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., NANTAHALA CAPITAL PARTNERS, LP, and BLACKWELL CAPITAL PARTNERS, LLC, Plaintiffs, - against - WASHINGTON MUTUAL, INC., Defendant.	Adv. Pro. No. 10-50911 (MFW)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Dated: November 17, 2010
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

RULES AND STATUTES

TREATISES

Plaintiffs, Broadbill Investment Corp. ("Broadbill"), Nantahala Capital Partners, LP, and Blackwell Capital Partners, LLC (collectively, "Nantahala" and together with Broadbill, "Plaintiffs"), class plaintiffs, on behalf of themselves and all holders of LTWs (as defined herein), by their undersigned counsel, hereby submit this Memorandum of Law in Opposition to Washington Mutual, Inc.'s ("WMI's" or "Defendant's") Motion for Summary Judgment, dated October 29, 2010 (the "Motion").

INTRODUCTION

As a threshold matter, summary judgment is manifestly inappropriate because discovery in this proceeding is still in its nascent stages. Moreover, it is clear that there are genuine issues of material fact that would preclude a determination of summary judgment. WMI (whom, in contrast to Plaintiffs, has vastly better initial access to relevant information) has not submitted an affidavit by a person with knowledge of the relevant facts at issue here, and the so-called "evidence" it does submit is either inadmissible, irrelevant, or both. The intent of the Dime Bancorp, Inc. ("Dime") board of directors in issuing the Litigation Tracking Warrants (the "LTWs"), the proper interpretation of the governing documents relating to the LTWs, and the actions taken (and not taken) by WMI's board of directors to protect the rights of LTW Holders since WMI's Chapter 11 filing are all material factual issues that need to be fleshed out before any determination can be made on the merits.

By itself resorting to extrinsic "evidence" to support its motion and by legal positions taken by WMI in this and other proceedings,[1] WMI has conceded that the governing agreement is not "clear and unambiguous," and that judgment in its favor cannot be granted without an

[1] For example, Defendant has asserted in pleadings filed in litigation between Defendant and JPMorgan that the governing agreement may be "recharacterized" or "reinterpreted," by claiming ownership of the Anchor Litigation, in the face of the specific language of Section 6.3 of the governing agreement ("The Bank will retain sole and exclusive control of the Litigation and will retain 100% of any recovery from the Litigation…"). See Exhibits H and I to the Silverstein Declaration (as defined herein).

examination beyond the "four corners" of the document. For example, Defendant argues repeatedly that the intent of the Dime board of directors supports its Motion - - without any actual evidence supporting a statement of such intent - - and, thus, concedes that extrinsic evidence will be required for this Court to adjudicate this proceeding on the merits.

By hindering the discovery process, Defendant hopes to gain an advantage by this Motion. Defendant only recently produced hundreds of thousands of pages of .pdf documents - - most of which were produced in a format making it difficult to search and are, in any event, largely unresponsive - - after failing to respond to discovery requests propounded approximately six (6) months ago. In addition, depositions of, among others, members of the Dime board of directors and WMI's board of directors have been noticed, and scheduled for mid-December. Under these circumstances, Defendant's motion for summary judgment must be denied. Moreover, WMI previously filed a motion to dismiss this proceeding and objections to LTW Holders' claims in WMI's chapter 11 case. These WMI pleadings are strikingly similar to the Motion. Significantly, the Debtors withdrew the motion to dismiss and stayed the claims objection based, in part, on the recognized need for Plaintiffs to take discovery. Defendant's premature summary judgment motion is really nothing more than a "backdoor" attempt to circumvent the concession already made by Defendant that discovery is necessary.

Moreover, procedure aside, WMI's substantive arguments are legally unsupportable. WMI's interpretation of the governing agreement is contradicted by the language of the agreement itself. Indeed, as demonstrated below, each of Defendant's recycled arguments is contrary to either the governing agreement, applicable law, or both. WMI's Motion must therefore be denied.

RELEVANT FACTUAL BACKGROUND

1. Anchor Litigation

Between 1982 and 1985, Anchor Savings Bank FSB ("Anchor FSB") acquired eight failing savings and loan institutions, the deposits of which were insured by the Federal Savings and Loan Insurance Corporation (the "FSLIC"). In acquiring such institutions, Anchor FSB assumed liabilities determined to exceed the assets it acquired. The difference between the fair values of the assets acquired and the liabilities assumed in such transactions was recorded on Anchor FSB's books as "goodwill." At the time of these acquisitions, the FSLIC had agreed that Anchor FSB, among other things, could include such "goodwill" in its regulatory capital.

When the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") was enacted, Anchor FSB had over $500 million of regulatory capital from supervisory acquisitions on its books. FIRREA, however, required the remaining supervisory goodwill to be eliminated.

On January 13, 1995, Anchor FSB filed a lawsuit (the "Anchor Litigation") against the United States government in the Court of Federal Claims (captioned *Anchor Savings Bank FSB v. United States*, No. 95-39C), alleging breach of contract and taking of property without compensation in contravention of the Fifth Amendment to the United States Constitution. After the Anchor Litigation was commenced, Dime acquired Anchor and The Dime Savings Bank of New York, FSB ("Dime FSB") acquired Anchor FSB. In connection therewith, the Anchor Litigation was transferred to either Dime or Dime FSB. On January 4, 2002, Dime FSB merged into WMB and either WMB or WMI assumed the rights under the Anchor Litigation.

In litigation against JPMorgan, WMI has stated that, notwithstanding the language of the governing agreement, WMI, as contrasted to WMB, is the owner of the Anchor Litigation. See Exhibit I to the Declaration of Paul Silverstein in Support of Plaintiffs' Memorandum of Law in

Opposition to Defendant's Motion for Summary Judgment filed concurrently herewith and incorporated herein by reference (the "Silverstein Declaration"), at p. 125. Under WMI's proposed plan of reorganization, WMI purports to sell its interest in the Anchor Litigation to JPMorgan. Shortly before WMI's bankruptcy filing, counsel of record to the plaintiff in the Anchor Litigation indicated that WMI - - not WMB - - was the party in interest in the Anchor Litigation. See Exhibit H to the Silverstein Declaration.

On March 14, 2008, the U.S. Court of Federal Claims held that Anchor was entitled to damages in the approximate amount of $382 million, plus an undetermined amount for a gross-up of tax liabilities.[2] See Exhibit J to the Silverstein Declaration. On July 16, 2008, the Court reduced the judgment to approximately $356 million. Id. On March 10, 2010, the Federal Circuit Court of Appeals affirmed the judgment of approximately $356 million, and also remanded the case to the Court of Federal Claims for further determination of whether that court had made a calculation error and should increase the damage award by an additional $63 million. See Exhibit K to the Silverstein Declaration. In June 2010, JPMorgan filed a motion in the Court of Federal Claims seeking approval of its calculation of the tax gross up, in an amount between $104 million and $144 million. See Exhibit L to the Silverstein Declaration.

