IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: WASHINGTON MUTUAL, INC., et al., Debtors.	Chapter 11 Case No. 08-12229 (MFW) Jointly Administered
BROADBILL INVESTMENT CORP., Broadbill, - against - WASHINGTON MUTUAL, INC., Defendant	Adv. Pro. No. 10-50911 (MFW)

MEMORANDUM OF LAW FILED BY NANTAHALA CAPITAL PARTNERS LP AND BLACKWELL PARTNERS LP IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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Nantahala Capital Partners, LP and Blackwell Partners LP (collectively, the Claimants"), as a party in interest[1], submit this Memorandum of Law in support of the Response ("Response") filed by Plaintiff Broadbill Investment Corp. ("Broadbill"), which opposes the Motion to Dismiss, dated May 17, 2010 ("Motion to Dismiss") filed by Washington Mutual Inc. ("WMI" or the "Debtor") in respect of Broadbill's Declaratory Judgment Complaint, dated April 12, 2010 ("Complaint"). Essentially, the Complaint seeks a judicial declaration that the holders of Litigation Tracking Warrants ("LTWs") relating to the Anchor Litigation[2] are creditors of, and not holders of equity interests in, the Debtor. The Claimants are LTW holders.

PRELIMINARY STATEMENT

The Claimants have reviewed the Response filed by Broadbill and fully adopt the principles stated therein. The Response contains a point-by-point refutation of the grounds set forth in the Motion to Dismiss, with appropriate citations to relevant facts and applicable law.

As a practical matter, the issues raised by the Complaint are the same issues that all LTW holders have with respect to the Debtor's improper classification and treatment of LTW holders under the Debtor's Proposed Plan of Reorganization, dated June 2, 2010 ("Proposed Plan"). The issues presented in the Complaint will need to be addressed by the Debtor as part of confirming the Proposed Plan. As will be demonstrated herein, the Complaint sets forth more than sufficient factual and legal issues to defeat a Motion to Dismiss. LTW holders (including without limitation the Claimants and Broadbill) should be permitted to complete discovery to fully develop their case that that they are creditors, and not equity interest holders, of the Debtor.

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[1] At the June 3, 2010 hearing before the Court in the Debtor's bankruptcy case, the parties to this declaratory judgment adversary proceeding consented to the Claimants' request to be heard on the issues raised in this adversary proceeding.

[2] Capitalized terms used herein and not otherwise defined shall have the meaning attributed to them in the Complaint.

In reality, it is extremely rare for a declaratory judgment action to be dismissed on the merits, at the pleadings stage, pursuant to a FRCP §12(b)(6) motion. This clearly is not the case to do so.

In the sections that follow, the Claimants will show that (a) the LTWs are different than warrants to purchase stock of the Debtor, (b) the Proposed Plan improperly strips the value of the LTWs from the LTW holders, (c) the Debtor breached its obligations under the Warrant Agreement thus creating a claim in favor of the LTW holders against the Debtor, and (d) the Proposed Disclosure Statement, dated June 2, 2010 ("Proposed Disclosure Statement") does not contain "adequate information" as it relates to the LTWs.

RELEVANT BACKGROUND

The Claimants have filed claims in the Debtor's bankruptcy case asserting, on similar grounds that Broadbill has alleged in the Complaint, that they are creditors of the Debtor.

A. The LTWs

On or about December 22, 2000, Dime Bancorp Inc. ("Dime") transferred the value of a contingent asset (the Anchor Litigation recovery) to its shareholders, through the issuance of the LTWs. Complaint, para. 1[3]. As originally issued by Dime, the LTWs entitled LTW holders to receive 85% of the net recovery from the Anchor Litigation, originally payable in the form of Dime common stock. Registration Statement, p.1. The LTWs were registered under a Registration Statement [4], and were traded on the NASDAQ exchange under the symbol

[3] In reviewing a motion to dismiss under Rule 12(b)(6), the court must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether under any reasonable reading of the complaint, the plaintiff may be entitled to relief. See, *Fowles v. UPMC Shadyside*, 578 F.3d. 203 (3rd Cir. 2009).

[4] The Complaint makes numerous references to the Registration Statement. See, e.g., paras. 14, 15, 16.

"DIMEZ". Proposed Disclosure Statement, p.48.[5] Over time, and as the LTWs traded, there was less overlap between the LTW holders and the Dime/WMI equity holders.

The purpose underlying the issuance of the LTWs was stated in the Registration Statement, at page 1, where it asks and answers the question, "Why are we distributing the LTWs? We are distributing the LTWs in an effort to pass along the potential value of our claim against the government to our existing shareholders..." Complaint, para. 15. In a press release issued by Dime on December 18, 2000, Dime announced that its Board of Directors "has declared a distribution of a substantial portion of Dime's economic interest in its pending "goodwill" lawsuit against the United States government through the issuance of Litigation Tracking Warrants". In a further release dated December 20, 2000, it was reported that once the LTWs were issued, Dime common stock would trade on the New York Stock Exchange without the value of the LTWs. A copy of these releases are annexed hereto as **Exhibit A.**

In a meeting held by a Joint Committee of the SEC and the AICPA on March 12, 1998, the participants discussed LTWs in the context of certain accounting issues. The minutes of the meeting describe that LTWs were issued because the issuer does "not believe the trading value of its shares in the market properly included the value of the contingent asset." The members of the Committee believed that LTWs, once issued, effectively separated the contingent asset from the remainder of the company--it had the same economic effect of a "spin-off" of the contingent asset. A copy of the relevant portion of the minutes of this 1998 meeting is annexed hereto as **Exhibit B.**

The structure of the LTWs makes it clear that the LTWs are not equity warrants. The LTWs do not provide for the purchase of a specific number of shares of stock at a set strike

[5] For purposes of the Response, the Court can take judicial notice of the terms of the Proposed Disclosure Statement.

price--two fundamental and requisite elements of an equity warrant. Complaint, para. 32. *See Reiss v. Financial Performance Corp.*, 764 NE 2d 958 (NY 2001). The LTWs are not intended to expose the LTW holders to equity or stock risk of the issuer. For example, if WMI's common stock had a low trading price, the LTWs would simply be entitled to more shares--all as determined by the recovery in the Anchor Litigation. Complaint, para. 33.

The Risk Factors in the Registration Statement do not mention that the issuer could file for bankruptcy and its common stock would be rendered worthless. Complaint, para. 37. The Registration Statement makes clear that the LTWs are not stock warrants, equity securities or equity interests. In particular, the Registration Statement at page 5 states: "An investment in the LTWs involves different risks and considerations from an investment in the common stock of a savings and loan company such as Dime Bancorp." Complaint, para. 16.

B. <u>WMI Purchases Dime</u>

In or around January 2002, WMI purchased Dime. Complaint, para. 14. The Dime equity purchased by WMI did not reflect the value of the Anchor Litigation, which had already been embedded in the separately traded LTW instrument. As part of the transaction, WMI was required to, and did assume the LTW obligations. Complaint, para. 14. In other words, when WMI acquired Dime's interest in the Anchor Litigation, it did so subject to the existing LTW structure in which the LTW holders had been transferred the economic right to receive 85% of the net recovery in the Anchor Litigation. WMI's assumption obligations to the LTW holders, is reflected, in part, in that certain 2003 Amended and Restated Warrant Agreement, dated as of March 11, 2003 ("Warrant Agreement") between WMI and Mellon Investor Services LLC, as the warrant agent ("Warrant Agent"). Complaint, para. 13.

