. At any time before such cancellation, if any beneficial interest in a Global Warrant is exchanged for Certificated Warrants, redeemed, repurchased or canceled, the number of Warrants represented by such Global Warrant will be reduced and an adjustment will be made on the books and records of the Warrant Agent with respect to such Global Warrant, by the Warrant Agent or DTC, to reflect such reduction.

(g) Obligations with Respect to Transfers and Exchanges of Warrants.

(i) To permit registrations of transfers and exchanges, the Company will execute and the Warrant Agent will countersign Certificated Warrants and Global Warrants as required pursuant to the provisions of this Section 2.5.

(ii) All Certificated Warrants and Global Warrants issued upon any registration of transfer or exchange of Certificated Warrants will be the valid obligations of the Company, entitled to the same benefits under this Agreement as the Certificated Warrants or Global Warrants surrendered upon such registration of transfer or exchange.

(iii) Before due presentment for registration of transfer of any Warrant, the Warrant Agent and the Company may deem and treat the Person in whose name any Warrant is registered as the absolute owner of such Warrant and neither the Warrant Agent nor the Company will be affected by any notice to the contrary.

(iv) No service charge will be made to a Holder for any registration of transfer or exchange upon surrender of any Warrant Certificate at the office of the Warrant Agent maintained for that purpose. The Company

may require payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in connection with any registration of transfer or exchange of Warrant Certificates. The Warrant Agent shall have no duty or obligation under this Section 25 unless and until it is satisfied that all such taxes and/or charges have been paid in full.

2.6 Replacement Certificates. If a mutilated Warrant Certificate is surrendered to the Warrant Agent or if the Holder of a Warrant Certificate claims that the Warrant Certificate has been lost, destroyed or wrongfully taken, the Company will issue and the Warrant Agent will countersign a replacement Warrant Certificate. If required by the Warrant Agent or the Company, such Holder will furnish an indemnity bond or other instrument sufficient in the judgment of the Company and the Warrant Agent to protect the Company and the Warrant Agent from any loss which either of them may suffer if a Warrant Certificate is replaced. The Company and the Warrant Agent may charge the Holder for their expenses in replacing a Warrant Certificate.

2.7 Cancellation. (a) In the event the Company will purchase or otherwise acquire Certificated Warrants, the same will thereupon be delivered to the Warrant Agent for cancellation.

(b) The Warrant Agent and no one else will cancel and destroy all Warrant Certificates surrendered for transfer, exchange, replacement, exercise or cancellation and deliver a certificate of such destruction to the Company unless the Company directs the Warrant Agent to deliver canceled Warrant Certificates to the Company. The Company may not issue new Warrant Certificates to replace Warrant Certificates to the extent they evidence Warrants that have been exercised or Warrants that the Company has purchased or otherwise acquired.

2.8 Purchase of Warrants by the Company. The Company will have the right, except as limited by law or other agreement, to purchase or otherwise acquire Warrants at such times, in such manner and for such consideration as it may deem appropriate.

ARTICLE III

Exercise Terms

3.1 Number of Warrant Shares; Exercise Price. Each Warrant will, upon exercise thereof and subject to adjustment as provided herein, entitle the Holder thereof to purchase the number of shares of Common Stock equal to the quotient of (a) the quotient of (i) the Adjusted Litigation Recovery divided by (ii) the Maximum Number of Warrants (112,975,597), divided by (b) the product of (x) the Adjusted Stock Price, and (y) the Dime Exchange Ratio (1.1232), upon surrender or cancellation of the Warrant and payment of an exercise price per Warrant equal to the number of shares of Common Stock for which the Warrant is exercisable multiplied by the Exercise Price (as defined below). All calculations made pursuant to this Section 3.1 will be performed by the Company (with written notice of any such calculation to the Warrant Agent) and shall be rounded to the nearest ten-thousandth. As of the date of this Agreement, the "Exercise Price" is zero dollars and zero cents (\$0.00) per each whole share of Common Stock, but shall be subject to adjustment as provided in this Agreement. The Warrant Agent shall not

be deemed to have knowledge of any such calculations made pursuant to this Section 3.1 unless and until it has received written notice thereof, and the Warrant Agent shall have no duty or obligation to inquire as to whether any such calculation is accurate.

3.2 Exercise Period. (a) The Company will provide written notice, as described below (the "*Exercise Notice*") to each Holder and the Warrant Agent, of the occurrence of the Trigger not more than 15 calendar days after the occurrence thereof. If the Amount Recovered is payable by the United States government in installments, the Trigger will not be deemed to have occurred until the Bank receives the last installment of the Amount Recovered. The Exercise Notice will be dated the date it is first sent to Holders and the Warrant Agent and will be provided by means of a press release to one or more national news services and by mailing such notice first class, postage prepaid, to each Holder at such Holder's address as it appears on the Certificate Register; *provided, however*, that neither the failure to give such notice by mail to any particular Holder or the Warrant Agent nor any defect therein will affect the validity of the Exercise Notice or the expiration of all Warrants on the Close of Business on the last day of the Warrant Exercise Period with respect to the other Holders. The Exercise Notice will contain the following information:

- (i) that the Trigger has occurred,
- (ii) the total number of shares for which the Warrants are exercisable,
- (iii) the number of shares of Common Stock for which one Warrant is exercisable,
- (iv) the Exercise Price (if any) per Warrant,
- (v) the manner in which the Warrants are exercisable, and
- (vi) the date on which the Warrants will no longer be exercisable.

(b) Subject to the terms and conditions set forth herein, each Warrant will be exercisable at any time or from time to time during the 60-day period commencing on the date on which the Exercise Notice is first sent to Holders and the Warrant Agent pursuant to Section 3.2(a) (the "*Warrant Exercise Period*").

(c) No Warrant will be exercisable after the Close of Business on the last day of the Warrant Exercise Period.

3.3 Expiration. A Warrant will terminate and become void as of the earlier of (a) the Close of Business on the last day of the Warrant Exercise Period, (b) the Close of Business on the date the Litigation has been disposed of in a manner such that no shares of Common Stock or other securities or property will be issuable under the terms of the Warrants (and the Agent shall receive prompt written notice thereof)(the "*Termination Date*") or (c) the time and date such Warrant is exercised. The Company will provide notice, as described below (the "*Termination Notice*"), of the occurrence of the Termination Date or the expiration of the Warrant Exercise Period not more than 60 calendar days after the occurrence thereof to the Holders and the Warrant Agent. The Termination Notice will be dated the date it is first sent to Holders and the

Warrant Agent and will be provided by means of a press release to one or more national news services and by mailing such notice first class, postage prepaid, to each Holder at such Holder's address as it appears on the Certificate Register. The Termination Notice will state the following:

- (i) that the Termination Date has occurred or the Warrant Exercise Period has expired, as the case may be, and
- (ii) that all outstanding Warrants have terminated and become void.