2. LTWs

On March 12, 1998, in a meeting held by a Joint Committee of the SEC and the ICPA, the participants discussed "litigation tracking warrants" in the context of certain accounting issues.[3] See Exhibit M to the Silverstein Declaration, at § XIX.A. The highlights of the meeting described that "litigation tracking warrants" 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." Id.

[2] The Court deferred ruling on the amount of the tax gross-up.

[3] The term "Litigation Tracking Warrants" is a trademarked term owned by Credit Suisse First Boston and was a financial product marketed by it to prospective clients, such as Dime. The label of this financial product as a "warrant" should be viewed in that context.

The members of the Joint Committee believed that "litigation tracking warrants," once issued, effectively separated the contingent asset from the remainder of the company - - an issuance of "litigation tracking warrants" had the same economic effect of a "spin-off" of the contingent asset. Id.

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' litigation against the United States through the issuance of Litigation Tracking Warrants." See Exhibit N to the Silverstein Declaration. In a further press release dated December 20, 2000, it was reported on behalf of Dime that once the LTWs were issued, Dime's common stock would trade on the New York Stock Exchange without the value of the LTWs. See Exhibit O to the Silverstein Declaration.

On December 22, 2000, in an attempt to convey the potential value of the Anchor Litigation to Dime's stockholders, Dime distributed LTWs to its shareholders as a tax-free dividend. See Exhibit P to the Silverstein Declaration, at p. 20. The LTWs were issued under a registration statement dated December 15, 2000 (as amended, the "Registration Statement") and were governed pursuant to an agreement, dated as of December 21, 2000 (the "Original Agreement"). See Exhibit Q to the Silverstein Declaration.

The Registration Statement states the intent in issuing the LTWs: to pass 85% of the value of the net proceeds of the Anchor Litigation to the LTW Holders. The Registration Statement states: "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 stockholders . . . .". See Exhibit P to the Silverstein Declaration, at p. 1 The Registration Statement also is clear that the LTWs are not stock warrants, equity securities or equity interests. "An investment

in the LTWs involves different risks and considerations from an investment in the common stock of a savings and loan holding company such as Dime Bancorp." Id., at p. 6.

On January 4, 2002, Dime merged into WMI and WMI assumed Dime's obligations under the LTWs. In the merger, WMI paid Dime shareholders their choice of cash (up to an aggregate of $1.4 billion) or WMI common stock (up to an aggregate of 92.3 million shares). It appears as though Dime stockholders electing cash received the entire merger consideration in cash. On March 11, 2003, WMI and Mellon Investor Services LLC entered into an agreement (the "Amended Agreement" and together with the Original Agreement, individually and collectively, the "Agreements"), which purported to amend and restate the terms of the Original Agreement. See Exhibit R to the Silverstein Declaration.

3. The Amended Agreement

Particularly germane to the issues presented in the Motion (and the Adversary Proceeding) are the provisions of Article IV of the Amended Agreement, which is captioned "Adjustments." Article IV sets forth what must occur if WMI undergoes a major corporate transaction before a "Trigger" (as defined in the Agreement) occurs. It provides that the LTW holders will receive appropriate consideration and adjustments will be made to ensure that the intent and principles underlying the LTWs are preserved for the benefit of the LTW holders. A summary of the general provisions of Article IV is set forth below.

(i) Section 4.1 deals with a "Reorganization."

(ii) Section 4.2 deals with a "Combination" (which includes a sale of substantially all of the assets of the issuer of the LTWs).

(iii) Section 4.3 deals with a Reorganization or a Combination for cash consideration.

(iv) Section 4.4 - - captioned "Other Events" - - deals with a corporate transaction other than a "Reorganization" or "Combination" covered by Sections 4.1 - 4.3 or,

if covered, a transaction whereby the provisions of Sections 4.1 - 4.3 would not "fairly and adequately protect" the LTW Holders in accordance with the "essential intent and principles" of such provisions.

(v) Section 4.5 is a notice provision that provides that, in the event of a liquidation of the issuer of the LTWs, an Article IV "Adjustment" will be made to the LTWs.

Read in its entirety, Article IV provides for modifications to be made to the terms of the LTWs. These provisions contemplate that LTW Holders would receive property other than issuer common stock in certain circumstances, which are present here. In particular, Section 4.4 recognizes that the Agreement could not anticipate every type of major corporate transaction that might occur before a "Trigger" and obligates the WMI Board to adjust the LTWs in order to preserve the essential intent and principles of the Agreement.

4. WMI's Bankruptcy

On September 25, 2008, the FDIC was appointed as a receiver for WMB, took possession of WMB's assets, and promptly sold them to JPMorgan in exchange for $1.88 billion and the assumption of certain WMB liabilities.

On September 26, 2008, WMI and WMI Investment Corp. (collectively, the "Debtors") each commenced a Chapter 11 case with this Court. On March 26, 2010, the Debtors filed a proposed Chapter 11 plan (as thereafter amended, the "Proposed Plan") and disclosure statement with respect thereto (as thereafter amended and supplemented, the "Disclosure Statement"). Section 24.1 of the Proposed Plan provides that the LTW Holders will receive no distribution thereunder and the LTWs will be canceled on the Effective Date (as defined in the Proposed Plan).[4]

[4] Section 25.1 of the Proposed Plan provides that holders of WMI common stock will receive no distribution under the Proposed Plan and the shares of WMI common stock will be canceled on the Effective Date.

After numerous pleadings filed by Plaintiffs, the Debtors finally agreed to amend the Proposed Plan to provide that the claims of the LTW Holders will be treated as "disputed claims" with a reserve for the maximum amount of such claims. The Debtors believe the claims reserve should be $183.9 million. See Disclosure Statement, at pp 58, fn 17. Plaintiffs believe that the claims reserve should be in a significantly greater amount, which dispute will be addressed in connection with confirmation of the Proposed Plan.

RELEVANT PROCEDURAL BACKGROUND

1. The Adversary Proceeding

On April 12, 2010, Broadbill filed a complaint (the "Original Complaint") commencing the above-captioned adversary proceeding (the "Adversary Proceeding") against Defendant. [Docket No. 1]. Nantahala intervened in the Adversary Proceeding. On May 17, 2010, Defendant filed a motion to dismiss the Original Complaint (the "Motion to Dismiss") pursuant to Rule 12(b) of the Federal Rules of Civil Procedure (the "Federal Rules"). [Docket No. 6]. Broadbill and Nantahala filed answering briefs in opposition to Defendant's Motion to Dismiss. [Docket Nos. 19 and 20]. Defendant never responded to Plaintiffs' opposition to the Motion to Dismiss. The present Motion (under Rule 56 of the Federal Rules) is substantially similar to the Motion to Dismiss.