C. Warrant Agreement

The Motion to Dismiss ignores and also misconstrues some of the critical provisions of Article IV of the Warrant Agreement,[6] which is captioned "Adjustments." Article IV deals with the circumstance as to what must occur if WMI undergoes a major corporate transaction before a Triggering Event (as defined in the Warrant Agreement) has occurred. It provides that the LTW holders will receive appropriate consideration and, adjustments (if necessary) will be made to ensure that the intent and principles underlying the LTWs are preserved for the benefit of the LTW holders.

(i) Section 4.1 deals with the circumstance of a Reorganization of WMI common stock before a Triggering Event occurs.

(ii) Section 4.2 deals with a Combination (which includes a sale of substantially all of the assets of WMI) before a Triggering Event occurs.

(iii) Section 4.3 deals with an adjustment in the Exercise Price if there is a Reorganization or a Combination for consideration other than all stock. In such event, the WMI Board is required to adjust the Exercise Price of the LTWs "to be equitable in the circumstances," and LTW holders will receive on account of their LTW distribution something other than all stock. Stated differently, Section 4.3 specifically recognizes that the LTWs can be paid in cash and other property, and not just stock of the issuer.

(iv) Section 4.4 deals with the situation when there is a Reorganization or Combination which is not precisely covered by Sections 4.1-4.3, or if covered, would not "fairly and adequately protect" the LTW holders in accordance with the "essential intent and principles" of such provisions. In such circumstance, WMI and its Board of Directors are required to make such "adjustments" as "may be reasonably necessary" in accordance with the "essential intent

[6] The Complaint makes numerous references to the Warrant Agreement. See, e.g., paras. 20, 27.

and principles" of the LTWs. Complaint, para. 27. Essentially, this section recognizes that the Warrant Agreement could not anticipate every type of major corporate transaction that might occur before a Triggering Event, and the document needed to maintain flexibility in order to adjust to circumstances so as to protect the interests of LTW holders.

(v) Section 4.5 is a notice provision (which the Debtor has breached) but it does provide that, in the circumstance of a WMI liquidation, an "adjustment", as required, will be made to the LTWs.

The Claimants have asserted that a Combination has or will occur. The Debtor's primary asset was WAMU Bank. Proposed Disclosure Statement, p. 1. The transfer of assets of WAMU Bank--either in September 2008 when JPMC purchased the assets of WAMU Bank, or through the Global Settlement Agreement--constitutes a Combination under the Warrant Agreement. In the claims filed by the Debtor against the FDIC Receiver for WAMU Bank, and in the subsequent litigation filed by the Debtor against the FDIC, the Debtor argued that the FDIC's actions relating to WAMU Bank constituted a taking of the Debtor's property without just compensation in violation of the Fifth Amendment of the U.S. Constitution and a conversion of the Debtor's property in violation of the Federal Tort Claims Act. Proposed Disclosure Statement, p.3. These allegations are very similar to the ones made by the Claimants -- that being, the JPMC acquisition was a transfer of substantially all of WMI's assets and thus, a Combination within the meaning of the Warrant Agreement.

Pursuant to Section 4.2(d) of the Warrant Agreement, in the case of a Combination, WMI is required to ensure that the Successor Company enters into a new warrant agreement for the benefit of LTW holders and that "adjustments," if required, be made to protect the LTW holders rights. Specifically:

> The Company (WMI) 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' (LTW holders) rights pursuant to 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.

The Claimants have asserted that the Debtor failed to satisfy this requirement of protecting the contractual rights of the LTW holders, since JPMC never entered into a new warrant agreement. Indeed, the Global Settlement Agreement which the Debtor has executed, expressly seeks judicial relief to terminate JPMC's obligation as the Successor Company. Proposed Disclosure Statement, p. 48. As such, the Claimants have contended that the Debtor has breached the Warrant Agreement, and the Claimants have a claim against the Debtor arising therefrom.

Even if there was no Combination within the strict wording of Section 4.2 of the Warrant Agreement, pursuant to Section 4.4 of the Warrant Agreement, if WMI undergoes a major corporate transaction before a Triggering Event, the Debtor and its Board are required to make an adjustment to the LTWs, in accordance with the “intents and principles” of the LTWs, as may be reasonably necessary to protect the rights of the LTW holders. Complaint, para. 27. The "intents and principles" of the Warrant Agreement are for the LTW holders to receive the bargained for value (85%) of the net recovery in the Anchor Litigation. While it was intended that this value could be given in stock of WMI, Section 4.4 of the Warrant Agreement contemplates circumstances when that might not be appropriate or practicable. In other words, there is no requirement that the only way to compensate the LTW holders is in stock. And, any

attempt by the Debtor to evade the intent of the Warrant Agreement is a breach thereof, and results in the Claimants having a claim against the Debtor.[7]

Finally, under Section 6.3 of the Warrant Agreement, WAMU Bank is required to retain sole and exclusive control over the Anchor Litigation. The Global Settlement Agreement seeks to transfer control over the Anchor Litigation, retroactive to a date almost two years ago, to JPMC. Unless JPMC acknowledges its obligations as a Successor Company, the transfer to JPMC constitutes a breach of the Warrant Agreement and results in the Claimants having a claim against the Debtor.

D. Proposed Plan and Proposed Disclosure Statement

In the past three months, the Debtor has proffered three versions of a plan of reorganization and a proposed Disclosure Statement. In each version of its Proposed Plan, the Debtor separately classifies the LTW holders and provides for no distribution on account of the LTW holders claims. The Debtor's Proposed Plan is based on a Global Settlement with JPMC. Under the Global Settlement, the Debtor is selling the Anchor Litigation to JPMC, free and clear of liens and claims and specifically the rights of the LTW holders. Proposed Disclosure Statement, p. 48. The Proposed Plan also provides for a discharge for the Debtor, and a third party release in favor of, among others, the Debtor's directors and JPMC.

Under Section 4.5 of the Warrant Agreement, the Debtor had notice obligations to inform the Warrant Agent if it was going to take certain actions relating to the LTWs. The Warrant Agent, once informed, had notice obligations to the holders of the LTWs. The Warrant Agent is the agent for the Debtor--not the LTW holders. Warrant Agreement, para. 5.1.

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[7] Moreover, assuming a Triggering Event has already occurred, the Debtor arguably could issue stock and, as of this date, the Debtor's stock is trading, and has a value. Thus, it is clear that under all circumstances, the LTWs have a value. The Proposed Plan's attempt to strip that value from the LTW holders results in a breach of the Warrant Agreement. That breach results in a claim by the LTW holders against the Debtor.

The Proposed Disclosure Statement states that the Debtor had two Good Will Litigations--the Anchor Litigation and the American Savings Bank, F.A. litigation. Proposed Disclosure Statement, pp. 46-48. Under the Global Settlement, the Debtor retains the rights in the American Savings Litigation and sells the Anchor Litigation, retroactive to September 2008, to JPMC, pursuant to Section 363 of the Bankruptcy Code. Proposed Disclosure Statement, pp. 47-48. No explanation is provided in the Proposed Disclosure Statement as to why one Good Will litigation is retained by the Debtor and the other Good Will litigation is transferred to JPMC.