The Warrants will terminate and become void as provided herein notwithstanding the Company's failure to give the Termination Notice. The Warrant Agent shall not be deemed to have knowledge the Termination Date has occurred, the Warrant Exercise Period has expired or the outstanding Warrants have terminated unless and until it shall have received written notice thereof.

3.4 Manner of Exercise. Warrants may be exercised upon (i) surrender to the Warrant Agent of the Warrant Certificates, together with the form of election to purchase Common Stock on the reverse thereof properly completed and validly executed by the Holder thereof and (ii) payment to the Warrant Agent, for the account of the Company, of the total Exercise Price (if any) for the number of Warrants being exercised. Such payment will be made by certified or official bank check or personal check payable to the order of the Company. Subject to Sections 3.2 and 3.3, the Warrants will be exercisable at the election of the Holders thereof either in full at any time or from time to time in part. In the event that a Warrant Certificate is surrendered for exercise in respect of less than all the Warrant Shares purchasable on such exercise at any time before the expiration of the Warrant Exercise Period a new Warrant Certificate exercisable for the remaining Warrant Shares will be issued and its exercise will also be subject to Sections 3.2 and 3.3. The Warrant Agent will countersign and deliver the required new Warrant Certificates, and the Company, at the Warrant Agent's request, will supply the Warrant Agent with Warrant Certificates duly signed on behalf of the Company for such purpose. The Warrant Agent will account promptly to the Company with respect to all Warrants exercised and concurrently pay to the Company all moneys received by the Warrant Agent for the purchase of shares of Common Stock through the exercise of such Warrants.

3.5 Issuance of Warrant Shares. Subject to Section 3.6, upon the surrender of Warrant Certificates and payment of the Exercise Price in accordance with Section 3.4, the Company will issue and cause the Warrant Agent or, if appointed, a transfer agent for the Common Stock ("*Transfer Agent*") to countersign and deliver to or upon the written order of the Holder and in such name or names as the Holder may designate, a certificate or certificates for the number of full Warrant Shares so purchased upon the exercise of such Warrants or such other securities or property to which it is entitled, to the Person or Persons entitled to receive the same, together with the payment of cash by the Company as provided in Section 3.6 in respect of any fractional Warrant Shares. Such certificate or certificates will be deemed to have been issued and any Person so designated to be named therein will be deemed to have become a holder of record of such Warrant Shares as of the date of the surrender of such Warrant Certificates and payment of the Exercise Price.

3.6 Fractional Warrant Shares. The Company will not issue fractional Warrant Shares. If any fraction of a Warrant Share would, except for this Section 3.6, be issuable, the Company will pay an amount in cash equal to (a) the sum of (i) the Adjusted Stock Price and (ii) the Exercise Price (if any) per whole Warrant Share that would have been received), multiplied by (b) such fraction. Such cash amount will be rounded to the nearest whole cent.

3.7 Reservation of Warrant Shares. (a) The Company will use its best efforts to at all times keep reserved and available out of its authorized and unissued shares of Common Stock or shares of Common Stock held in its treasury a number of shares of Common Stock sufficient to provide for the exercise in full of all Warrants then outstanding or reserved for issuance pursuant to Section 2.1. The registrar for the Common Stock (the "Registrar") will at all times until the Termination Date, or the time at which all Warrants have been exercised or canceled, reserve such number of authorized shares as will be required for such purpose. The Company will keep a copy of this Agreement on file with the Registrar. The Company will supply such Registrar with duly executed stock certificates for such purpose and will itself provide or otherwise make available any cash which may be payable as provided in Section 3.6. The Company will furnish to such Registrar a copy of all notices of adjustments and certificates related thereto transmitted to each Holder.

(b) If, upon the Trigger, the number of shares of Common Stock authorized but not issued plus the number of shares of Common Stock held in the Company's treasury is less than the number of shares of Common Stock necessary to permit the exercise in full of the Warrants then outstanding or reserved for issuance pursuant to Section 2.1 (the number of shares of Common Stock comprising such deficiency being the "*Number of Shortfall Shares*"), then the Company will either (i) to the extent permitted by applicable law and any material agreements then in effect to which the Company is a party, commence a tender offer or buyback for the aggregate number of shares of Common Stock at least equal to the Number of Shortfall Shares or (ii) call a special meeting of the holders of Common Stock for the purpose of increasing the number of authorized shares of Common Stock in an amount at least equal to the Number of Shortfall Shares. In such an event, the Warrant Exercise Period will be automatically extended to 60 calendar days after (A) the date on which the tender offer or buyback referred to in clause (i) above is successfully completed or (B) the effective date of the increase in the number of authorized shares of Common Stock referred to in clause (ii) above.

(c) The Company covenants that all shares of Common Stock that may be issued upon exercise of Warrants will, upon issue, be fully paid, nonassessable, free of preemptive rights, free from all taxes, liens, charges and security interests, created by or through the Company, with respect to the issue thereof.

3.8 Compliance with Law. (a) Notwithstanding anything in this Agreement to the contrary, in no event will a Holder be entitled to exercise a Warrant unless (i) a registration statement filed under the Securities Act in respect of the issuance of the Warrant Shares is then effective or (ii) an exemption from such registration requirements is available to all Holders under the Securities Act at the time of such exercise.

(b) If any shares of Common Stock required to be reserved for purposes of exercise of Warrants require, under any other Federal or state law or applicable governing rule or

regulation of any national securities exchange or stock market, registration with or approval of any governmental authority, or listing on any such national securities exchange or stock market before such shares may be issued upon exercise, the Company will cause such shares to be duly registered or approved by such governmental authority or listed on the relevant national securities exchange or stock market.

3.9 Holders Not Entitled to Interest. Notwithstanding anything to the contrary, Holders will not be entitled to receive any interest or additional shares of our common stock for any period, including, without limitation, the period of time between the date on which the Bank receives the Amount Recovered (in full or in part) and the date on which the Warrants become exercisable.

ARTICLE IV

Adjustments

4.1 Reclassifications, Redesignations or Reorganizations of Common Stock. (a) In the event that at any time or from time to time after the date hereof the Company will issue by reclassification, redesignation or reorganization of the shares of Common Stock any shares of capital stock of the Company then, in any such event, the Holders will have the right to receive upon exercise of each Warrant the number of shares of such capital stock of the Company equal to the Adjusted Litigation Recovery divided by the Maximum Number of Warrants divided by the aggregate Adjusted Stock Price of the capital stock of the Company that 1.1232 shares of Common Stock were exchanged for or converted into as a result of such reclassification, redesignation or reorganization.

(b) The proportion and type of capital stock of the Company that the Holders will have the right to receive in the circumstance set forth in Section 4.1(a) will be in the same proportion and type as one share of Common Stock was exchanged for or converted into as a result of such reclassification, redesignation or reorganization. Such adjustment will become effective immediately after the effective date of such reclassification, redesignation or reorganization. In the event of the occurrence of more than one of the foregoing, such adjustments will be made successively.