On June 16, 2010, the Debtors filed their Forty-Third and Forty-Fourth Omnibus Objections to Claims (the "Omnibus Objections"), in which the Debtors objected to claims filed by LTW Holders (including Plaintiffs). [Main Docket Nos. 4749 and 4750]. Thereafter, WMI consented to the treatment of the Adversary Proceeding as a class action under Rules 23(b)(1) and 23(b)(2) of the Federal Rules, withdrew the Motion to Dismiss and Omnibus Objections and agreed that the parties would engage in discovery.

On September 3, 2010, Plaintiffs filed an amended complaint (the "Class Complaint") in the Adversary Proceeding, the substance of which is substantially similar to the substance of the Original Complaint. [Docket No. 52]. On September 17, 2010, Defendant filed an Answer and Counterclaim to the Class Complaint (the "Original Answer") and on September 24, 2010, WMI filed its First Amended Answer and Counterclaim (the "Amended Answer"). [Docket Nos. 56 and 57]. Plaintiffs thereafter filed their First Response to WMI's First Amended Answer (the "First Response"). [Docket No. 61].

On October 29, 2010, Defendant filed the present Motion and set a response deadline for November 12, 2010. On November 10, 2010, after motion practice, Defendant finally consented to extend the response deadline to November 17, 2010.

2. Document Discovery

On May 25, 2010, nearly six (6) months ago, Broadbill served its First Request for Production of Documents on the Debtors (the "First Discovery Request"). On June 24 and 25, 2010, the Debtors served their Responses and Objections to the First Discovery Request (the "Discovery Response"). The Discovery Response contained generic "boilerplate" objections to the First Discovery Request. Defendant did not produce a single document in response to the First Discovery Request prior to the deadline under the Federal Rules.

On September 20, 2010, four (4) months following service of the First Discovery Request, Defendant finally provided Plaintiffs access to a data room containing hundreds of thousands of pages of documents in .pdf form (rather than a format typically utilized in litigation support software, such as .tif). Defendant has continued to upload .pdf documents to the data room, including as recently as the day it filed the Motion when it produced approximately 62,000

additional pages of documents.[5] On October 15, 2010, Defendant first provided a privilege log. See Exhibits C and D to the Silverstein Declaration. Among the relevant documents which Defendant has improperly withheld on privilege grounds are: (i) minutes of Dime Board meetings at which goodwill litigations were discussed; (ii) communications relating to goodwill litigations; and (iii) a draft prospectus relating to the issuance of the LTWs. See Exhibit C to the Silverstein Declaration, at pp. 25, 33, 34 and 54. To date, the vast majority of the documents produced by Defendant are unresponsive to the First Discovery Request.[6] Significantly, Defendant has improperly failed to produce any relevant electronic Communications (as defined in the First Discovery Request).

On October 15, 2010, Plaintiffs served their First Set of Interrogatories on Defendant (the "First Interrogatories"). On October 29, 2010, Defendant served their Responses and Objection to Plaintiffs' First Set of Interrogatories (the "First Interrogatories Objection"). The First Interrogatories Objection contained numerous generic "boilerplate" objections to the First Interrogatories.

Defendant, however, did make the following telling admissions: (i) "the WMI Board of Directors had no obligation to obtain the referenced advice [as to its duty] under Section 4.4 of the Amended Agreement, and no such advice was given;" (ii) "WMI never asked JP Morgan to assume any obligations related to the LTWs;" (iii) the last Dime board meeting at which the LTWs were discussed occurred in 2000; and (iv) WMI's Board never held a meeting at which the LTWs were discussed. See Exhibit F to the Silverstein Declaration, at pp. 12, 17 and 18.

On November 11, 2010, Plaintiffs served deposition notices and subpoenas on various individuals, including members of the Dime Board at or around the time of issuance of the

[5] Defendant supplemented the data room with additional .pdf documents on October 1, 2010, October 7, 2010, October 15, 2010 and October 29, 2010.

[6] For example, the LTWs were issued in 2000 and Defendant produced a substantial number of documents from the 1970's and 1980's.

LTWs, and members of Defendant's current board of directors. See Exhibit G to the Silverstein Declaration. Plaintiffs believe that these individuals have personal knowledge of certain material facts necessary for this Court to adjudicate the Adversary Proceeding on the merits. The depositions are currently scheduled to take place during mid-December 2010.

ARGUMENT

1. The Motion Should Be Denied Because Defendant Has Not Met Its Burden Under Rule 56.

a. The Standard of Review for Summary Judgment under Rule 56.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Levy v. Sterling Holding Co., LLC, 544 F.3d 493, 501 (3d Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). Moreover, where, as here, "motive and intent are at issue, summary judgment should be granted only in the clearest of cases." 10 COLLIER ON BANKRUPTCY ¶ 7056.04.

The party moving for summary judgment bears the initial burden of showing that no genuine issues of fact exists. Wachovia Bank, N.A. v. Commonwealth Sprinkler Co. (In re Commonwealth Sprinkler Co.), 296 B.R. 694, 699 (Bankr. E.D. Va. 2001). The movant's burden is a heavy one because the court must view the evidence in a light most favorable to the nonmoving party, In re Delta Mills, Inc., 404 B.R. 95, 105 (Bankr. D. Del. 2009), and any doubt as to the existence of genuine issues of fact must be resolved against the moving party. See In re Cantin, 114 B.R. 339, 341 (Bankr. D. Mass. 1990).

b. Defendant Has Failed to Demonstrate That No Genuine Issues of Material Fact Exist.

Defendant has failed to satisfy its burden under Rule 56 by a large margin. The Motion is a rehash of Defendant's legal arguments in the Motion to Dismiss and the Omnibus Objections. First, Defendant has already conceded that discovery is necessary and appropriate. Second,

discovery is in its "infancy." Third, Defendant has done everything in its power to stall this proceeding, including, among other things, consistent discovery delays. Defendant has much of the relevant discovery in its possession and Plaintiffs should be given adequate time and opportunity to examine the underlying facts.