The Claimants believe this construct in the Global Settlement was used because the Anchor Litigation was encumbered by the LTWs, and JPMC had an obligation to assume the LTWs pursuant to Section 4.2(d) of the Warrant Agreement. Therefore, instead of retaining both Good Will litigations, the Debtor purports to use Section 363 of the Bankruptcy Code to transfer the Anchor Litigation to JPMC free and clear of LTW claims. The Debtor refuses to state in the Disclosure Statement what provision it is using under Section 363 of the Bankruptcy Code to effectuate the transfer of the Anchor Litigation "free and clear" of LTW claims. If the Debtor is seeking to use Section 363(f) of the Bankruptcy Code, the Debtor should explain why the LTW holders' claims do not attach to the proceeds of sale. The Debtor does not explain why the sale of the Anchor Litigation needs to be free and clear of LTW claims if the LTW holders have no claims. The Debtor does not explain why the transfer of the Anchor Litigation has to be retroactive to the year 2008.

Interestingly, the Debtor does not explain why it believes it owns the Anchor Litigation and can sell it pursuant to Section 363 of the Bankruptcy Code. The Debtor states in the Motion to Dismiss that the Warrant Agreement is unambiguous and Section 6.3 thereof is clear. Motion

to Dismiss, p.15. Perhaps, in the latest version of the Proposed Disclosure Statement, the Debtor can reconcile the language of Section 6.3 of the Warrant Agreement that says WAMU Bank, not WMI, will control the Anchor Litigation and the recovery of the Anchor Litigation, with (a) the position WMI took in its litigation with JPMC wherein it claimed to own the Anchor Litigation, and (b) the Global Settlement which says that WMI owns the Anchor Litigation and is selling it to JPMC pursuant to Section 363 of the Bankruptcy Code free and clear of liens. It may be coincidental, or not, that JPMC's lawyers in the Debtor's bankruptcy case, who presumably required that JPMC obtain the Anchor Litigation free and clear of the LTWs, are the ones who represented Dime and drafted the LTWs. It is not coincidental that the Debtor and the Creditors Committee crafted a flawed Global Settlement that takes a specific asset (the Anchor Litigation) which was promised to the LTW holders, and sells it to JPMC, who then pays the value thereof back to the Debtor's estate, so that other unsecured creditors can receive what belonged to the LTW holders.

E. The Broadbill Complaint

The Broadbill Complaint is best understood in the context of the Debtor's Proposed Plan which essentially seeks to improperly deprive the LTW holders of the economic value of the Anchor Litigation, which was given to LTW holders, through the LTWs, approximately 10 years ago. The Warrant Agent essentially has refused to do anything to protect the LTW holders. Broadbill apparently decided that the best way to raise the legitimate concerns of the LTW holders was to file the Complaint. As a result of the commencement of this adversary proceeding, the Debtor was required to timely respond to the allegations of the LTW holders. The Debtor is also required to respond to timely discovery demands, which have been served by Broadbill. The Debtor’s response to Broadbill’s document discovery is due before the end of the month.

Broadbill's strategy was a good one. It finally got the attention of the Debtor. Indeed, in the third version of the Proposed Disclosure Statement, the Debtor conceded that if Broadbill was right and that the LTW holders had a claim, Broadbill would be treated as a holder of a general unsecured claim. Proposed Disclosure Statement, p. 48. When the Claimants asked the Debtor why only Broadbill was getting this protection and not all LTW holders, the Debtor first responded that Broadbill had filed the Complaint and no one else had. Then, the Debtor recanted and said that all LTW holders would get the treatment provided to Broadbill. Then it appears that the Debtor may have recanted again, to suggest that only a limited number of the LTW holders would get the Broadbill treatment. Presumably as part of the continued disclosure statement hearing, this issue will be finally clarified.

F. The Claimants Remaining Objections to the Proposed Disclosure Statement

The Claimants have confirmation objections to the Proposed Plan which relate, among other things, to third party releases and the "cram down" provision. With respect to the Proposed Disclosure Statement, the Claimants believe that the Debtor still needs to clarify that, if the LTW holders are deemed to be creditors, all LTW holders will be treated, at a minimum, the same as general unsecured creditors. The Debtor also needs to provide in the Proposed Plan that, until the issue relating to the LTW claims is determined, there will be a sufficient reserve maintained by the Liquidating Trustee in accordance with Article XXVII of the Proposed Plan to cover the potential LTW distribution. Further, the LTW holders should have the right, if it is determined they are creditors, to have the same election choice with respect to their distribution, that general unsecured creditors, who check the box on their ballot, have. As of this date, LTW holders are not scheduled to get a ballot to vote on the Proposed Plan and therefore cannot make any election regarding their distribution. The LTW holders are deemed to have rejected the Proposed Plan.

In addition to the foregoing, the Debtor needs to enhance the Disclosure Statement regarding the Global Settlement to provide (a) what provision of Section 363 of the Bankruptcy Code allows the Debtor to sell the Anchor Litigation "free and clear" of liens and claims?; (b) in the contemplated Section 363 "free and clear" sale, will the liens and claims attach to the proceeds of sale? (c) how is it that the Debtor owns the Anchor Litigation and can sell this asset to JPMC?; (d) why does the Global Settlement need to be backdated?; and (e) why does the Proposed Disclosure Statement state that JPMC is assuming liabilities relating to the assets it is buying, when it is buying the Anchor Litigation and not assuming the LTW obligation? Proposed Disclosure Statement, p. 12.

The Disclosure Statement also needs to be clarified that, it is not only Broadbill that objects to the treatment of the LTW holders, but there are many other LTW holders (such as the Claimants) who object to what they believe is the improper attempt by the Debtor to strip the value of the LTWs from the LTW holders.

Finally, if the Debtor intends to reject its executory obligations under the Warrant Agreement, as would seem to be the case, it should so state now, and not wait until the Plan Supplement is filed, so that LTW holders can file a further claim in the Debtor's bankruptcy case.

MOTION TO DISMISS

The Debtor makes four arguments in the Motion to Dismiss, none of which have any merit. The Claimants will address them in the order they are presented in the Motion to Dismiss.

A. Broadbill Clearly Has Standing to Bring the Complaint

It is ludicrous for the Debtor to suggest that Broadbill or any other LTW holder should defer to the Warrant Agent when the Debtor seeks to improperly strip the LTWs of their value under the Proposed Plan. First, the Warrant Agent is the agent for the Debtor, not the LTW

holders. Second, the Debtor has breached its obligations to inform the Warrant Agent as to its improper intentions relating to the LTWs. Thus, the Warrant Agent has done nothing to notify the LTW holders as to the potential loss of value they face under the Proposed Plan. Third, the Warrant Agent has done nothing to protect the LTW holders during the pendency of the Debtor's bankruptcy case, and has done nothing in connection with this pending adversary proceeding. Fourth, the Debtor cannot rely on procedural provisions in the Warrant Agreement when it essentially has stated, in the Proposed Plan, that it will breach all of the material provisions of the Warrant Agreement that protect the LTW holders.

The Debtor has continuously pressed the Court to swiftly move to approve its Proposed Plan and Global Settlement. The Complaint is intended to force the Debtor to respond in a timely manner to its improper actions relating to the LTWs. The so called "standing" objection in the Motion to Dismiss is a transparent attempt at improper delay by the Debtor. It should be viewed as such and summarily dismissed.

B. Broadbill's Claim For Breach Is Timely and Ripe

It is incomprehensible how the Debtor can maintain the Complaint is not ripe for adjudication. The Debtor has proffered the Proposed Plan which seeks to strip the value of the LTWs from the LTW holders. As part of confirming the Proposed Plan, the Debtor will need to demonstrate that its proposed treatment of the LTW holders under the Proposed Plan is fair and equitable. The Complaint was filed in response to what was fairly perceived by Broadbill as the improper treatment of the LTWs under the Proposed Plan and the Global Settlement. The issues that underlie the Complaint need to be determined now.