4.2 Combination. (a) Except as provided in Section 4.2(c), in the event of a Combination, the Holders will have the right to receive upon exercise of each Warrant the number of shares of capital stock or other securities or an amount of property equal to the Adjusted Litigation Recovery divided by the Maximum Number of Warrants divided by the aggregate Adjusted Stock Price of the capital stock, other securities or property that 1.1232 shares of Common Stock were exchanged for or converted into as a result of such Combination.

(b) The proportion and type of capital stock, other securities or property that the Holders will have the right to receive in the circumstance set forth in Section 4.2(a) will be in the same proportion and type as one share of Common Stock was exchanged for or converted into as a result of such Combination. The provisions of this Section 4.2 will similarly apply to successive Combinations involving the surviving or acquiring Person (the "Successor Company") in any Combination.

(c) In the event of a Combination where consideration is payable to holders of Common Stock in exchange for their shares solely in cash, the Holders will have the right to receive upon exercise of each Warrant cash in an amount equal to the Adjusted Litigation Recovery divided by the Maximum Number of Warrants, less the Exercise Price (if any). In case of any Combination described in this Section 4.2(c), the surviving or acquiring Person will promptly after the occurrence of the Trigger deposit with the Warrant Agent the funds necessary to pay to the Holders of the Warrants the amounts to which they are entitled as described above. After such funds and the surrendered Warrant Certificates are received, the Warrant Agent is hereby instructed to make payment to the Holders by delivering a check in such amount as is appropriate to such Person or Persons as it may be directed in writing by the Holders surrendering such Warrants. No interest will accrue to the Holders or the surviving or acquiring Person on such funds.

(d) The Company hereby represents and warrants that any Successor Company will enter into, and the Company will provide, an agreement with the Warrant Agent confirming the Holders' rights pursuant to this Section 4.2 and providing for adjustments, which will be as nearly equivalent as may be practicable to the adjustments provided for in this Article IV.

4.3 Exercise Price Adjustment. In case of any reclassification, redesignation or reorganization described in Section 4.1 or any Combination described in Section 4.2, the Exercise Price of one Warrant after such reclassification, redesignation, reorganization or Combination will equal (i) if the Warrants are exercisable into stock only or stock and any cash or property other than cash which is received instead of any fractional share of stock, the per share par value (if any) of such stock multiplied by the number of shares of such stock into which one Warrant is exercisable and (ii) if the Warrants are exercisable for cash or property only, \$0.01. The Exercise Price may be adjusted, to the extent permitted by law, in such manner, if any, and at such time, as the Board may determine in good faith to be equitable in the circumstances. The Warrant Agent shall not be deemed to have knowledge of any such adjustment of the Exercise Price unless and until it has received written notice thereof.

4.4 Other Events. If any event occurs as to which the foregoing provisions of this Article IV are not strictly applicable or, if strictly applicable, would not, in the good faith judgment of the Board, fairly and adequately protect the purchase rights of the Holders of the Warrants in accordance with the essential intent and principles of such provisions, then the Board may make, without the consent of the Holders, such adjustments to the terms of this Article IV, in accordance with such essential intent and principles, as will be reasonably necessary, in the good faith opinion of such Board, to protect such purchase rights as aforesaid.

4.5 Notice of Certain Transactions. In the event that the Company will publicly announce a plan (a) to effect any reclassification, redesignation or reorganization of its shares of Common Stock, (b) to effect any capital reorganization, consolidation or merger or (c) to effect the voluntary or involuntary dissolution, liquidation or winding-up of the Company, the Company will within 5 calendar days after such public announcement send to the Warrant Agent and the Warrant Agent will within 5 Business Days after receipt of such notice thereof and the form of notice of action, send the Holders a notice (in such form as will be furnished to the Warrant Agent by the Company) of such proposed action, such notice to be mailed by the

Warrant Agent to the Holders at their addresses as they appear in the Certificate Register, which notice will specify the expected date that such issuance or event is to take place and the expected date of participation therein by the holders of Common Stock and will briefly indicate the effect of such action on the Common Stock and on the number and kind of any other shares of stock and on other securities or property, if any, and the number of shares of Common Stock and other securities or property, if any, purchasable upon exercise of each Warrant and the Exercise Price after giving effect to any adjustment which will be required as a result of such action.

4.6 Adjustment to Warrant Certificate. The form of Warrant Certificate need not be changed because of any adjustment made pursuant to this Article IV, and Warrant Certificates issued after such adjustment may have the same terms and conditions as are stated in any Warrant Certificates issued prior to the adjustment. The Company, however, may at any time in its sole discretion make any change in the form of Warrant Certificate that it may deem appropriate to give effect to such adjustments, which do not affect the rights, duties or responsibilities of the Warrant Agent and that does not affect the substance of the Warrant Certificate, and any Warrant Certificate thereafter issued or countersigned, whether in exchange or substitution for an outstanding Warrant Certificate or otherwise, may be in the form as so changed.

ARTICLE V

Warrant Agent

5.1 Nature of Duties and Responsibilities Assumed.

(a) Appointment. The Company hereby appoints the Warrant Agent to act as agent of the Company as expressly set forth in this Agreement. The Warrant Agent hereby accepts the appointment as agent of the Company and agrees to perform that agency upon the express terms and conditions herein set forth (and no implied duties or obligations), by all of which the Company and the Warrant Holders, by their acceptance thereof, will be bound.

(b) Authorization. Whenever in the performance of its duties under this Agreement, the Warrant Agent will deem it necessary or desirable that any fact or matter be proved or established by the Company prior to taking, suffering or omitting any action hereunder, such fact or matter (unless other evidence in respect thereof be herein specifically prescribed) may be deemed to be conclusively proved and established by a certificate signed by an Officer and delivered to the Warrant Agent; and such certificate will be full authorization to the Warrant Agent and the Warrant Agent shall incur no liability for or in respect of any action taken, suffered or omitted in good faith by it under the provisions of this Agreement in reliance upon such certificate.