The crux of Defendant's arguments is the intent of the Dime Board in issuing the LTWs and the proper interpretation of the related documentation. See, *inter alia*, Motion, at pp. 26, 28, 29, 32, 35 and 36. By referencing extrinsic evidence concerning the Dime Board's intent, Defendant has already acknowledged that the language of the Amended Agreement is not "clear and unambiguous" on its face. Given that there is a factual issue of intent, Defendant is nowhere near establishing that such issue is not in genuine dispute. Indeed, instead of filing an affidavit by an individual with personal knowledge of the Dime Board's intent, Defendant has only filed a declaration of its bankruptcy counsel (the "Shiffman Declaration"). The Shiffman Declaration attached (i) publicly filed documents relating to the LTWs that are already part of the record in the Adversary Proceeding, (ii) generic presentations or articles relating to "litigation participation securities" other than the LTWs, and (iii) pleadings in the Anchor Litigation. Defendant did not put forth any factual evidence with respect to the issues that are at the core of Plaintiffs' claims -- i.e., the intent of the Dime Board, the meaning of the LTW governing documents, and the actions taken (and not taken) by WMI's board of directors following the Debtors' Chapter 11 filing.

Defendant only recently identified, in the First Interrogatories Objection, fourteen (14) individuals that were involved in the creation, registration, or distribution of the LTWs. See Exhibit F to the Silverstein Declaration, at pp. 7-8. Remarkably, no affidavit from any of these

individuals is provided by Defendant.[7] If there were undisputed facts that evidenced the intent of the Dime Board, Defendant would have referenced such facts in the Motion. These circumstances alone demonstrate why summary judgment is improper and why Defendant has utterly failed to meet its burden under Rule 56.

Furthermore, the so-called "evidence" submitted by Defendant is inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Guider v. Patriot News, 33 Fed. Appx. 627, 630 (3rd Cir. 2002) (citing Fed. R. Evid. 801(c)). Media articles are hearsay when offered for the truth of their contents. Tracinda Corp. v. DaimlerChrysler AG, 362 F.Supp.2d 487, 497 (D. Del. 2005). Thus, they are inadmissible unless the authors are available for cross-examination and/or an exception to the hearsay rule otherwise applies. Id. (citing Wright v. Montgomery County, 2002 WL 1060528 (E.D. Pa. May 20, 2002)); Barnes Found. v. Township of Lower Merion, 982 F. Supp. 970, 995-996 (E.D. Pa. 1997). See also Campbell v. City of New Kensington, 2009 WL 3166276, at *8 (W.D. Pa. Sept. 29, 2009) (where articles were relied upon for the truth of the matters contained therein, they were "hearsay, and in some instances, hearsay within hearsay, and [could] not be considered on a motion for summary judgment.").

Much of Defendant's purported evidence consists of media articles and analyst presentations that were attached to a declaration filed by Defendant's bankruptcy counsel. Aside from the fact that such documents were not relevant to the arguments presented in the Motion - - because they did not relate to the LTWs issued by Dime - - the documents were submitted for the truth of the statements therein. Substantially all of the documents relate to "litigation participating securities" issued by financial institutions that Defendant concedes in its First Interrogatories Objection are not relevant to the issuance of the Dime LTWs. See Exhibit F to

[7] Plaintiffs are presently seeking depositions of many of these identified individuals. See Exhibit G to the Silverstein Declaration.

the Silverstein Declaration, at pp. 20-21. In sum, such documents are either irrelevant or constitute inadmissible hearsay and do not support summary judgment here.

2. The Motion Should Be Denied Pursuant to Rule 56(f).

Even if Defendant had introduced relevant and admissible evidence in support of its Motion, Rule 56(f) of the Federal Rules would require this Court to dismiss or continue the Motion to allow Plaintiffs to complete the discovery process.[8] Rule 56(f) motions are generally favored and should be liberally granted. Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 534 (5th Cir. 1999); See Gonzalez v. K-Mart Corp., 940 F. Supp. 429, 431 ("Courts should generally grant Rule 56(f) requests" unless the party has been dilatory in conducting discovery or is attempting to delay the case). This is because summary judgment is inappropriate when the bulk of discovery has not yet been undertaken in a case. Mauney v. Imperial Delivery Servs., 865 F.Supp. 142, 148 (S.D.N.Y. 1994).

As set forth above and in the Silverstein Declaration, filed concurrently herewith and incorporated herein by reference, the discovery process in this Adversary Proceeding is in the "early stages." Plaintiffs must be given the opportunity to complete the discovery process.

3. Defendant's Arguments on the Merits Should Be Rejected.

a. WMI Has Breached Section 4.4 of the Amended Agreement.

Defendant argues that, as a matter of law, it has not breached Section 4.4 of the Amended Agreement because "nothing in Section 4.4 requires WMI or its board of directors to do anything." See Motion, at p. 27. Contrary to Defendant's claim, however, Section 4.4 of the Amended Agreement, when understood in conjunction with the other sections of the Amended

[8] Rule 56(f) is made applicable to this action pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure. See Fed. R. Bankr. P. 7056. Rule 56(f) states that: "[i]f a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order." Fed. R. Civ. P. 56(f).

Agreement, imposes a duty on WMI's board to act in good faith to protect the rights of LTW Holders.

Section 4.4 of the Amended Agreement provides:

> 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 rights of the Holders of the LTWs 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.

The purpose of the Section 4.4 adjustment is set forth in its opening phrase: "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 rights of the Holders of the LTWs in accordance with the essential intent and principles of such provisions . . .". Yet, according to Defendant, use of the word "may" in the latter part of Section 4.4 purportedly makes clear that Defendant and its board have no duty to make any kind of "adjustment," even if the LTW Holders' rights needed protection.

Contrary to Defendant's claim, the correct reading of Section 4.4 is that the purpose of the word "may" is not to absolve WMI's board of any responsibility to protect the rights of LTW Holders, but, rather, to make clear that WMI's board would not be required to solicit the consent of the LTW Holders in order to make an adjustment. Immediately after the word "may" is the phrase "without the consent of the Holders…" The word "may" makes perfect sense in this context because the consent of the holders otherwise would have been required. Specifically, Section 7.2 of the Amended Agreement states, in pertinent part: "[a]ny 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

word "may" in Section 4.4 must be interpreted as carving out one particular instance in which the consent of Holders is not required.

According to Defendant, because the wholly unrelated Golden State agreement (as referenced in the Motion) contains the word "shall" rather than "may," and because the Dime Board was allegedly aware of the Golden State agreement, the meaning of Section 4.4 is purportedly clear and unambiguous. See Motion, at pp. 28-30. Defendant claims that this change from "shall" to "may" is the only important difference between the Golden State agreement and the Original Agreement. Id, at pp. 28-29. However, another important change - - that Defendant ignores - - is that, in the Original Agreement, the word "may" in Section 4.4 is followed immediately by the phrase "without the consent of the Holders." That phrase appears nowhere in the corresponding section of the Golden State agreement. Id. Moreover, Defendant's speculative argument lacks any relevant evidence demonstrating the intent of the drafters of the LTWs, or why the language is different between the two agreements. In other words, Defendant is merely guessing at what the relationship between the Golden State agreement and the LTWs might have been. Indeed, it is far more likely that, since there is not a shred of evidence that the drafters of the LTWs intended or considered changing the overall effect of Section 4.4, they made a minor wording change to address the LTW Holder consent issue, as explained above, without any intent to change the effect or the obligation of the Board to make adjustments.