C. The Major Economic Interest in the Anchor Litigation was Given to the LTW Holders Approximately 10 Years Ago Pursuant to the LTWs

The Complaint and the claims filed by the LTW holders all demonstrate that (a) the purpose of the LTWs was to transfer the major economic value of the Anchor Litigation to the LTW holders, (b) the press releases issued by the Dime at the time so provides; (c) the Registration Statement issued in connection with the LTWs so provides, and (d) comments made by an SEC committee state that the purpose of LTWs in general is to isolate the value of a contingent asset from the equity value of the company at issue.

The Debtor's basis for saying that the LTW holders have no interest in the Anchor Litigation is Section 6.3 of the Warrant Agreement. That provision, according to the Debtor, is unambiguous on its face—it allegedly provides that the Anchor Litigation belongs to the Bank. Motion to Dismiss, p. 15. Yet, for almost two years, the Debtor has argued with JPMC and the FDIC as receiver for WAMU Bank a contrary position. Specifically, notwithstanding Section 6.3 of the Warrant Agreement, the Debtor has contended that the Anchor Litigation belongs to it and not WAMU Bank. In effect, for almost 2 years, the Debtor has argued that Section 6.3 of the Warrant Agreement is not determinative as to who owns the Anchor Litigation, and that the issue is more complex than it appears on its face. The Debtor is judicially estopped from now changing its position.

Indeed, under the Global Settlement it is agreed by the parties thereto that the Anchor Litigation belongs to the Debtor, not WAMU Bank, and that the Anchor Litigation needs to be transferred to JPMC pursuant to Section 363 of the Bankruptcy Code. This contention by the Debtor relating to the Global Settlement is also contrary to the Section 6.3 argument raised in the Motion to Dismiss.

In the context of a Motion to Dismiss, the factual allegations of Broadbill and the LTW holders need to be accepted at face value. The provisions of Section 6.3 of the Warrant Agreement need to be read in the context of the full Warrant Agreement, the ancillary documents issued in connection with the LTWs, and the stated purpose of the LTWs. Broadbill has an outstanding discovery request against the Debtor to more fully develop these issues. In light of these circumstances, the Motion to Dismiss on this point should be denied.

D. <u>The LTW Holders Have Claims Against the Debtors</u>

The Debtor seeks to disavow its obligations under the Warrant Agreement in favor of the LTW holders. That breach results in a claim in favor of the LTW holders against the Debtor.

The Debtor seeks to sell the value of the Anchor Litigation to JPMC pursuant to the Global Settlement free and clear of the claims of the LTW holders. The Debtor seeks under the Proposed Plan to shield JPMC from all claims relating to the LTWs. Those actions result in a claim by the LTW holders against the Debtor.

The Complaint has alleged that the LTWs are not equity securities and that under Section 4.4 of the Warrant Agreement, the form of payment to LTW holders did not have to be in stock of WMI. Section 4.4 of the Warrant Agreement speaks in terms of the "essential intent and principles" of the LTWs and the necessary "adjustments" that need to be made to adhere to such "intents and principles." In the context of a Motion to Dismiss, the LTW holders' formulation of such "intents and principles" must be taken as true. In all events, such "intents and principles" are not legal concepts for which a Motion to Dismiss can be granted. Broadbill has outstanding discovery requests to further develop this point.

The Debtor's point that Section 4.4 of the Warrant Agreement uses the word "may" and therefore, the obligation to protect the LTW holders is purely discretionary must be rejected. First, in the context of a Motion to Dismiss, the word "may" as used in Section 4.4 of the

Warrant Agreement is subject to more than one interpretation-- not just the unsupported one provided by the Debtor. Indeed, the LTW holders believe that the word "may" refers to the ability of the WMI Board to act in good faith, without the consent of the LTW holders, to protect the LTW holders' interests. The word "may" did not alleviate the WMI Board[8] from acting when there was a good faith basis to make an "adjustment" to protect the LTW holders. In the context of a Motion to Dismiss, the Debtor's interpretation of an ambiguous phrase that is plainly capable of more than one interpretation, must be rejected. *See Walk in Medical Centers Inc. v. Breuer Capital Corp.*, 818 F.2d 260 (2d. Cir. 1987).

The pertinent question is not, as the Debtor has framed the issue, whether the LTWs are equity securities. The relevant question is whether the Debtor's breach of its contractual obligations in the Warrant Agreement to give the LTW holders the major economic benefit of the Anchor Litigation constitutes a claim in favor of the LTW holders.

In any event, the LTWs are a totally different kind of instrument than a warrant to purchase the stock of a debtor, and are not equity securities. The LTWs were not intended to expose the LTW holders to equity or stock risk. The risk factors in the Registration Statement do not mention that the issuer could file for bankruptcy and its common stock could be rendered worthless. As noted, the Registration Statement stated that an investment in LTWs represented different risks and considerations than an equity investment in the issuer. In particular, the LTWs do not have the common characteristics of a stock warrant. The LTWs are not exercisable for a specified number of shares. They do not contain a specified exercise price, and they have no term. The LTWs are a financial derivative.

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[8] For purposes of the Motion to Dismiss, it should be assumed that the Debtor's Board did nothing to protect the LTW holders. In fact, the Board approved an improper scheme to strip the value of the LTWs from the LTW holders.

Courts often look at the substance of a contract over its form. As such, the LTWs must be analyzed based on their attributes and the context for which they were given, and not because the word "warrant" is simply used to refer to the financial instrument. *See Atwater & Co. v. Panama R.R., Co.*, 246 NY 519 (NY 1927).

In sum, the LTWs were intended to transfer a substantial portion of the economic value of the Anchor Litigation to the LTW holders. Since the Debtor has breached the commitment in the Warrant Agreement to transfer such value, the LTW holders have been damaged, and they have a claim arising therefrom.

CONCLUSION

For all of the foregoing reasons, the Motion to Dismiss must be denied and the Claimants should be granted such other and further relief as is just under the circumstances.

Dated: Wilmington, Delaware
June 8, 2010

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EXHIBIT A

Business Services Industry

0 Comments

Dime Announces Distribution of Litigation Tracking Warrants

Business Wire, Dec 18, 2000

Business Editors

NEW YORK--(BUSINESS WIRE)--Dec. 18, 2000

Dime Bancorp, Inc. (NYSE: DME) today announced that its Board of Directors has declared a distribution to common stockholders of a substantial portion of Dime's economic interest in its pending "goodwill" lawsuit against the United States government through the issuance of Litigation Tracking Warrants(TM) (LTW(TM)s).

Dime has set the close of business on December 22, 2000 as the record date for the determination of those stockholders eligible to receive LTWs. Each eligible stockholder will receive one LTW for each share of Dime's common stock held on the record date. Dime will distribute the LTWs to eligible stockholders beginning on December 29, 2000. The LTWs will be listed on the Nasdaq National Market under the trading symbol DIMEZ (CUSIP number 25429Q 11 0) and will begin trading following the record date. Dime understands that its common stock will continue to trade on the New York Stock Exchange with "due bills" (reflecting a seller's obligations to deliver LTWs when received) from December 20, 2000 until the "ex-distribution date," which will be January 2, 2001 - the first business day after the December 29th distribution date.

At September 30, 2000, Dime had assets of $25.2 billion and deposits of $13.9 billion. Its principal subsidiary, The Dime Savings Bank of New York, FSB (www.dime.com), is a regional bank serving consumers and businesses through 127 branches located throughout the greater New York City metropolitan area. Directly and through its mortgage banking subsidiary, North American Mortgage Company (www.namc.com), Dime also provides consumer loans, insurance products and mortgage banking services throughout the United States.