(c) Liability of Warrant Agent. The Warrant Agent will be liable hereunder only for its own gross negligence, bad faith or willful misconduct, as each is finally determined by a court of competent jurisdiction. The Warrant Agent will not be liable for or by reason of any of the statements of fact or recitals contained in this Agreement or in the Warrant Certificates or be required to verify the same, but all such statements and recitals are and will be deemed to have been made by the Company only. The Warrant Agent will not have any liability

or responsibility in respect of the legality, validity or enforceability of this Agreement or the execution and delivery hereof (except the due execution hereof by the Warrant Agent) or in respect of the validity or execution of any Warrant Certificate (except its countersignature thereof); nor will it be responsible or liable for any breach by the Company of any covenant or condition contained in this Agreement or in any Warrant Certificate; nor will it be responsible or liable for the making of any change in the number of shares of Common Stock required under the provisions of Article IV or responsible for the manner, method or amount of any such change or the ascertaining of the existence of any facts that would require any such adjustment or change; nor will it by any act hereunder be deemed to make any representation or warranty as to the authorization or reservation of any shares of Common Stock to be issued pursuant to this Agreement or any Warrant Certificate or as to whether any shares of Common Stock will, when issued, be validly issued, fully paid and nonassessable. The Warrant Agent will not be responsible or liable for any failure of the Company to comply with any of the covenants contained in this Agreement or in the Warrant Certificates to be complied with by the Company. The Warrant Agent will not incur any liability or responsibility to the Company or to any Warrant Holder for any action taken, suffered or omitted, in reliance on any notice, resolution, waiver, consent, order, instruction, certificate, or other paper, document or instrument reasonably believed by the Warrant Agent to be genuine and to have been signed, sent or presented by the proper party or parties. Anything to the contrary notwithstanding, in no event shall the Warrant Agent be liable for special, punitive, indirect, consequential or incidental loss or damage of any kind whatsoever (including but not limited to lost profits), even if the Warrant Agent has been advised of the likelihood of such loss or damage. Any liability of the Warrant Agent under this Agreement will be limited to the amount of fees paid by the Company to the Warrant Agent. The provisions provided in this Section shall survive to termination of this Agreement and the resignation or removal of the Warrant Agent hereunder.

(d) Litigation. The Warrant Agent will be under no obligation to institute any action, suit or legal proceeding or take any other action likely to involve expense unless the Company or one or more Holders of Warrants will furnish the Warrant Agent with security and indemnity satisfactory to the Warrant Agent for any costs and expenses which may be incurred. All rights of action under this Agreement or under any of the Warrants may be enforced by the Warrant Agent without the possession of any of the Warrants or the production thereof at any trial or other proceeding relative thereto, and any such action, suit or proceeding instituted by the Warrant Agent will be brought in its name as Warrant Agent and any recovery of judgment, except for judgments relating to claims of indemnification and compensation due the Warrant Agent hereunder, will be for the ratable benefit of the Holders of the Warrants, as their respective rights or interests may appear. The Warrant Agent will promptly notify the Company in writing of any claim made or action, suit or proceeding instituted against it arising out of or in connection with this Agreement.

(e) Instructions from the Company. The Warrant Agent is hereby authorized and directed to accept written instructions, orders or other communications, with respect to the performance of its duties hereunder from an Officer, and to apply to any such Officer for advice or instructions in connection with the Warrant Agent's duties, and it will not be liable for or in respect of any action taken, suffered or omitted by it in good faith in accordance with the instructions of any such Officer.

(f) Agents. The Warrant Agent may execute and exercise any of the rights and powers hereby vested in it or perform any of its duty or obligation hereunder either itself or by or through its attorneys or agents and the Warrant Agent shall not be answerable or accountable for any act, default, neglect or misconduct of any such attorneys or agent or for any loss to the Company, any Holder, or any other Person, resulting from such act, default, neglect or misconduct, absent gross negligence or willful misconduct, as each is finally determined by a court of competent jurisdiction, in the selection and in the continued employment of any such attorney or agent.

(g) Other Acts. The Company will perform, execute, acknowledge and deliver or cause to be performed, executed, acknowledged and delivered all such further acts, instruments and assurances as may reasonably be required by the Warrant Agent in order to enable it to carry out or perform its duties under this Agreement.

(h) Agreement as Source of Duties. The Warrant Agent will act hereunder solely as agent of the Company in a ministerial capacity, and its duties will be determined solely by the expressed provisions hereof.

5.2 Right to Consult Counsel. The Warrant Agent may at any time consult with legal counsel satisfactory to it (who may be legal counsel for the Company) and the advice or opinion of such counsel will be full and complete authorization and protection to the Warrant Agent as to any action taken, suffered or omitted by it in good faith in accordance with such advice or opinion.

5.3 Compensation and Reimbursement. The Company agrees to pay to the Warrant Agent from time to time compensation for all services rendered by it hereunder as set forth in the attached Exhibit D, and to reimburse the Warrant Agent for reasonable expenses and disbursements incurred in connection with the preparation, delivery, execution, amendment and administration of this Agreement (including the reasonable compensation and expenses of its counsel). The provisions of this Section 5.3 shall survive the termination of this Agreement and the resignation or removal of the Warrant Agent. The costs and expenses incurred in enforcing this right of compensation shall be paid by the Company.

5.4 Indemnification. The Company agrees to indemnify the Warrant Agent for, and to hold it harmless against, any loss, liability, damage, judgment, fine, penalty, claim, demand, settlement, cost or expenses incurred without gross negligence, bad faith or willful misconduct on its part (as each is finally determined by a court of competent jurisdiction) for any action taken, suffered or omitted by the Warrant Agent in connection with the acceptance and administration of this Agreement or the exercise or performance of its duties hereunder, including, without limitation, the costs and expenses of defending itself against any claim or liability in connection with the exercise or performance of any of its powers or duties hereunder. The indemnity provided herein shall survive the termination of this Agreement and the resignation or removal of the Warrant Agent. The costs and expenses incurred in enforcing this right of indemnification shall be paid by the Company.

5.5 Warrant Agent May Hold Company Securities. The Warrant Agent and any stockholder, director, officer affiliate or employee of the Warrant Agent may buy, sell or deal in

any of the Warrants or other securities of the Company or its affiliates or have a pecuniary interest in any transaction in which the Company or its affiliates may be interested, or contract with or lend money to the Company or its affiliates or otherwise act as fully and freely as though it were not the Warrant Agent under this Agreement. Nothing herein will preclude the Company and its affiliates from engaging the Warrant Agent in any other capacity.

5.6 Change of Warrant Agent. The Warrant Agent may resign and be discharged from its duties under this Agreement upon 30 calendar days' prior notice in writing mailed, by registered or certified mail, to the Company. The Company may remove the Warrant Agent or any successor warrant agent upon 60 calendar days' prior notice in writing, mailed to the Warrant Agent or successor warrant agent, as the case may be, by registered or certified mail. Notwithstanding the foregoing, if the Warrant Agent becomes incapable of acting or is adjudged a bankrupt or insolvent or a receiver of the Warrant Agent or its property is appointed or any public officer takes control of the Warrant Agent or its property or affairs for the purpose of rehabilitation, conservation or liquidation, then the Company may remove the Warrant Agent immediately. If the Warrant Agent resigns or is removed or otherwise becomes incapable of acting, the Company will appoint a successor to the Warrant Agent (the "Successor Warrant Agent") and will, within 30 calendar days following such appointment, give notice thereof in writing to each registered Holder of the Warrant Certificates. If the Company fails to make such appointment within a period of 30 calendar days after giving notice of such removal or after it has been notified in writing of such resignation or incapacity by the resigning or incapacitated Warrant Agent, then the Company agrees to perform the duties of the Warrant Agent hereunder until a Successor Warrant Agent is appointed. After appointment, the Successor Warrant Agent will be vested with the same powers, rights, duties and responsibilities as if it had been originally named as Warrant Agent without further act or deed; but the former Warrant Agent will deliver and transfer to the Successor Warrant Agent any property at the time held by it hereunder, and execute and deliver any further assurance, conveyance, act or deed necessary for this purpose. Failure to give any notice provided for in this Section, however, or any defect therein will not affect the legality or validity of the resignation or removal of the Warrant Agent or the appointment of the Successor Warrant Agent, as the case may be.