Plaintiffs' interpretation of Section 4.4 is buttressed by Section 5.2(a) of the Amended Agreement, which makes clear that the Agent under the Amended Agreement has no duties to protect the rights of LTW Holders (as contrasted, for example, with an indenture trustee, whose conduct is governed by the Trust Indenture Act of 1939, 15 U.S.C. § 77). Section 4.4 must be interpreted as "tasking" WMI's Board with protecting LTW Holders, since the Agent does not act unless instructed to by WMI. Section 5.2(a) of the Amended Agreement states:

> 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.

(emphasis added)

Taken together, Sections 4.4 and 5.2(a) make clear that WMI's Board, rather than the Agent, was responsible for protecting the rights of the LTW Holders if an event occurred for which an Adjustment is required. The intent of the LTWs was unquestionably to provide the LTW Holders with 85% of the net proceeds of the Anchor Litigation. Any attempt to cancel the LTWs and/or WMI's common stock under the Proposed Plan would be an "event" within the meaning of Section 4.4 of the Amended Agreement requiring Defendant's Board to act to protect the rights of the LTW Holders. As a result, the LTW Holders are entitled to a claim under the Proposed Plan in an amount equal to 85% of the net proceeds of the Anchor Litigation and WMI's Board is required to act to ensure that occurs.

Further, Defendant would have this Court believe that Section 4.4, which includes terms like "good faith," "intent and principles" and "protect the rights," was included in the Amended Agreement solely to provide the Board with the "option" of taking action to protect the rights of the LTW Holders. Such a reading, however, makes no sense, since Section 4.4 would then serve no purpose. It is well established that every word, phrase or term of a contract must be given effect and meaning. Galli v. Metz, 973 F.2d 145 (2d Cir. 1992). A court should interpret a contract in a manner that gives reasonable meaning to all of its provisions. Trident Center v. Connecticut General Life Ins. Co., 847 F.2d 564 (9th Cir. 1988); Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 117 F.3d 1328 (11th Cir. 1997).

Defendant's interpretation of Section 4.4 is also disingenuous. Defendant admits that the WMI Board did not ask for, nor receive, the advice required by Section 4.4, and never even considered the issue of making an Adjustment: "the WMI Board of Directors had no obligation to obtain the referenced advice [as to its duty] under Section 4.4 of the Amended Agreement, and no such advice was given." See Exhibit F to the Silverstein Declaration, at p. 17. Thus, WMI's Board never considered the issue at all, as contrasted with considering the issue and exercising its so-called "option" to do nothing when something was required. The failure to even consider the issue undermines Defendant's flawed interpretation and is itself a breach of the WMI Board's duty to the LTW Holders. In any event, whether WMI's Board acted (or failed to act) in good faith is a question of fact that will be addressed in the discovery process and further demonstrates that summary judgment cannot be granted.

In sum, when interpreting the Amended Agreement "to give reasonable meaning to all of its provisions," it is clear that Defendant's reading of Section 4.4 is unsupportable. Section 4.4 exists to provide a mechanism by which, without soliciting the consent of the LTW Holders, WMI's Board can, in good faith, take action to protect the rights of LTW Holders. WMI's and its Board's attempt to evade the intent of the Amended Agreement is a breach of their express duty to the LTW Holders.

b. Defendant Has Not Established that Section 4.2 of the Amended Agreement Was Not Breached.

Contrary to Defendant's assertion,[9] Plaintiffs have not abandoned their claim that Defendant breached (or will breach) Section 4.2(d) of the Amended Agreement. Defendant's argument that the language of Section 4.2(d) confirms no breach occurred is meritless. Section 4.2(d) provides:

> 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.

Defendant is a bank holding company. Its only material assets are WMB stock. Accordingly, a sale of all or substantially all of the assets of WMB is a sale of "all or substantially all" of Defendant's assets, notwithstanding that Defendant retains stock in WMB.[10] Defendant admits that, on September 25, 2008, substantially all the assets of WMB were sold to JPMorgan. See Exhibit F to the Silverstein Declaration, at p. 16. Since JPMorgan received Defendant's assets as a result of a Combination, Defendant was required, under Section 4.2(d), to cause JPMorgan to assume the Amended Agreement.

In the Proposed Plan, pursuant to the Global Settlement Agreement, Defendant seeks a result opposite than that mandated by Section 4.2(d), since WMI is attempting to retroactively transfer the Anchor Litigation, along with substantially all of its remaining assets, to JPMorgan free and clear of the liens, claims and interests of the LTW Holders. See Disclosure Statement, at p. 12. That action itself - - the Global Settlement - - may be a Combination within the meaning

[9] In footnote 8 of the Motion, Defendant contends that Plaintiffs "abandoned" the argument that Defendant breached (or will breach) Section 4.2(d) of the Amended Agreement. Defendant also argues that this claim is "utterly frivolous." See Motion, at p. 30. WMI claims that it has not breached section 4.2(d) in that JPMorgan does not qualify as a "Successor Company," because WMI did not sell all or substantially all of its property to JPMorgan. Id.

[10] In any event, after the September 2008 sale, WMB became a shell and WMI recently filed a motion to abandon its stock interests in WMB, which WMI admits is worthless. [Main Docket No. 5885].

of the Amended Agreement. As noted, Defendant has conceded that it never asked, nor does it intend to cause, JPMorgan to assume the obligations under the Amended Agreement. See Exhibit F to the Silverstein Declaration, at p. 18 ("WMI responds that WMI never asked JP Morgan to assume any obligations related to the LTWs."). But, tellingly, JPMorgan assumed other liabilities under the Global Settlement Agreement relating to assets purchased thereunder from WMI. See Disclosure Statement, at p. 13. It is strange that the Section 4.2(d) obligation is the one liability related to a purchased asset that was ignored by the Debtors and JPMorgan. Further, Defendant failed to include the Amended Agreement as an "assumed agreement" in the Plan Supplement it filed on October 29, 2010. [Main Docket No. 5724]. As such, it is clear that Defendant is rejecting the Amended Agreement and its affirmative obligations to the LTW Holders thereunder, giving rise to claims by LTW Holders against WMI.

c. Defendant Has Not Established that Sections 4.2(b) and (c) of the Amended Agreement Were Not Breached.