Certain statements in this press release may be forward-looking. A variety of factors could cause Dime's actual results and experience to differ materially from the anticipated results or other expectations expressed in such forward-looking statements. The risks and uncertainties that may affect such forward-looking statements include the vagaries of litigation, the timing and occurrence (or non-occurrence) of events that may be subject to circumstances beyond Dime's control, market fluctuations, and changes in applicable laws and regulations or interpretations thereof.

Dime Announces Timetable for Trading of Litigation Tracking Warrants.

Link to this page

Business Editors

NEW YORK--(BUSINESS WIRE)--Dec. 20, 2000

Dime Bancorp, Inc. (NYSE:DME) today announced that its Litigation Tracking Warrants (TM) (LTW(TM)s) will begin trading on the Nasdaq National Market on December 26, 2000 on a "when-issued" basis under the trading symbol DIMZV through December 29, 2000. Commencing January 2, 2001, the LTWs will be traded "regular-way" under the trading symbol DIMEZ.

Dime's common stock will continue to trade on the New York Stock Exchange with "due bills" (i.e., including the value of the LTWs and reflecting a seller's obligation to deliver LTWs to a buyer) through December 29, 2000. Commencing January 2, 2001, Dime's common stock will trade on the New York Stock Exchange without the value of the LTWs.

At September 30, 2000, Dime had assets of $25.2 billion and deposits of $13.9 billion. Its principal subsidiary, The Dime Savings Bank of New York, FSB (www.dime.com), is a regional bank serving consumers and businesses through 127 branches located throughout the greater New York City metropolitan area. Directly and through its mortgage banking subsidiary, North American Mortgage Company (www.namc.com), Dime also provides consumer loans, insurance products and mortgage banking services throughout the United States.

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Dime Bancorp, Inc. Increases Cash Dividend.

Free Trade Area of the Americas.

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT.

Washington Mutual Receives Regulatory Approval of Dime Acquisition.

Washington Mutual Completes Acquisition of Dime Bancorp.

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EXHIBIT B

SEC Regulations Committee Highlights

Joint Meeting with SEC Staff - March 12, 1998

Location: SEC Headquarters - Washington, D.C.

NOTICE: The AICPA SEC Regulations Committee meets periodically with the staff of the SEC to discuss emerging technical accounting and reporting issues relating to SEC rules and regulations. The purpose of the following highlights is to summarize the issues discussed at the meetings. These highlights have not been considered and acted on by senior technical committees of the AICPA, or by the Financial Accounting Standards Board, and do not represent an official position of either organization.

In addition, these highlights are not authoritative positions or interpretations issued by the SEC or its staff. The highlights were not transcribed by the SEC and have not been considered or acted upon by the SEC or its staff. Accordingly, these highlights do not constitute an official statement of the views of the Commission or of the staff of the Commission.

I. **ATTENDANCE**

A. **SEC Regulations Committee**

Robert H. Herz, Chairman
Val Bitton
Mark Bagaason
Ernie Baugh
Ed Coulson
David Einhorn
Jay Hartig
Terri Iannaconi
Rodney Liddle
Eric Press
Tony Ressino
Amy Ripepi
Stewart Sandman
Bill Travis
Bill Yeates

B. **Securities and Exchange Commission**

Office of the Chief Accountant

Jane Adams, Deputy Chief Accountant
Scott Bayless, Assistant Chief Accountant
Donna Coallier, Professional Accounting Fellow
Jeffrey Jones, Professional Accounting Fellow
Mike Kigin, Associate Chief Accountant
Leslie Overton, Assistant Chief Accountant
Armando Pimentel, Professional Accounting Fellow
Cody Smith, Professional Accounting Fellow
Walter Teets, Academic Accounting Fellow
Bob Uhl, Professional Accounting Fellow

Division of Corporation Finance

Robert Bayless, Chief Accountant
Craig Olinger, Deputy Chief Accountant

Division of Market Regulation

Matt Hughey

C. **AICPA**

Annette Schumacher Barr, Technical Manager
Brad Davidson, Technical Manager

D. **Guests**

Kenny Chatelain, Coopers & Lybrand
Debra Mac Laughlin, BDO Seidman

II. ORGANIZATIONAL/STAFF CHANGES

Robert Bayless reported that the Division of Corporation Finance will be expanding the number of offices in operations from 9 to 12. A list of the new offices is included as Attachment A to these highlights.

Jane Adams announced that the Office of the Chief Accountant is seeking an additional professional accounting fellow with a background in financial instruments and financial services. Applications for this position will be accepted until April 10th, 1998.

III. STATUS OF COMPANY REGISTRATION

Craig Olinger reported that press reports regarding SEC proposal of "company registration" rules in the summer of 1998 are not entirely accurate. Proposed rules refining the registration process are expected by the end of 1998. The staff does not consider the proposal to be "company registration." Instead, it will be a comprehensive look at the entire registration process. Issues to be addressed may include:

- The communications outside the prospectus at or near the time of an offering
- Prospectus delivery requirements
- Private versus public offerings-distinctions and integration
- Improvements in the quality of disclosures
- The staff's administrative process regarding registrations.

IV. OBSERVATIONS ON SAB 98

Cody Smith made the following staff observations relating to Staff Accounting Bulletin (SAB) No. 98:

On February 3, 1998, the Commission issued SAB 98. SAB 98 makes technical revisions to various existing SABs to be consistent with the requirements of FASB Statement No. 128, Earnings Per Share. The SAB is effective immediately.

SAB 98 amends SAB Topic 1:B:2 and 1:B:3 to remove the previous requirement to delete historical earnings per share since deleting historical earnings per share is inconsistent with Statement 128. Pro forma information may be required under Article 11, and may be presented on the face of the income statement.

SAB 98 amends SAB Topic 3:A to delete the references to supplemental earnings per share in APB 15. The staff still expects registrants to provide the same information outside the financial statements if material based on the requirements of Article 11.

SAB 98 amends SAB Topic 4:D with respect to the calculation of earnings per share in an IPO. Previously, Topic 4:D specified a computation method to be applied to all prior periods presented to reflect the dilutive nature of stocks and warrants issued within a one year period prior to the IPO at prices below the IPO price. The revised guidance requires registrants to follow Statement 128 (which generally requires issuances to be reflected from issuance date forward) but cautions registrants that the staff considers issuances for nominal consideration before an IPO to be in-substance stock splits that should be retroactively reflected under Statement 128.

Issuances for which the recording of compensation or other expense has been appropriately considered under APB Opinion 25 or FASB Statement 123 ordinarily would not be considered nominal issuances. Also, issuances in exchange for assets (e.g. SAB 48 transactions) would not be considered nominal issuances unless the fair value of the assets is nominal in relation to the fair value of the equity instrument issued. The staff anticipates that nominal issuances will likely be limited to issuances to investors or promoters for considerably less than fair value. The revisions do not change existing requirements to recognize expense for stock or options issued in exchange for employee or non-employee services under APB Opinion 25 or FASB Statement 123. However, for financial statements for periods ending prior to December 15, 1997, the staff will not object to the continued application of SAB 83 as long as the registrant included SAB 74 disclosure as to what the earnings per share will be under Statement 128 and SAB 98 once adopted.

SAB 98 retains the guidance in SAB Topic 6:B:1 that calls for presentation of earnings available to common shareholders on the face of the income statement. SAB 98 amends Topic 6:B:1 to suggest how registrants who elect to present Comprehensive Income under FASB Statement 130 on the face of the income statement should report income available to common shareholders.