5.7 Merger or Consolidation or Change of Name of Warrant Agent. Any Person into which the Warrant Agent or any Successor Warrant Agent may be merged or with which it may be consolidated, or any Person resulting from any merger or consolidation to which the Warrant Agent or any Successor Warrant Agent shall be a party, or any Person succeeding to the business of the Warrant Agent or any Successor Warrant Agent, shall be the successor to the Warrant Agent under this Agreement without the execution or filing of any paper or any further act on the part of any of the parties hereto. In case at the time such Successor Warrant Agent shall succeed to the agency created by this Agreement, any of the Warrant Certificates shall have been countersigned but not delivered, any such Successor Warrant Agent may adopt the countersignature of the predecessor Warrant Agent and deliver such Warrant Certificates so countersigned; and in case at that time any of the Warrant Certificates shall not have been countersigned, any Successor Warrant Agent may countersign such Warrant Certificates either in the name of the predecessor Warrant Agent or in the name of the Successor Warrant Agent; and in all such cases such Warrant Certificates shall have the full force provided in the Warrant Certificates and in this Agreement.

ARTICLE VI

Rights of Holders

6.1 Holder not Stockholders. No Holder, as such, will be entitled to vote or to receive dividends or otherwise will be deemed to be the holder of shares of Common Stock for any purpose, nor will anything contained herein or in any Warrant Certificate be construed to confer upon any Holder, as such, any of the rights of a stockholder of the Company or any right to vote upon or give or withhold consent to any action of the Company (whether upon any reorganization, issuance of securities, reclassification or conversion of Common Stock, consolidation, merger, sale, lease, conveyance or otherwise), receive notice of meetings or other action affecting stockholders (except for notices expressly provided for in this Agreement) or receive dividends or subscription rights, unless and until such Warrant Certificate will have been surrendered for exercise as provided in this Agreement, payment in respect of such exercise will have been received by the Warrant Agent, and shares of Common Stock will have become issuable thereunder and such person will have been deemed to have become a holder of record of such shares. No Holder will, upon the exercise of Warrants, be entitled to any dividends if the record date with respect to payment of such dividends will be a date prior to the date such shares of Common Stock became issuable upon the exercise of such Warrants.

6.2 Claims by Holders. All rights of action in respect of the Warrants will be vested in the respective Holders; *provided, however*, that no Holder will have the right to enforce, institute or maintain any suit, action or proceeding against the Company to enforce, or otherwise act in respect of, the Warrants, unless (a) such Holder has previously given written notice to the Company of the substance of such dispute, and the Holders of at least 25% of the issued and outstanding Warrants have given written notice to the Company of their support for the institution of such proceeding to resolve such dispute, (b) such Holder has previously given written notice to the Warrant Agent of the substance of such dispute and of the support for the institution of such proceeding and (c) the Warrant Agent has not instituted appropriate proceedings with respect to such dispute within 30 days following the date of such written notice to the Warrant Agent, it being understood and intended that the Warrant Agent has no obligation to institute proceedings and that no one or more Holders will have the right in any manner whatsoever to affect, disturb or prejudice the rights of any other Holders, or to obtain or to seek to obtain priority or preference over any other Holders or to enforce any rights of the Holders, except in the manner described in this Section 6.2 for the equal and ratable benefit of all Holders. Except as described above, no Holder will have the right to enforce, institute or maintain any suit, action or proceeding to enforce, or otherwise act in respect of, the Warrants.

6.3 Control of Litigation. The Bank will retain sole and exclusive control of the Litigation and will retain 100% of any recovery from the Litigation. The Holders will not have any right to control or manage the course or disposition of the Litigation or the proceeds of any recovery therefrom or any rights against the Company for any decision regarding the conduct of the Litigation or disposition of the Litigation for an amount less than the amount claimed in damages in the Litigation, regardless of the effect on the value of the Warrants.

6.4 Determination of Values. The determination of the Board of the Adjusted Litigation Recovery, the number of shares of Common Stock issuable upon exercise of a Warrant and the Exercise Price will be final, conclusive and binding upon the Holders.

ARTICLE VII

Miscellaneous

7.1 Information. So long as any Warrant remains outstanding, the Company will deliver to the Warrant Agent and the Holders its annual report to stockholders and any other documents that the Company, in its discretion, deems appropriate.

7.2 Amendment. This Agreement may be amended by the parties hereto without the consent of any Holder for the purpose of curing any ambiguity, or of curing, correcting or supplementing any defective provision contained herein or making any other provisions with respect to matters or questions arising under this Agreement as the Company and the Warrant Agent may deem necessary or desirable; *provided, however*, that such action will not affect adversely the rights of the Holders. Any amendment or supplement to this Agreement that has an adverse effect on the interests of the Holders will require the written consent of the Holders of a majority of the then outstanding Warrants. The consent of each Holder affected will be required for any amendment pursuant to which the Exercise Price would be increased or the number of Warrant Shares purchasable upon exercise of Warrants would be decreased (other than pursuant to adjustments provided for herein). In determining whether the Holders of the required number of Warrants have concurred in any direction, waiver or consent, Warrants owned by the Company or by any Person directly or indirectly controlling or controlled by or under direct or indirect common control with the Company will be disregarded and deemed not to be outstanding, except that, for the purpose of determining whether the Warrant Agent will be protected in relying on any such direction, waiver or consent, only Warrants which the Warrant Agent knows are so owned will be so disregarded. Also, subject to the foregoing, only Warrants outstanding at the time will be considered in any such determination. Prior to executing any amendment or supplement to this Agreement, an Officer of the Company shall deliver to the Warrant Agent a certificate that states that the proposed supplement or amendment is in compliance with the terms of this Section 7.2.

7.3 Notices. Any notice, request, instruction or other document to be given hereunder by any party to the other will be in writing and will be deemed to have been duly given (a) on the date of delivery if delivered personally, or by telecopy or telefacsimile, upon confirmation of receipt, (b) on the first Business Day following the date of dispatch if delivered by a recognized next-day courier service, or (c) on the third Business Day following the date of mailing if delivered by registered or certified mail, return receipt requested, postage prepaid. All notices hereunder will be delivered as set forth below, or pursuant to such other instructions as may be designated in writing by the party to receive such notice.

