

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<p>In re:</p> <p>WASHINGTON MUTUAL, INC., <u>et al.</u>,</p> <p style="text-align: center;">Debtors.</p>	<p>Chapter 11</p> <p>Case No. 08-12229 (MFW)</p> <p>Jointly Administered</p>
<p>BROADBILL INVESTMENT CORP.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>WASHINGTON MUTUAL, INC.,</p> <p style="text-align: center;">Defendant</p>	<p>Adv. Pro. No. 10-50911 (MFW)</p> <p>Hearing Date: July 20, 2010 at 10:30 a.m. Objection Deadline: July 15, 2010 at 5:00 p.m.</p>

**OBJECTION TO DEBTOR’S MOTION SEEKING (A) TO CONSOLIDATE
THE DEBTOR’S FORTY THIRD AND FORTY FOURTH OBJECTIONS
TO CLAIMS WITH THE BROADBILL ADVERSARY PROCEEDING,
AND (B) STAYING THE BROADBILL ADVERSARY PROCEEDING**

Nantahala Capital Partners, L.P. and Blackwell Partners, L.L.C. (collectively, the Claimants”) hereby file this objection (“Objection”) to the Debtor’s Motion, dated June 24, 2010 (“Consolidation Motion”) seeking (a) to consolidate the Debtor’s forty third and forty fourth objections to claims (collectively, “Claims Objections”) with the Broadbill Adversary Proceeding, and (b) staying the Broadbill Adversary Proceeding. In support of the Objection, the Claimants allege as follows:

1. The Claimants are intervenors in the Adversary Proceeding No. 10-50911 (“Broadbill Adversary Proceeding”) commenced on or about April 12, 2010 by Broadbill Investment Corp (“Broadbill”) against Washington Mutual Inc. (“Debtor”). On June 30, 2010,



the Claimants filed their intervenor complaint against the Debtor. The Claimants also filed proofs of claim against the Debtor, which have been objected to as part of the Claims Objection.

2. The Claimants agree with the Debtor that the same legal issues are present in the Broadbill Adversary Proceeding and the Claims Objections. Essentially, both proceedings seek a judicial determination as to whether the holders of Litigation Tracking Warrants (“LTWs”) relating to the so-called Anchor Litigation are creditors of the Debtor, or equity security holders of the Debtor. The Claimants also agree with the Debtor that the Broadbill Adversary Proceeding should be coordinated with the Claims Objection in order to create a more efficient process. However, the Debtor has it wrong; it is the later filed Claims Objection that should be stayed, and it is the earlier commenced Broadbill Adversary Proceeding, that has been actively litigated by the parties thereto, which should go forward.

3. The Claimants position as to why the Broadbill Adversary Proceeding should go forward and the Claims Objection should be stayed is based on the following principles:

(a) The Broadbill Adversary Proceeding seeks a declaratory judgment as to the creditor status of the LTW holders. The Claimants have been advised that Broadbill will amend the complaint in the Broadbill Adversary Proceeding to make it a class complaint so the litigation will unequivocally be binding on all LTW holders. Presumably, the Debtor will not object to the class nature of any declaratory judgment action relating to the LTWs since the Claims Objection is a uniform objection to the LTW holders claims; it seeks the same relief against each LTW holder for the same purported legal reasons.

Even if a class complaint is not filed by Broadbill, the Court should treat the Broadbill Adversary Proceeding as the test case to litigate the issue as to whether LTW holders are creditors of the Debtor.

By contrast, the Claims Objection only applies to LTW holders who have filed proofs of claim. It does not apply to all LTW holders. Many LTW holders have not filed claims. The reasons why LTW holders have not filed claims are numerous and compelling. First, many LTW holders do not believe the claims bar date applies to them and therefore have not filed claims. The confusion stems from the Debtor issuing a public statement at the beginning of its bankruptcy case that LTW holders were equity, and then obtaining a claims bar order that states that equity holders do not need to file claims. Indeed, the claims bar date notice states that “warrant” holders do not have to file claims.¹ The Debtor’s actions, which created the confusion, have never been clarified. Second, there is a Warrant Agent (Mellon Services) under the so-called Warrant Agreement, dated March 11, 2003 relating to the LTWs. Many LTW holders thought the Warrant Agent would act, as an indenture trustee would act, to protect their interests, by filing a class proof of claim. The Warrant Agent is actually an agent of the Debtor though and, as it turns out, intentionally did not file a claim for the LTW holders. Third, many of the LTW holders never got notice of the bar date and, as far as the Claimants can determine, the Debtor did not try and serve the bar date notice so that LTW holders would receive it. Fourth, the bar date notice was never sent by the Warrant Agent to the LTW holders, which should have occurred. Fifth, at least one LTW holder, filed a claim on behalf of all LTW holders. It is believed that some LTW holders thought they were covered by that action. Sixth, some LTW holders are waiting for the Debtor to reject its obligations under the Warrant Agreement, which seems inevitable. That act, rejecting the Warrant Agreement, will trigger a new deadline for LTW holders to file a claim against the Debtor.