SAB 98 amends SAB Topic 6:G to change the references to basic and diluted earnings per share from primary and fully diluted earnings per share.

V. REVISED STAFF LEGAL BULLETIN NO. 5

Craig Olinger briefly discussed the revision to Staff Legal Bulletin 5. Jane Adams reported that she had reminded members of the Committee on Corporate Reporting of the Financial Executives Institute as to registrants' obligations to report the costs associated with year 2000 remediation.

VI. FASB STATEMENT NO. 131 AND MD&A

Craig Olinger stated that a decision to early adopt FAS 131 does not relieve the

issuer of the obligation to recast segment data for all years presented, unless to do so would be impractical. Companies that expect a material future change in their segment data are encouraged to apply the provisions of SAB 74, including: (1) a discussion of the standards and its requirement, and (2) the impact on their current segment groupings.

VII. PLAIN ENGLISH RULES

Craig Olinger discussed the recently adopted Plain English rules, noting that they will require registrants to follow six key elements of plain english when drafting the cover page, summary and risk factors section of prospectuses. The final rules, which are effective October 1, 1998, are substantially the same as the proposed rules. Elements in the proposed rules that were not adopted include limitations on the number of risk factors, ranking of risk factors, and overall length of the prospectus summary. Current Rule 421(B), which requires the entire prospectus to be written in clear and concise language, has been strengthened.

Bob Herz asked how the rules will be enforced in the review process. Mr. Olinger responded that the staff is being trained to evaluate "plain english" disclosures and does not intend to act as "grammar police". Amy Ripepi noted that the "Plain English" restatement of the risk factors on the ratio of earnings to fixed charges appears to change the calculation. Craig responded that no change to the substance of the rule was intended.

VIII. RECENT AMENDMENTS TO REGULATIONS

Craig Olinger briefly discussed the recent amendments to Regulation S. The amendments are designed to eliminate abusive practices under Regulation S, while preserving the benefits of the rule for capital formation. The amendments will affect offshore offerings of equity securities, including convertible securities, by US companies. Key provisions of the amendments include: the classification of offshore placements of equity securities of domestic issuers under Regulation S as "restricted securities" within the meaning of Rule 144, so that resales without registration will be restricted; lengthening of the holding period under Regulation S from 40 days to one year; and certification and legending requirements for the securities.

IX. FRR 50: RECOGNITION OF THE INDEPENDENCE STANDARDS BOARD

Scott Bayless briefly discussed Financial Reporting Release (FRR) 50 which recognizes the Independence Standards Board (ISB) as the authoritative standard-setting body for auditor independence.

Mr. Bayless stated that new questions regarding interpretation of SEC independence requirements should now be referred to the ISB staff. He also indicated that the release provides that the Commission and its staff will consult with the ISB during the course of ISB consideration of standards or interpretations, including those dealing with matters addressed by existing SEC guidance. As the ISB reconsiders and effectuates changes in independence standards and practices that involve existing SEC guidance, the Commission will consider modifying or withdrawing its conflicting guidance unless the Commission determines that it should not accept the

ISB position in a particular area.

X. BROKER DEALER YEAR 2000 REPORTS

Matt Hughey of the Division of Market Regulation described the recently proposed rules that would require broker-dealers to report on Year 2000 readiness. The proposed rules would also require auditors to attest to some relevant assertions.. The intent of the attestation rules was to require from auditors the lowest level of exposure while still rendering an attest report (rather than agreed-upon procedures). The $100,000 minimum net capital requirement for the broker-dealer report would cover about 2,200 of the 7,800 registered broker-dealers. The items to be discussed in the report (not attested to by the auditor) would include:

(1) Whether the board of directors (or similar body) of the broker-dealer has approved and funded plans for preparing and testing the broker-dealer's computer systems for potential computer problems caused by Year 2000 Problems;

(2) Whether the broker-dealer's plans exist in writing and address all of a broker-dealer's major computer systems wherever located throughout the world;

(3) Whether the broker-dealer has assigned existing employees, hired new employees, or engaged third parties to provide assistance in avoiding Year 2000 Problems; and if so, the work that these individuals have performed as of the date of each report;

(4) What is the broker-dealer's current progress on each stage of preparation for potential computer problems caused by Year 2000 Problems. These stages are:

(i) awareness of potential Year 2000 Problems;

(ii) assessment of what steps the broker-dealer must take to avoid Year 2000 Problems;

(iii) implementation of the steps needed to avoid Year 2000 Problems;

(iv) internal testing of software designed to avoid Year 2000 Problems, including the number and the nature of the exceptions resulting from such testing;

(v) integrated or industry-wide testing of software designed to avoid Year 2000 Problems (including testing with other broker-dealers, other financial institutions, customers, and vendors), including the number and the nature of the exceptions resulting from such testing; and

(vi) implementation of tested software that will avoid Year 2000 Problems;

(5) Whether the broker-dealer has written contingency plans in the event that, after December 31, 1999, it has computer problems caused by Year 2000 Problems; and

(6) Identify what levels of the broker-dealer's management are responsible for addressing potential computer problems caused by Year 2000 Problems, including a

description of these individuals' responsibilities regarding the Year 2000 and an estimate of the percentage of time that each individual has spent on Year 2000 issues during the preceding twelve month period; in each report, the broker-dealer shall identify a contact person regarding Year 2000 matters.

The second report for broker dealers and the two follow-up reports for transfer agents will require a series of assertions by management. The information in these assertions overlaps somewhat with the items required to be discussed. The intent of the overlap is to limit the assertions to items to which the Commission believes can be the subject of auditor attestation. Those assertions are as follows:

(1) Whether the broker-dealer has developed written plans for preparing and testing the broker-dealer's computer systems for potential Year 2000 Problems;

(2) Whether the board of directors (or similar body) of the broker-dealer has approved the plans described in (1) above;

(3) Whether a member of the broker-dealer's board of directors (or similar body) is responsible for the execution of the plans described in (1) above:

(4) Whether the broker-dealer's plans described in (1) above address the broker-dealer's domestic and international operations, including the activities of each of the firm's subsidiaries, affiliates, and divisions. (These provisions do not apply to subsidiaries, affiliates, and divisions of the broker-dealer that are regulated by U.S. or foreign regulators other than the Commission);

(5) Whether the broker-dealer has assigned existing employees, hired new employees, or engaged third parties to implement the broker-dealer's plans described in (1) above;

(6) Whether the broker-dealer or third party has conducted internal testing, whether such testing is on schedule in accordance with the plan described in paragraph (1) above, and whether the broker-dealer has determined as a result of the internal testing that the firm has modified its software to correct Year 2000 Problems; and

(7) Whether the broker-dealer has conducted external or industry-wide testing, whether such testing is on schedule in accordance with the plan described in paragraph (1) above, and whether the broker-dealer has determined as a result of the external or industry-wide testing that the firm has modified its software to correct Year 2000 Problems.

Comments on the proposed release are due on or about April 13, 1998.

XI. SECPS NOTIFICATION REQUIREMENTS

Scott Bayless and Bob Herz discussed the staff's views of the profession's proposal to change the SECPS requirement for the auditor to notify the staff of the termination of an audit relationship. The SECPS and the SEC Regulations Committee proposed an "exception reporting" requirement whereby the auditor would notify the staff only if the registrant does not provide a Form 8-K to the auditor. The staff would accept this change only if the auditor were also required to check EDGAR to verify that the 8-K

was filed. The SECPS is not willing to make auditors responsible for verifying that filings were made. Bob Herz asked whether a change to the "15 day letter" requirements might be made to require the auditor to file that letter directly with the staff, covering notification of termination and disagreements. Scott's reaction was that this would not satisfy the need for timely reporting of the termination.