(a) If to the Company:

Fay L. Chapman
Senior Executive Vice President
Washington Mutual, Inc.
1201 Third Avenue, WMT 1601
Seattle, WA 98101
Telecopy: (206) 461-5739

with a copy to:

David R. Wilson, Esq.
Heller Ehrman White & McAuliffe
701 Fifth Avenue
Seattle, WA 98104
Telecopy: (206) 447-0849

(b) If to Warrant Agent:

Mellon Investor Services LLC
520 Pike Street, Suite 1220
Seattle, WA 98101
Attn: U. Julie Roh

Any notice or communication mailed to a Holder will be mailed to the Holder at the Holder's address as it appears on the Certificate Register and will be sufficiently given if so mailed within the time prescribed. Failure to mail a notice or communication to a Holder or any defect in it will not affect its sufficiency with respect to other Holders. If a notice or communication is mailed in the manner provided above, it is duly given, whether or not the addressee receives it.

7.4 GOVERNING LAW. THIS AGREEMENT WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND TO BE PERFORMED ENTIRELY WITHIN SUCH STATE.

7.5 WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

7.6 Entire Agreement, Etc. (a) This Agreement constitutes the entire agreement, and supersedes all other prior agreements, understandings, representations and warranties, both written and oral, between the parties, with respect to the subject matter hereof, and (b) this Agreement will not be assignable by operation of law or otherwise, except as provided herein with respect to any Successor Company or Successor Warrant Agent (any such other attempted assignment in contravention hereof being null and void).

7.7 Counterparts and Facsimile. For the convenience of the parties hereto, this Agreement may be executed in any number of separate counterparts, each such counterpart being deemed to be an original instrument, and all such counterparts will together constitute the same agreement. Executed signature pages to this Agreement may be delivered by facsimile and such facsimiles will be deemed as sufficient as if actual signature pages had been delivered.

7.8 Captions. The Article, Section and paragraph captions herein are for convenience of reference only, do not constitute part of this Agreement and will not be deemed to limit or otherwise affect any of the provisions hereof.

7.9 Severability. If any provision of this Agreement or the application thereof to any person (including, without limitation, the officers and directors of the Warrant Agent and the Company) or circumstance is determined by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions hereof, or the application of such provision to persons or circumstances other than those as to which it has been held invalid or unenforceable, will remain in full force and effect and will in no way be affected, impaired or invalidated thereby, so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any party. Upon such determination, the parties will negotiate in good faith in an effort to agree upon a suitable and equitable substitute provision to effect the original intent of the parties.

7.10 No Third-Party Beneficiaries. Nothing contained in this Agreement, expressed or implied, is intended to confer upon any Person other than the parties hereto, any benefit, right or remedies.

7.11 Successors. All agreements of the Company in this Agreement and the Warrant Certificates will bind its successors. All agreements of the Warrant Agent in this Agreement will bind its successors.

[Remainder of Page intentionally left blank]

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the date first written above.

WASHINGTON MUTUAL, INC.

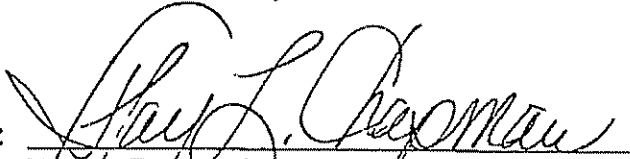
By: _____
Name: Fay L. Chapman
Title: Senior Executive Vice President

MELLON INVESTOR SERVICES LLC,
as Warrant Agent,

By: *U. Julie Roh*
Name: U. JULIE ROH
Title: ASSISTANT VICE PRESIDENT

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the date first written above.

WASHINGTON MUTUAL, INC.

By: 
Name: Fay L. Chapman
Title: Senior Executive Vice President

MELLON INVESTOR SERVICES LLC,
as Warrant Agent,

By: _____
Name:
Title:

[FORM OF FACE OF WARRANT CERTIFICATE]

[Unless and until it is exchanged in whole or in part for Warrants in definitive form, this Warrant may not be transferred except as a whole by the depository to a nominee of the depository or by a nominee of the depository to the depository or another nominee of the depository or by the depository or any such nominee to a successor depository or a nominee of such successor depository. The Depository Trust Company ("DTC") (55 Water Street, New York, New York) will act as the depository until a successor will be appointed by the Company and the Warrant Agent. Unless this certificate is presented by an authorized representative of DTC to the issuer or its agent for registration of transfer, exchange or Amount Recovered, and any certificate issued is registered in the name of Cede & Co. or such other name as requested by an authorized representative of DTC (and any Amount Recovered is made to Cede & Co. or such other entity as is requested by an authorized representative of DTC), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL INASMUCH AS THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.]*

WASHINGTON MUTUAL, INC.

LITIGATION TRACKING WARRANT

No. _____

Certificate for _____ Litigation Tracking Warrants to
Purchase Shares of Common Stock
of Washington Mutual, Inc.

THIS CERTIFIES THAT, _____, or registered assigns, is the registered holder of the number of Litigation Tracking Warrants set forth above (the "*Warrants*"). Each Warrant entitles the holder thereof (the "*Holder*"), at its option and subject to the provisions contained herein and in the Warrant Agreement referred to below, to purchase from Washington Mutual, Inc. (the "*Company*"), successor by merger to DIME BANCORP, INC., a Delaware corporation ("*Dime*"), the number of shares of Common Stock ("*Warrant Shares*"), no par value per share, of the Company (the "*Common Stock*") equal to the Adjusted Litigation Recovery divided by the product of (1) the Adjusted Stock Price, multiplied by (2) the Maximum Number of Warrants, multiplied by (3) the Dime Exchange Ratio (1.1232), at an exercise price per Warrant equal to the number of shares of Common Stock for which one Warrant is exercisable multiplied by the Exercise Price, if any. This Warrant Certificate will terminate and become void on the earliest of (i) the Close of Business on the last day of the Warrant Exercise Period, (ii) the Close of Business on the date the Litigation has been disposed of in a manner such that no shares of Common Stock or other securities or property will be issuable under the terms of the Warrants and (iii) the time and date such Warrant is exercised.

* To be included only if the Warrant is in global form.

This Warrant Certificate and each Warrant represented hereby are issued pursuant to and are subject in all respects to the terms and conditions contained in a 2003 Amended and Restated Warrant Agreement dated as of March 11, 2003 as such agreement may be amended from time to time (the "*Warrant Agreement*"), between the Company, as successor to Dime, and Mellon Investor Services LLC, as successor to EquiServe Trust Company, N.A. and EquiServe Limited Partnership, as warrant agent (in such capacity, the "*Warrant Agent*", which term includes any successor Warrant Agent under the Warrant Agreement), to all of which terms and provisions the Holder of this Warrant Certificate consents by acceptance hereof. The Warrant Agreement is hereby incorporated herein by reference and made a part hereof. Reference is hereby made to the Warrant Agreement for a full statement of the respective rights, limitations of rights, duties and obligations of the Company, the Warrant Agent and the Holders of the Warrants. Capitalized terms used but not defined herein will have the meanings ascribed thereto in the Warrant Agreement. A copy of the Warrant Agreement may be obtained for inspection by the Holder hereof upon written request to the Warrant Agent.