Finally, aside from the Section 4.2(d) argument, the LTW Holders have a claim because of Defendant's breach of Sections 4.2(b) and 4.2(c) of the Original Agreement. These sections provide that, if there was a Combination, LTW holders were required to get the same type of consideration offered to Dime shareholders. See Exhibit Q to the Silverstein Declaration, at §§ 4.2(b) and 4.2(c). When WMI purchased Dime, WMI offered Dime shareholders their choice of cash (up to $1.4 billion) or WMI common stock (92.3 million shares).[11] It appears as though Dime shareholders electing cash received the entire merger consideration in cash. It is undisputed that WMI's purchase of Dime was a Combination within the meaning of the Original Agreement. As a result, LTW holders have since been (and currently are) entitled to receive what the Dime shareholders received in that Combination - - i.e., an option to take cash or WMI

[11] This fact became known to Plaintiffs only recently when documents were produced by Defendant in the Adversary Proceeding.

stock. A failure to provide such option to the LTW Holders (in this circumstance, cash) constitutes a current breach giving rise to a claim by the LTW Holders against WMI.

d. Defendant Has Not Established, As a Matter of Law, that the LTWs Constitute "Equity Securities," Because the LTWs are not "Equity Securities."

Defendant argues that it is entitled to summary judgment because the LTWs constitute "equity securities" (and, thus, LTW Holders hold equity interests in WMI). WMI's argument that the LTWs constitute equity securities can be separated into three distinct points. First, WMI alleges that, because "warrants to purchase stock" are "equity securities," the LTWs must be equity securities. Second, WMI asserts that, because other parties that issued "litigation participation securities" drafted their respective "litigation participation" agreements to grant a direct right to the proceeds of the underlying litigation, the failure by Dime to grant the LTW Holders a direct right to the Anchor Litigation proceeds unequivocally evidences that Dime intended the LTWs to be equity securities. Third, because the LTWs were structured in a tax-efficient manner, the treatment of the LTWs under the Internal Revenue Code shows that the LTWs constitute equity securities.

Defendant's first argument is that the LTWs are "equity securities" because "warrants" allegedly constitute "equity securities" under Section 101(16) of the Bankruptcy Code. Plaintiffs, however, do not dispute (and have not alleged otherwise in this Adversary Proceeding) that the Bankruptcy Code defines "equity security" to include "warrants." This fact, however, does not support Defendant's argument because the LTWs are not "warrants" to purchase equity securities as that term is used in Section 101(16) of the Bankruptcy Code. A stock "warrant" is defined as "a contract entitling the holder to purchase a specified number of shares of stock for a specific price during a designated time period." Reiss v. Financial Performance Corp., 764 N.E.2d 958, 960 (NY 2001); see also Robert Half International, Inc. v. Franchise Tax Board, 78

Cal.Rptr.2d 453, 454 (Cal. Ct. App. 1998) ("A warrant is simply an option to purchase the shares of a corporation at a specified price and for a specified period of time."). The plain language of the LTWs and the Amended Agreement makes it clear that the only similarity the LTWs have with stock warrants is the label given to them. The LTWs do not contain the three characteristics that define stock "warrants": they are not exercisable for a specified number of shares, they do not contain a specified exercise or purchase price, and they have no fixed term.

Defendant further argues that the LTWs are "equity securities" because they represent "rights to purchase" WMI common stock. A review of the terms of the LTWs makes it clear, however, that the LTWs are not rights to "purchase" securities. As noted above, the LTWs have no exercise or purchase price. See Exhibit R to the Silverstein Declaration, at § 3.1. In fact, no consideration whatsoever must be paid by an LTW Holder to realize the value from an LTW. An LTW Holder must simply surrender the LTW to WMI in order to receive the value of the Anchor Litigation recovery. Id., at § 3.4. An equity or stock warrant would provide the holder of the warrant with the right to purchase an equity security for a defined purchase price. Here, LTW Holders have no right to "purchase" anything by virtue of their LTW ownership.[12] As such, the LTWs are not "rights to purchase" equity securities and are not thereby "equity securities." LTWs are akin to a "contingent value right" based on the net proceeds from the Anchor Litigation, where Dime common stock was used as the initial currency to convey the value of such proceeds. As set forth in Sections 4.2, 4.3, 4.4. and 4.5 thereof, however, the Amended Agreement specifically contemplates paying the Anchor Litigation proceeds to the LTWs in property other than stock. Indeed, as previously explained, because of the Dime/WMI merger, the LTWs are now payable in cash - - not WMI common stock.

[12] "Purchase" is defined as "[t]he act or an instance of buying." See Black's Law Dictionary, at p. 1270.

Defendant claims that the LTWs are "equity securities" because some issuers of "litigation participation securities" chose to structure securities to provide a direct right to cash proceeds from the Anchor Litigation and, according to Defendant, the Dime Board did not. Defendant cites to no factual or evidentiary support, however, for this proposition.

Defendant's third argument also relates to the intent of the Dime Board in issuing the LTWs. Defendant argues that the LTWs were intended to be "equity securities" because "the distribution of LTWs to a U.S. holder should be treated as a tax-free stock dividend under Section 305(a) of the Internal Revenue Code." See Motion, at pp. 33. Actions taken for tax reasons, however, do not change the character and nature of the LTWs or the Amended Agreement for other purposes. In any event, Defendant does not cite to any facts or evidence to support its argument. Specifically, Defendant does not include an affidavit by any person - - i.e., a member of the Dime Board or a person that participated in drafting the Original Agreement or related documents - - with actual knowledge of the intent behind the issuance of the LTWs. Further, because Defendant attempts to use the tax attributes of the LTWs to establish the intent of the Dime Board in issuing the LTWs, it concedes that analysis of the LTWs requires going beyond the language of the Original Agreement.

Defendant makes much of the fact that the LTWs are nominally called "warrants." Referring to the trademarked term for a financial product marketed by an investment bank, however, is hardly the basis to support a legal argument as to the intent and proper characterization of an agreement. Also, pertinent case law and the LTWs themselves show that they are not "equity securities," regardless of what they are called. According to the Third Circuit, the "determinative inquiry" in assessing whether a particular instrument is equity "is the intent of the parties as it existed at the time of the transaction." In re Submicron Sys. Corp., 432 F.3d 448, 457 (3d Cir. 2006). The language of the Registration Statement indicates that the

intent behind the issuance of the LTWs was "to pass along the potential value of our claim against the government to our existing stockholders . . ." and that "[a]n investment in the LTWs involves different risks and considerations from an investment in the common stock of a savings and loan holding company . . .". See Exhibit P to the Silverstein Declaration, at pp. 1 and 6. The Risk Factors contained in the Registration Statement also do not mention that the issuer could file for bankruptcy and its common stock would be rendered worthless thereby affecting the value of the LTWs.[13] Id.