XII. TOTAL RETURN SWAPS

Armando Pimentel addressed questions surrounding his remarks at the SEC Developments Conference in which the staff required consolidation of an SPE in a total return swap because the registrant retained "all of the substantive risks and rewards" in the arrangement. He stressed that his remarks were not intended to change practice or define the term "substantive" -- in the particular fact pattern, the registrant had in fact retained all of the risks and rewards.

XIII. DISCOUNTS ON RESTRICTED STOCK

The Committee asked the staff to participate in an effort to produce a "best practices" paper regarding valuations of restricted stock. The intent would be to reduce preparer uncertainty and inconsistency in the discount that the staff will accept. Donna Coallier reported that valuations were discussed in a recent training session held by the Division of Corporation Finance. Jay Hartig explained that rejection of company-specific valuations by the staff is of particular concern. Craig Olinger replied that often a "company-specific" valuation incorrectly excludes recent company developments such as contemporaneous issuances of equity for cash, and is based mainly on general information. Donna Coallier offered to review examples of valuations in connection with the staff's review of the "best practices" paper.

XIV. FASB STATEMENT NO. 123 PRO FORMA DISCLOSURES

Robert Bayless discussed the staff's reaction to a paper prepared by the Employee Benefits Task Force regarding materiality criteria and FAS 123 pro forma disclosures. Mr. Bayless indicated that a written response would be forthcoming. [Note: The Committee subsequently received a written response from the staff; see Attachment B to these highlights.] He expressed disagreement with the conclusion that materiality should be measured only quantitatively or based on the determination of whether an auditor might qualify their report because of its omission. He noted that the Commission viewed the required disclosure as a reasonable compromise from the FASB's preferred position of income statement recognition, and to eliminate that disclosure would be a breech of that compromise. He also observed that the public outcry over the proposed standard is difficult to reconcile with the frequent omission of the information because the effect is immaterial. Mr. Bayless also indicated that the Division's selection criteria for reviewing filings on Form S-2 and S-3 may be modified to include consideration of whether the issuer has reasonably excluded FAS 123 pro forma disclosures. The information gathered from these reviews will help the staff decide whether additional guidance on this issue is necessary.

XV. SECURITIZATION OF SUBPRIME LOANS

Robert Uhl discussed recent media reports of lenders eliminating recognition of gains on the sale of loans under SFAS No. 125. The staff will make an announcement at

the next EITF meeting that includes four major points:

1) Recognition of gain on the sale of loans is not elective.

2) In estimating the fair value of retained and new interests, the assumptions used must be reasonable and supportable.

3) Assumptions and methodologies used to estimate the fair value of similar instruments must be consistent.

4) Significant assumptions used in estimating the fair value of retained and new interests at the balance sheet date should be disclosed. Significant assumptions generally include default rates, interest rates and prepayment rates.

XVI. RULE 3-05 SIGNIFICANCE TEST AND EXCHANGE TRANSACTIONS

Craig Olinger discussed the following fact pattern and analysis:

A registrant and another party may each contribute businesses to a Newco (or "joint venture"), receiving in exchange an equity interest in the combined company. In this transaction, the registrant is giving the other party an interest in a formerly consolidated business in exchange for an equity interest in the other party's business.

Instruction 2 to Item 2 of Form 8-K specifies that dispositions and acquisitions effected through exchange transactions each be reported under that Item. The Item specifies separate thresholds for determining when each of those transactions is significant. The significance of the disposition and acquisition should be evaluated separately in determining whether pro forma information about the disposition (and receipt of an equity investment) is required, and whether audited financial statements of the business contributed by the other party are required.

Pro forma financial statements should be furnished to reflect the effects of a disposition of a controlling interest in a business if the business is a "significant subsidiary" exceeding the 10% level under the tests in Rule 1-02(w) of Regulation S-X. Retention of an equity interest in the business (or the newly combined businesses) does not alter that requirement.

The acquisition of an interest in a business to be accounted for using the equity method is deemed the acquisition of a business. Therefore, if the interest in the joint venture will be accounted for using the equity method, financial statements of the business or businesses contributed by the other party may be required under Rule 3-05 of Regulation S-X. The asset, investment and pretax earnings tests of Rule 1-02(w) should be based on the acquired percentage of the other party's business compared to the registrant's historical financial statements (without adjustment for the related disposition of the business contributed by the registrant to the joint venture). Whether or not the transaction is accounted for at fair value, the investment test should be based on the fair value of the consideration given up or the consideration received, whichever is more reliably determinable.

If reporting of both the disposition and the acquisition are required by Form 8-K, a

registrant may be unable to present a pro forma income statement depicting the joint venture formation because financial statements of the business contributed by the other party are not available. Those financial statements and related pro forma financial statements need not be filed until 75 days after the transaction is consummated. Pro forma financial statements depicting a significant disposition are required to be filed within 15 business days of the disposition. In these circumstances, the initial Form 8-K reporting the transaction should include a narrative description of the effects of the disposition, quantified to the extent practicable, with complete pro forma information depicting the effects of the exchange of interests furnished at the time that the audited financial statements of the acquired business are filed.

XVII. PRORATA CONSOLIDATION

Bob Herz noted that Robert Bayless has asked for the Committee's views about when prorata consolidation is considered appropriate. Bob stated that although no formal research was done, the Committee discussed the issue and agreed that prorata consolidation (other than in foreign issuer filings) is generally considered appropriate only for undivided interests. While this is most prevalent in some industries such as in oil and gas and construction projects, it may be appropriate in other circumstances provided there are undivided interests. However, "synthetic" undivided interests (such as might be created with corporate structures) should not qualify for such treatment. A Committee member noted that prorata statements could also be shown on a supplemental basis.

XVIII. PRO FORMA FINANCIAL STATEMENTS THAT INCLUDE COST-SAVING ADJUSTMENTS

Robert Bayless agreed to share ideas with the Filing Issues Task Force related to reporting expected cost savings and similar matters in pro forma financial statements. The emphasis of this effort will be to help issuers present information that is meaningful to investors while clearly distinguishing pro forma financial information in accordance with regulation S-X from other forward-looking information.

XIX. POOLING OF INTEREST CRITERIA

. Tainted Treasury Shares and the Acquisition of Preferred Shares

Jeff Jones discussed a pooling issue in which the company wanted to acquire the minority interest of a subsidiary in a target company. The registrant proposed to issue tainted treasury shares to acquire the outstanding minority interest and thereby cure the taint for the instant pooling transaction. The staff concluded that issuing tainted treasury shares for this purpose would not cure the taint for the instant pooling transaction. The staff would reach a similar conclusion if an issuer proposed to use tainted treasury shares to acquire other securities of the target company.

A. Litigation Tracking Warrants

Donna Coallier discussed a pooling issue in which a registrant had a contingent asset that could be realized upon favorable settlement of certain

litigation. The registrant did not believe that the trading value of its shares in the market properly included the value of the contingent asset. As a result, the registrant proposed to issue a warrant that they believed would capture and isolate the value of the contingent asset. The registrant planned to issue one warrant to each shareholder for each share outstanding as of a date shortly following a business combination. At issue was whether such an issuance would preclude pooling of interest accounting for the business combination that preceded the issuance.