Subject to the terms of the Warrant Agreement, the Warrants may be exercised in whole or in part by surrender of this Warrant Certificate with the form of election to purchase Warrant Shares attached hereto duly executed and with the simultaneous payment of the Exercise Price in cash (subject to adjustment) to the Warrant Agent for the account of the Company at the office of the Warrant Agent. Payment of the Exercise Price will be made by certified or official bank check or personal check payable to the order of the Company or by wire transfer of funds to an account designated by the Company for such purpose. No fractional Warrant Shares will be issued upon the exercise of any Warrant, but the Company will pay cash in lieu of a fractional share as provided in the Warrant Agreement.

As provided in the Warrant Agreement and subject to the terms and conditions therein set forth, each Warrant will be exercisable at any time from and from time to time during the Warrant Exercise Period only and will not be exercisable after the expiration of the Warrant Exercise Period.

The Warrant Agreement provides that upon the occurrence of certain events the number of Warrant Shares may be, subject to certain conditions, adjusted.

The Company may require payment of a sum sufficient to pay all taxes and other governmental charges in connection with the transfer or exchange of the Warrant Certificates.

The holder in whose name the Warrant Certificate is registered may be deemed and treated by the Company and the Warrant Agent as the absolute owner of the Warrant Certificate for all purposes whatsoever and neither the Company nor the Warrant Agent will be affected by any notice to the contrary.

The Warrants represent a contingent right to purchase shares of Common Stock with an aggregate value based on a portion of any proceeds that may be received by the Bank from the Litigation. There can be no assurance as to when the Litigation will be resolved or the amount of proceeds, if any, the Bank or the Company will receive therefrom. The Holders will not have any right to control or manage the course or disposition of the Litigation or the proceeds of any recovery therefrom.

The Warrants do not entitle any holder hereof to any of the rights of a holder of any Common Stock or Preferred Stock of the Company.

This Warrant Certificate will not be valid or obligatory for any purpose until it will have been countersigned by the Warrant Agent.

WASHINGTON MUTUAL, INC.

By _____

[SEAL]

Attest: _____
Secretary

DATED:

Countersigned:
[]
as Warrant Agent,

by _____
Authorized Signatory

EXHIBIT B

FORM OF ELECTION TO PURCHASE WARRANT SHARES
(to be executed only upon exercise of Warrants)

WASHINGTON MUTUAL, INC.

The undersigned hereby irrevocably elects to exercise [] Warrants at an exercise price per Warrant of \$[] to acquire [] shares of Common Stock, no par value per share, of Washington Mutual, Inc. (the "*Company*"), on the terms and conditions specified in the within Warrant Certificate and the Warrant Agreement therein referred to, surrenders this Warrant Certificate and all right, title and interest therein to the Company, and directs that the shares of Common Stock deliverable upon the exercise of such Warrants be registered and delivered in the name and at the address specified below and delivered thereto.

Date: _____, _____

(Signature of Owner)*

(Street Address)

(City) (State) (Zip Code)

Signature Guaranteed by:

* The signature must correspond with the name as written upon the face of the within Warrant Certificate in every particular, without alteration or enlargement or any change whatever, and must be guaranteed by a national bank or trust company or by a member firm of any national securities exchange.

Securities and/or check to be issued to:

Name: _____

Social security or Federal tax identification number: _____

Street Address: _____

City, State and Zip Code: _____

Any unexercised Warrants evidenced by the within Warrant Certificate to be issued to:

Name: _____

Social security or Federal tax identification number: _____

Street Address: _____

City, State and Zip Code: _____

EXHIBIT C

The following exchanges of a part of this Global Warrant for definitive Warrants have been made:

**CERTIFICATE TO BE DELIVERED UPON EXCHANGE OR
REGISTRATION OF TRANSFER OF WARRANTS**

Re: Warrants to Purchase Common Stock (the "*Warrants*") of Washington Mutual, Inc. (the "*Company*")

This Certificate relates to _____ Warrants held in definitive form by _____ (the "*Transferor*").

The Transferor has requested the Warrant Agent by written order to exchange or register the transfer of a Warrant or Warrants. The Warrant Agent and the Company are entitled to rely upon this Certificate and are irrevocably authorized to produce this Certificate or a copy hereof to any interested party in any administrative or legal proceedings or official inquiry with respect to the matters covered hereby.

[INSERT NAME OF TRANSFEROR]

by _____

Date: _____

EXHIBIT D

Fee Schedule

A. Term.

The fees and other charges listed herein are subject to increase by Mellon Investor Services LLC ("Mellon"), at any time after January 6, 2004, and shall become effective upon receipt by Washington Mutual, Inc. (the "Client") of notice thereof.

B. Monthly Administrative Fee **\$3,000.00**

1. The Monthly Administrative Fee will be charged for all services listed on Schedule I attached hereto, and will be subject to the following allowances and the additional charges listed in Section B(2):

Number of active accounts maintained	21,000
Number of inactive accounts maintained	7,000
Number of option items processed	100
Number of restricted items processed	N/A
Number of legal items processed	N/A
Number of mailings per year (including one enclosure)	4
Number of reports or analyses	4
Number of lists or labels	4
Number of Inspectors of Election	N/A
Number of respondent bank omnibus proxies	N/A
Number of certificates issued and book-entry credits	1,000
Number of certificates cancelled and book-entry debits	2,000
Number of shareholder telephone calls per month handled by Interactive Voice Response System	750
Number of shareholder telephone calls per month transferred out of the IVR to a Customer Service Representative	360
Number of correspondence items per month responding to shareholder inquiries	120
Number of Investor ServiceDirect SM transactions per month	1,500

2. To the extent the allowances listed above in Section B(1) are exceeded or additional actions are required to be taken by Mellon, the following unit fees will apply:

For each active account maintained (per year)	\$5.00
For each inactive account maintained	\$2.00
For each option or restricted item processed	\$25.00
For each legal item processed	\$50.00
Lists, Labels and Analyses	See Section C(1)
Mailing Services	See Section C(2)
For each additional Inspector of Election	N/A
For each respondent bank omnibus proxy	N/A
For each DWAC delivery	\$25.00
For each certificate issued or cancelled	\$2.00
For each book-entry credit or debit posted	\$1.50
For each shareholder telephone call via CSR	\$5.25
For each shareholder telephone call via IVR	\$1.50
For each correspondence responding to a shareholder	\$15.00
For each Investor ServiceDirect transaction	\$1.50
For each stop maintained on a lost certificate (per month)	\$0.05
For each stop removed from a lost certificate	\$0.05
For each stop placed on or removed from a restricted security	\$50.00

3. For the purposes of this Fee Schedule, the following definitions apply:

- a. Investor ServiceDirect (“ISD”) transactions will include any shareholder transaction initiated through ISD including, but not limited to, the following:
- Purchasing or selling shares – N/A
 - Duplicate 1099 requests – N/A
 - Updating or changing consent to electronic delivery
 - Forms or document requests
 - Taxpayer certification
 - Certificate issuance
 - Update dividend reinvestment selection – N/A
 - Duplicate book entry statement – N/A
 - PIN change
- b. Active and Inactive accounts will be defined as follows:
- “Active accounts” are defined as accounts with a share balance greater than zero or outstanding cash balances or taxable income that has not yet been reported to the Internal Revenue Service.