The LTWs also lack fundamental characteristics of "equity securities." The holders of LTWs have no voting or other corporate governance rights that are characteristic of equity securities. Further, the LTWs have no liquidation preferences or rights to dividends or distributions. Paramountly, the LTWs also do not involve any equity risk, which is the defining characteristic of an "equity security." The aggregate value of shares to be issued pursuant to the LTWs does not change upon a change in value of WMI's common stock. The value of the LTWs would be unaffected if Dime's or WMI's common stock was valued at $0.01 per share or $100.00 per share - - LTW Holders were to receive the value of the net proceeds of the Anchor Litigation regardless of the underlying value of the Dime or WMI equity. Moreover, WMI's common stock was traded on the New York Stock Exchange and the LTWs were traded on NASDAQ. The market price of the LTWs was a function of the anticipated recovery in the Anchor Litigation (rather than the financial performance of WMI or the value of WMI's common stock). Creditors of WMI did not lend money to WMI based on the value of the Anchor Litigation. That contingent asset was spun off for the benefit of the LTW Holders years before WMI acquired Dime. Each of these characteristics (or lack thereof) reflects that the LTWs are not "equity securities."

[13] Indeed, as discussed above, Section 4.4 of the Amended Agreement provides, to the contrary, a mechanism by which WMI's board would protect the value of the LTWs.

Finally, Defendant's own positions in its chapter 11 case support the assertion that the LTWs do not constitute "equity securities." On October 10, 2008, Defendant and its affiliated debtor filed their Notice of Filing of List of Equity Holders (the "List of Equity Holders") [Main Docket No. 59]. The List of Equity Holders lists the names of all known holders of WMI's equity securities, and includes a comprehensive 700 page list of holders of WMI's common and preferred stock. The List of Equity Holders nowhere references the LTWs. (Further, the WMI capital structure set forth in the Disclosure Statement approved by this Court and distributed to Defendant's creditors and equity holders does not list the LTWs as "equity." See Disclosure Statement, at pp. 42-43.)

e. Defendant Has Not Established, as a Matter of Law, that Sections 4.2, 4.3 and 4.4 of the Amended Agreement Do Not Provide a Mechanism for Compensating LTW Holders in a Currency Other than WMI Common Stock.

Defendant argues that the LTW Holders do not have "claims" against Defendant's bankruptcy estate because "nothing in the Amended Agreement provides LTW Holders with any rights other than contingent rights to purchase WMI shares." See Motion, at pp. 35. The language of the Amended Agreement, however, specifically negates this argument. As set forth above, the provisions of Article IV - - not coincidentally entitled "Adjustments" - - describe various situations in which LTW Holders would be entitled to receive compensation or value other than WMI common stock.

Defendant ignores the plain language of Sections 4.2, 4.3 and 4.5 of the Amended Agreement, which provide, *inter alia*, that under various circumstances the LTW Holders might receive "other securities" [i.e., other than WMI common stock], "property," or "cash."[14] See Exhibit R to the Silverstein Declaration, §§ 4.2, 4.3 and 4.5. In addition, Section 4.4 of the

[14] For example, as described above, under sections Section 4.2 and 4.3 of the Amended Agreement, LTW Holders have the right to receive whatever holders of issuer common stock receive in connection with a Combination and, as noted, because of the cash paid by WMI to Dime shareholders, the LTWs are now payable in cash.

Amended Agreement provides a general mandate - - which is unquestionably not limited to issuing WMI shares - - for Defendant's Board to make adjustments when the foregoing provisions are not applicable or, if applicable, would not preserve the intent and principles of the Amended Agreement that the LTW Holders are entitled to receive value equal to 85% of the net recovery in the Anchor Litigation.

Accordingly, Defendant's contention that the Amended Agreement provides LTW Holders with nothing more than the limited contingent right to receive WMI common stock is plainly wrong and should be rejected.

f. Defendant Has Not Established that Section 6.3 of the Amended Agreement Was Not Breached.

Defendant argues that it did not breach Section 6.3 of the Amended Agreement because (i) Section 6.3 does not impose any requirements on WMI, (ii) LTW holders do not have rights thereunder that could be violated and (iii) "to the extent that JPMorgan is found to be WMB's successor-in-interest by the court in the Anchor Litigation, it falls well within Section 1.1's definition of 'Bank . . . '". See Motion, at pp. 25-26.

Defendant's first argument is belied by its statements in the Motion and elsewhere. In footnote 2 of the Motion, Defendant admits that "WMI has claimed in litigation with JPMorgan that WMI is still entitled to the proceeds of the Anchor Litigation." See Motion, at p. 13. In the Debtors' approved Disclosure Statement, Defendant concedes that it proposes to transfer its interest in the Anchor Litigation to JPMorgan. See Disclosure Statement, at p. 12. As evidenced by these statements, Defendant has consistently asserted that it, not WMB, is the true "owner" of the Anchor Litigation proceeds. See Exhibits H and I to the Silverstein Declaration. Thus, the Section 6.3 covenant cannot be interpreted as preventing only the Bank from acting, when WMI has claimed to be the relevant party in control of the Anchor Litigation. Id. The Section 6.3 covenant must also apply to WMI. Also, as noted above, WMI is a bank holding company with

no material assets other than WMB. WMI is therefore responsible for WMB's actions under the Amended Agreement.

Defendant's second argument also fails, based on the plain, uncontroverted language of Section 6.3. Section 6.3 states:

> 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.

The first sentence of Section 6.3 states, without qualification, that WMB is required to retain control over and ownership of the recovery from the Anchor Litigation. A natural reading of this language shows that Section 6.3 exists to protect the LTW holders from a sale or transfer of the Anchor Litigation that does not constitute a Combination, because such a transfer may eliminate or avoid the occurrence of a Trigger. Without this explicit provision (and assuming the Adjustments section of Article IV did not exist), WMB could try to frustrate the intent of the LTWs by selling the Anchor Litigation for no reason other than to avoid a Trigger event. To read the provision in the manner suggested by Defendant would lead to an absurd result.

In fact, Section 6.3 of the Amended Agreement protects the LTW Holders from precisely what occurred in September 2008 (or what WMI is attempting to do under the Global Settlement Agreement) - - transferring control over, and the imminent recovery from, the Anchor Litigation to JPMorgan without compensating the LTW Holders accordingly. As a result, the LTW holders are entitled to receive the value of the net proceeds of the Anchor Litigation, the proceeds received by WMI on account of such sale or transfer, or a claim against WMI.

g. Defendant Has Not Established, as a Matter of Law, that the Occurrence of "Trigger" Events Is a Prerequisite for LTW Holders to Hold Claims Against Defendant.