Whether the LTW holders filed a claim in this bankruptcy case should not be the basis for determining the rights of the LTW holders as against the Debtor. The Debtor was aware of the

¹ The proviso relating to that admonition is ambiguous, and significantly, does not use the work “warrant.”

LTW issue when it filed its bankruptcy case, and the LTW interests should have been properly included in the Debtors' Schedules so that no claims would have needed to be filed.² Further, in the context of a solvent bankruptcy estate, which the Debtor's estate is, late filed claims get paid anyway. That is because the "best interests test" of Section 1129(a)(7) of the Bankruptcy Code incorporates the distribution scheme of Section 726 of the Bankruptcy Code. In short, late filed claims get paid ahead of post petition interest on unsecured claims, and they get paid ahead of equity interests. The Debtor's Proposed Plan purports to pay both post petition interest on unsecured claims and preferred equity holders. Thus, a proceeding that adjudicates the rights of all LTW holders (such as the Broadbill Adversary Proceeding) and not just LTW holders who filed claims (like the Claims Objection) is the proper framework to adjudicate the issue of whether LTW holders are creditors.

(b) Many of the LTW holders who are part of the Claims Objection are acting *pro se*. Other LTW holders have not responded because they don't know what to do and can't afford to litigate against the well financed Debtor. Staying the Claims Objection and going forward with the Broadbill Adversary Proceeding prevents the Debtor from stripping this unrepresented group of their valid LTW claims. Allowing the Broadbill Adversary Proceeding to go forward levels the playing field for a fair resolution of the common issue as to whether the LTW holders are creditors of the Debtor. As a favorable by-product of proceeding in this recommended way, there will invariably be a reduction in the number of parties that otherwise would be forced to participate in the LTW creditor resolution process.

(c) The Consolidation Motion is a transparent litigation tactic of the Debtor which should not be rewarded. The Debtor is engaged in a well-financed and entirely wasteful

² The aggregate LTW claim is based on a formula in the Warrant Agreement and is dependent on the ultimate recovery in the Anchor Litigation (not yet received).

war of attrition; it has raised numerous and unnecessary roadblocks for the LTW holders for no legitimate purpose. The Consolidation Motion should be viewed in that context and summarily rejected. For example:

- (i) The Debtor filed numerous versions of its Disclosure Statement.

In its multiple versions of the Disclosure Statement, the Debtor contended that the parties to the Broadbill Adversary Proceeding would be protected as a disputed creditor under the Debtor's Proposed Plan, but all other LTW holders that filed proofs of claim would not be so protected. As a result, among other things, a distribution reserve would be established for the litigants in the Broadbill Adversary Proceeding but no such reserve would be established for LTW holders who filed claims. When asked at hearings why it was taking this indefensible position, the Debtor stated that Broadbill was a litigant in an adversary proceeding and somehow that made a difference. This unsupportable position has caused approximately 30 LTW holders to move for intervention, *pro se*, in the Broadbill Adversary Proceeding. It is the Claimants understanding that the Debtor will concede its error in the, to be filed, sixth version of its Proposed Disclosure Statement. In other words, the Debtor will drop the pretense that there is a difference in rights between an LTW holder who filed a claim and a party to the Broadbill Adversary Proceeding. The Consolidation Motion, which seeks to make the Claims Objection the primary proceeding and stay the Broadbill Adversary Proceeding, demonstrates what a bogus argument the Debtor made in its Proposed Disclosure Statement on this issue, and the chaos and waste that it intentionally created.

- (ii) The Broadbill Adversary Proceeding was filed two months earlier than the Claims Objection. The Debtor did not make a procedural motion (i.e., the Consolidation Motion) at that time. Instead, as noted above, it tried, without any legal basis, to draw

distinctions in creditor treatment between the rights of creditors who filed claims and the parties in the Broadbill Adversary Proceeding.