- “Inactive accounts” are defined as accounts with a share balance equal to zero and no outstanding cash balances and no taxable income to be reported to the Internal Revenue Service.

C. Notwithstanding anything contained herein, the following fees will also be charged for each of the services listed below:

1. Lists, Labels and Analyses.

- | | | |
|---|--|--------|
| a. LISTS | | |
| Per name listed | | \$0.05 |
| b. LABELS | | |
| Per label printed | | \$0.05 |
| c. ANALYSES | | |
| Per name passed on data base | | \$0.02 |
| Per name listed in report | | \$0.05 |
| d. The minimum charge for each of the above services will be \$250. | | |

2. Mailing Services.

- | | | |
|--|--|--------|
| a. ADDRESSING | | |
| Addressing mailing medium (per name) | | \$0.05 |
| b. AFFIXING | | |
| Affixing labels (per label) | | \$0.04 |
| c. INSERTING | | |
| i. Inserting Enclosures (Machine) | | |
| 1st Enclosure (per piece) | | \$0.05 |
| 2nd Enclosure (per piece) | | \$0.04 |
| Each Enclosure thereafter (per piece) | | \$0.03 |
| ii. Inserting Enclosures (Manual) | | |
| Charge will be determined based on analysis of work to be performed. | | |

- d. The minimum charge for any of the above-listed mailing services will be \$500.

D. Fees Relating to Warrant Exchange Services:

1. One time Set-Up/Administration Fee, per file	\$5,000.00
2. Annual Fee, per year	\$500.00
3. Processing Accounts, each	\$20.00
4. Examining & Canceling Certificates (per Certificate)	\$0.10
5. Items Requiring Additional Handling, additional each occurrence, including, Legal Items, Correspondence, Partial, Defective Items, Window Items, Items not providing a Taxpayer Identification Number, Transfer Requests (per transfer), multiple checks (per check), Lost Items	\$25.00
6. Prepare and File Form 1099 (B or D), each With Tendering Stockholder and Appropriate Government Agencies	Included
7. Minimum Annual Fee for first year, Exclusive of Special Services	\$5,500.00
8. Media & Drafting Services Changes to standard LT's: drafting event-related materials.	\$175 per hour
9. Special Services	
* Additional Changes to Shareholder File including transfer journal updates	\$25.00/account
* Special Tax Reporting	\$3.00/account
* Shareholder File/Tape Reload	\$2,000.00
* Termination of contract	By Appraisal
* Additional Special Services	By Appraisal
10. Out of Pocket Expenses Including Postage, Printing, Stationary, Overtime, Transportation, Microfilming, etc.	Additional

E. Expenses and Other Charges.

1. Fees and Out of Pocket Expenses: The cost of stationery and supplies, including but not limited to transfer sheets, dividend checks, envelopes,

successor agent inquiries). This fee will be based on Mellon's then-current deconversion fee schedule. Mellon may withhold the Client's records, reports and unused certificate stock from a successor agent pending the Client's payment in full of all fees and expenses owed to Mellon under this Amended and Restated Warrant Agreement.

5. Legal, Technological Expenses: Certain expenses may be incurred in resolving legal matters that arise in the course of performing services hereunder. This may result in a separate charge to cover Mellon's expenses (including the cost of external or internal counsel) in resolving such matters; provided that any legal expenses charged to the Client shall be reasonable.

In the event any Federal regulation and/or state or local law are enacted which require Mellon to make any technological improvements and/or modifications to its current system, Client shall compensate Mellon, on a pro rata basis proportionate to the Client's registered shareholder base, for the costs associated with making such required technological improvements and/or modifications.

6. Record Storage: Monthly fee of \$2.50 per box, with a minimum charge of \$50.00.
7. Lost Shareholder Services: A fee of \$3.00 will be charged for each lost account searched per database searched. A fee of \$2.50 will be charged per account for each state mandated due diligence mailing.
8. Other Services: Fees for any services provided under this Amended and Restated Warrant Agreement by or on behalf of Mellon that are not set forth in this *Exhibit D* will be based on Mellon's standard fees at the time such services are provided or, if no standard fees have been established, an appraisal of the work to be performed.

Services to be Provided

A. Account Maintenance Functions

- Opening new accounts
- Posting debits and credits
- Maintaining certificate history
- Placing and releasing stop transfer notations
- Consolidating accounts
- Coding accounts requiring special handling (e.g. "bad address," "do not mail," "VIP," etc.)
- Processing address changes
- Responding to shareholder correspondence
- Providing a toll-free phone number for shareholder inquiries
- Obtaining and posting Taxpayer Identification Number certifications pursuant to IDTCA regulations
- Maintaining inactive accounts for the purpose of research and tax reporting
- Closing (purging) inactive accounts that meet selective criteria
- Providing Client and its shareholders with on-line access to shareholder records
- Training on all aspects of Mellon's stock transfer system

B. Security Issuance Functions

- Qualifying under the rules of the NYSE and NASDAQ/AMEX to act in the dual capacity as transfer agent and registrar
- Maintaining mail and window facilities for the receipt of transfer requests
- Maintaining and securing unissued certificate inventory and supporting documents
- Examining issuance or transfer requests to ensure that proper authority is being exercised
- Verifying (to the extent possible) that surrendered certificates are genuine and have not been altered
- Verifying that original issuances are properly authorized and have necessary regulatory approval
- In connection with requests for transfer, verifying that Shares issued equal the amount surrendered
- Place and remove stop orders on Share
- Verifying that no stop orders are held against Shares submitted for transfer
- Issuing and registering new securities

- Recording canceled and issued securities
 - Canceling surrendered certificates
 - Delivering completed transfers
 - Processing restricted and legal transfers upon presentment of appropriate supporting documentation
 - Preparing daily transfer or management summary journals
- Replacing lost, destroyed or stolen certificates provided that Mellon is in receipt of (a) evidence acceptable to it of the loss, theft or destruction, and (b) a surety bond acceptable to Mellon sufficient to indemnify and hold it and Client harmless (charge imposed on shareholder)