The planned warrants were to be detachable and freely tradable separately from the common stock of the company. The warrants would be issued equally to issuer and combining company shareholders alike. The warrant would give the holder the right to obtain a variable amount stock for nominal consideration. The number of shares the holder available at exercise would vary based upon the amount of settlement received from the litigation. As a result, common stockholders that do not or cannot exercise warrants upon settlement of the litigation will be diluted to the extent of exercise by warrant holders that do exercise.

The staff concluded that if the company issued these warrants subsequent to consummation of a business combination, pooling of interest accounting would not be appropriate for the business combination. The staff believed that the instrument effectively separated the combined entity into two components: the contingent asset and the remainder of the company. Upon issuance of the warrant, the shareholders would be able to trade the value of the contingent asset separately from the rest of the company's value. The staff believed that such an ability was inconsistent with the introduction to paragraph 48 which requires that there be no planned transactions that are inconsistent with the combining of the entire existing common stock interests of the combining companies. In addition, the staff believed that the warrant issuance has the same economic effect as a spin-off of the contingent asset, which would be precluded by paragraph 48c.

B. **Systematic Patterns**

Donna Coallier discussed a pooling issue related to systematic patterns. She referred to a registrant that had submitted a formulaic systematic pattern based on the company's projections of annual treasury stock needs. The company projected its treasury stock needs based on the degree to which vested options were in or out of the money and historical exercise experience that had been compiled by its human resources department. The systematic pattern provided that the annual estimate of share needs would be repurchased ratably each day, after giving effect to legal black out periods. The staff concurred that the repurchase program described by the registrant qualified as a systematic pattern since it had explicit criteria that specified the amount and timing of shares to be repurchased.

However, in the first quarter in 1997, a decision was made to purchase additional shares beyond the number specified by systematic pattern. Specifically, due to sharp increases in the company's stock price, the company believed that a larger number of shares would be purchased in the first quarter, and adjusted repurchases accordingly. The systematic pattern

did not specify a criteria that would result in an immediate increase in share repurchases upon an increase in stock price. Rather, increases would be spread over time as through the mechanics of the systematic pattern. As a result, the staff concluded that the additional shares purchased beyond the number specified by the systematic pattern would be considered tainted shares that should be included in the company's 90% test in evaluating whether pooling of interest treatment is appropriate for business combinations.

XX. STAFF ANNOUNCEMENTS

The staff distributed the following written announcements:

. Impact of FASB Statement No. 128, "Earnings Per Share"

In February 1997, the FASB issued Statement No. 128, "Earnings per Share." The Statement establishes standards for computing and presenting earnings per share (EPS). It simplifies and supersedes the existing EPS guidance found in APB Opinion 15 and its 102 interpretations. The Statement is effective for financial statements issued for periods ending after December 31, 1997.

Audit literature may not permit an independent accountant to reissue its report on financial statements for inclusion in a Form S-3 after the registrant has reported its EPS initially in accordance with SFAS No. 128 in a Form 10-Q or in a press release. The staff will let firms decide for themselves whether they can permit reissuance of their opinion without restatement in this circumstance. However, if restated financial statements are not filed (under cover of Form 8-K, Item 5, for example), then the Form S-3 must present, at least, selected financial data (even though not required by instructions to Form S-3) that includes the restated EPS numbers (basic and diluted) for all periods, with prominent disclosure that the EPS data is restated in accordance with SFAS 128. This position is similar to the staff's position regarding stock splits that occur subsequent to filing of a Form 10-K that is incorporated by reference into a Form S-3.

See also the discussion below regarding filing of restated Financial Data Schedules.

A. Retroactive Changes and the Financial Data Schedule

Financial Data Schedules (FDS) are required to be included in EDGAR filings pursuant to Item 601(c) of Regulation S-K and Regulation S-B. Item 601(c)(iii) specifies when an amended or restated FDS is required to be filed. A restated FDS is required if any of the amounts reported in a previously submitted FDS are restated due to, for example, a pooling of interests or an accounting principle change. FAS 128 (Earnings per Share) is an example of a new accounting standard that requires retroactive restatement which will trigger an obligation to file restated FDSs.

Item 601(c)(2)(iii) specifies that restated FDSs should be filed for each affected period during the latest three fiscal years and interim periods of the

latest two fiscal years; except that a restated FDS need not be furnished for any period for which a FDS was not previously required to be furnished. The first filing made with the Commission which includes restated financial statements must include the restated FDS information. For registrants with a year-end of December 31, restated FDSs must be included with Form 10-K for the year ended December 31, 1997.

Even though the restatement may involve only a single item, such as EPS, the restated FDS must include all the required responses previously filed in addition to the restated item. (The tags in the FDS will not be changed in the near future to correspond to the new captions under FAS 128, so registrant should just report basic EPS for <EPS-Primary> and diluted EPS for <EPS-Diluted>. Filers should not change the tags. If they do, they will receive warning messages when they file.)

B. **Disclosures about Segments (FASB Statement No. 131)**

Disclosures specified by FASB Statement No. 131, Disclosures about Segments of an Enterprise and Related Information, are not required until annual financial statements for a year beginning after December 15, 1997 are presented. A registrant's election to adopt SFAS 131 in its annual financial statements earlier than required does not change the requirement to re-cast segment data for all years presented, unless impracticable. Companies should consider the requirement s of SAB 74 (see below) in light of the recent issuance of SFAS 131. Companies that expect a material future change in their segment financial information are encouraged to apply the provisions of SAB 74, including: (1) a discussion of the standard and its requirements, and (2) the impact on their current segment groupings.

Some companies may elect to furnish unaudited SFAS 131 segment data outside of annual financial statements or in interim statements earlier than required. If that data is presented, we believe unaudited segment information on the same basis should be furnished for the prior comparable period and all prior years included or incorporated by reference in the filing. However, the previously filed annual financial statements may always be incorporated by reference into a registration statement without revision to recast the segment data.

Items 101 and 303 of Regulation S-K require certain disclosures based on terms defined in SFAS 14, the previous segment standard. We will not object if companies electing to apply SFAS 131 early use the definitions of segments, products and services, and geographic areas in SFAS 131 in their responses to Item 101 and 303 of Regulation S-K. Of course, the disclosure must continue to be balanced and complete.

C. **Accounting and Disclosure by Physician Practice Management Companies**

Amortization PPMs may recognize "goodwill," in connection with a business combination with medical practices, or "capitalized management contract costs, " in connection with exchange transactions and management services

arrangements with medical practices. Factors inherent in this industry raise questions about the use of long amortization periods for these intangible assets. For example, significantly increased competition, industry consolidation, changing third party reimbursement requirements, technological medical innovation, an uncertain regulatory future, the ability of a PPM and the medical practices to perform under the terms of the services arrangement over an extended period, the uncertain continuity of revenues upon departure of key owner/physicians of the practice, and the relative infancy of the medical practice management industry make it difficult to assert that the PPM arrangement with the medical practices will survive and provide a competitive advantage on a long-term basis. The staff believes a relatively short amortization period is generally appropriate and does not contemplate circumstances where an amortization period in excess of twenty-five years would be justified.

CERTIFICATE OF SERVICE

I, Scott J. Leonhardt, hereby certify that on this 8th day of June, 2010, a copy of the foregoing ***Memorandum of Law Filed By Nantahala Capital Partners LP and Blackwell Partners LP in Response to Defendant's Motion to Dismiss*** was served by electronic notification through the CM/ECF System for the United States Bankruptcy Court for the District of Delaware on all parties registered in these cases, and upon the parties listed below via first class mail:

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