(iii) The Debtor also has actively participated in the Broadbill Adversary Proceeding. The Court already has conducted two status conferences relating to the Broadbill Adversary Proceeding. The Debtor filed a wasteful motion to dismiss the Broadbill Adversary Proceeding. Both Broadbill and the Claimants were then required to file a detailed response to the Debtor's Motion to Dismiss. The Consolidation Motion was filed on the day the Debtor's reply was due on its Motion to Dismiss. The Debtor never filed a reply. Indeed, the Consolidation Motion tacitly concedes that the Debtor's Motion to Dismiss was not well founded since the Debtor acknowledges that discovery is needed on the Claims Objection, and that a discovery schedule should be discussed at the return date of the Consolidation Motion. See para 28 of the Consolidation Motion. Simply put, motions to dismiss are without merit when, as apparently conceded by the Debtor, factual disputes exist and discovery is needed.

(iv) Broadbill also served a document request in the Broadbill Adversary Proceeding. The Debtor told the Court it would timely produce documents. Instead, it filed an opaque objection, and produced no documents at all. The Consolidation Motion seeks to cover up what the Debtor did not do, by staying all discovery in the Broadbill Adversary Proceeding and starting again. There is no reason to reinvent the wheel. Discovery, in the context of the Broadbill Adversary Proceeding, should proceed forthwith. The Debtor's tactic of delay and obfuscation must end.

(v) The Court indicated that the Claimants could intervene in the Broadbill Adversary Proceeding and suggested that the Claimants could respond to the Motion to Dismiss in the Broadbill Adversary Proceeding. The Debtor resisted that resolution, refused to

sign a plain vanilla intervention stipulation and instead, insisted that the Claimants file a new complaint against them. One week after making that argument in Court, the Debtor filed the Consolidation Motion and sought to stay the Broadbill Adversary Proceeding.

(vi) Even the Debtor's actions relating to the Claims Objection have been wasteful. The Debtor filed the Claims Objection and set a response deadline. Only after the deadline passed, did the Debtor tell the parties to the Claims Objection that it had already filed the Consolidation Motion, and would *sua sponte* extend the deadline to respond to the Claims Objection as a result of the Consolidation Motion.

4. Based on these actions, the Debtor has lost its credibility in suggesting a solution to the procedural issues raised in the Consolidation Motion. To date, the Debtor has done nothing but try to create unnecessary procedural hurdles and impediments to the resolution of the LTW claims issue.

5. It should be emphasized that the Debtor's delay and obfuscation tactics have also been utilized in the development of the Debtor's Proposed Plan, and the Debtor's continued failure to address the Claimants multiple objections to the Debtor's Proposed Disclosure Statement. The information which the Claimants seek to be included in the Debtor's Disclosure Statement all directly relate to the issues underlying the rights of the LTW holders against the Debtor. Since the Debtor is not filing a separate motion to approve the Global Settlement, it is imperative that the Proposed Disclosure Statement contain such critical information. For example:

- (a) Why, as part of negotiating the Global Settlement, did the Debtor decide to keep one of the Good Will Litigations (relating to American Savings Bank) while

seeking to sell the other Good Will Litigation (the Anchor Litigation) to J.P. Morgan? As noted, the Anchor Litigation specifically relates to the LTWs.

- (b) Why does the sale of the Anchor Litigation to J.P. Morgan need to be free of the rights of the LTW holders? After all, J.P. Morgan is assuming all other liabilities with respect to the assets it is acquiring under the Global Settlement.
- (c) Why don't the claims of the LTW holders then attach to the settlement proceeds paid by J.P. Morgan?
- (d) Why does the sale of the Anchor Litigation to J.P. Morgan have to take place *nunc pro tunc* as of a date almost two years ago?
- (e) Why does the Debtor take the position in the Proposed Disclosure Statement and in a prior litigation before the Court that it owns the Anchor Litigation while, in the context of litigating with the LTW holders, it takes a contrary position that the Anchor Litigation is owned by J.P. Morgan, as the successor to WAMU Bank?
- (f) What is the Debtor's basis to claim that it owns the Anchor Litigation?
- (g) What is J.P. Morgan paying in the Global Settlement for the Anchor Litigation recovery?
- (h) Why does the Debtor refuse to tell LTW holders now that it is going to reject its obligations to the LTW holders under the Warrant Agreement?

6. The Debtor's failure to address these issues is telling. It should however, be required to include such information in the Proposed Disclosure Statement.

7. In summary, the Consolidation Motion is not intended to promote efficiency. It is an attempt by the Debtor to do the opposite. The Debtor's wasteful tactics must cease immediately. The Consolidation Motion does not promote the efficient administration of the

bankruptcy estate. The Broadbill Adversary Proceeding should not be stayed. The Claims Objection should be stayed.

8. The Claimants seek from the Court such other and further relief as is appropriate under the circumstances.

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