Defendant argues that, notwithstanding whether it breached the Amended Agreement or whether the LTWs constitute equity securities, neither Plaintiffs nor LTW Holders are entitled to any recovery based on the LTWs "because none of the Trigger events required for exercise of the LTWs have occurred." See Motion, at p. 36. Defendant, however, misreads (or misstates) Plaintiffs' arguments. As specifically defined in the Amended Agreement, the "Trigger" events are the following: (i) receipt of the amount recovered from the Anchor Litigation; (ii) calculation of the amount of the Adjusted Litigation Recovery (as defined in the Amended Agreement); and (iii) receipt of all regulatory approvals necessary to issue shares of WMI common stock. See Exhibit R to the Silverstein Declaration, at p. 4.

Plaintiffs do not contend that the "Trigger" events, as specifically defined in the Amended Agreement, have occurred.[15] While a minimum recovery amount of $356 million has been set with respect to the Anchor Litigation (plus the tax gross-up amount), there is no question that the United States Government has yet to pay damages as a result of such decision. This fact, however, is not determinative of Plaintiffs' claims. Under black letter New York law (which governs the Amended Agreement), a party to a contract containing a condition precedent has "an implied obligation 'not to do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract' or to act in such a way as to 'frustrate[ ] or prevent[ ] the occurrence of the condition.'" Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d 200, 212 (2d Cir. 2002), citing A.H.A. Gen. Constr., Inc. v. N.Y. City Hous. Auth., 92 N.Y.2d 20, 31 (1998); See Consolidated Edison, Inc. v. Northeast Util., 426

[15] Plaintiffs argue in the alternative below that a sale of the Anchor Litigation to JPMorgan should be considered a trigger because it reflects a monetization of the Anchor Litigation and the LTW Holders were promised 85% of the net recovery thereof.

F.3d 524, 529 (2d Cir. 2005); See Rus, Inc. v. Bay Industries, Inc., 322 F.Supp.2d 302, 311 (S.D.N.Y. 2003). A party taking such action commits an "anticipatory breach" of the contract giving rise to damages on the part of the injured party.

By transferring the Anchor Litigation proceeds to JPMorgan (without requiring JPMorgan to assume the obligations of WMI under the Amended Agreement), Defendant has breached the Amended Agreement. By proposing a plan to cancel the LTWs for no compensation or consideration, Defendant has breached the Amended Agreement. By not paying LTW Holders cash for the LTWs as was required by Sections 4.2(b) and 4.2(c), Defendant has breached the Amended Agreement. By not making the Section 4.4 Adjustment, Defendant has breached the Amended Agreement. By rejecting its obligations under the Amended Agreement, Defendant has breached the Amended Agreement. All of these constitute present claims for the LTW Holders, whether or not the "Trigger" events, as defined in the Amended Agreement, have occurred.[16]

h. Defendant Has Not Established, as a Matter of Law, that Section 510(b) Applies to the Claims of LTW Holders.

Defendant's final argument is that any claims that the LTW Holders have against Defendant must be subordinated to the claims of Defendant's general unsecured creditors under Section 510(b) of the Bankruptcy Code. In support of its argument that Section 510(b) applies to the claims of LTW Holders, however, Defendant does not cite to any persuasive authority.

[16]As an alternative argument, if the "Trigger" events, as defined in the Amended Agreement, are rendered impossible by Defendant's conduct, this Court, as a court of equity, should consider the receipt of proceeds or value from the sale or transfer of the Anchor Litigation by WMI to be deemed a "trigger" under the Amended Agreement. The "triggers" can generally be broken down to three events: (i) receipt of value on account of the Anchor Litigation; (ii) calculation of the amount to be distributed to LTW Holders - - i.e., netting out taxes, issuance and registration costs, and the 15% of the proceeds retained by WMB; and (iii) acquisition of any regulatory approvals required to issue the Anchor Litigation property to the LTW Holders. See Exhibit R to the Silverstein Declaration, §1.1. Once value was (or is) received from JPMorgan on account of the transferred Anchor Litigation, the "trigger" should be deemed satisfied, since the general purpose of the "trigger" requirements will have occurred. At such point, Defendant's Board has an obligation to effect the purposes and intent of the LTWs. To the extent that Defendant's Board does not take such actions, the LTW Holders should be entitled to a claim for damages equal to the value of the net proceeds received for the sale or transfer of the Anchor Litigation to JPMorgan.

Rather, Defendant disingenuously miscites In re Telegroup, Inc., 281 F.3d 133 (3d Cir. 2002), for the propositions that "section 510(b) encompasses all potential claims arising from the purchase or sale of securities," See Motion, at p. 38, and "the relevant inquiry is whether 'the claim would not exist *but for* claimants' purchase of debtor's stock." See Motion, at p. 38. In fact, Telegroup does not stand for either proposition.

In Telegroup, the Third Circuit held that a claim for breach of a provision in a stock purchase agreement requiring the issuer to use its best efforts to register its stock and ensure that the stock is freely tradeable "arises from" the purchase of the stock, for purposes of Section 510(b). In reaching its holding, the Third Circuit stated that, in order for a claim to "arise from" the purchase or sale of stock such as to render it subject to Section 510, "there must obviously be some nexus or causal relationship between the claim and the sale of the security." Telegroup, 281 F.3d at 138. Under Telegroup, there is no "per se" rule as to when a claim "arises from" the purchase or sale of stock and is thus subject to Section 510(b). The Court must look at the facts of the case to determine if the policies underlying Section 510(b) require subordination of the claims. Here, as set forth at length above, there is no nexus or causal relationship with a purchase or sale of anything, let alone stock. The LTWs were distributed for no consideration to Dime's stockholders as a tax-free dividend and the LTWs do not have a purchase or exercise price. The purpose of the LTWs was to spin off a contingent asset to shareholders of an entity that was subsequently acquired by Defendant. WMI acquired Dime subject to the rights of LTW Holders to receive 85% of the net proceeds in the Anchor Litigation.

Courts look to the legislative history to aid in their interpretation of Section 510(b) because the phrase "arising from" is ambiguous. See Telegroup, 281 F.3d, at 138-39. "Congress enacted [Section] 510(b) to prevent disappointed *shareholders* from recovering their investment loss by using fraud and other securities claims to bootstrap their way to parity with general

unsecured creditors in a bankruptcy proceeding." Id., at 142 (emphasis added). This intent is echoed in the proposal on which Section 510(b) was based. Id., at 141 ("[T]he Slain and Kripke proposal that inspired [Section] 510(b) appears intended to prevent disappointed shareholders from recovering the value of their investment by filing bankruptcy claims predicated on the issuers unlawful conduct at the time of issuance, when the shareholders assumed the risk of business failure by investing in equity rather than debt instruments."). "Section 510(b) thus represents a Congressional judgment that, as between shareholders and general unsecured creditors, it is shareholders who should bear the risk of illegality in the issuance of stock in the event the issuer enters bankruptcy." Id.

This Court has held that Section 510(b) was intended to "prevent *shareholders* . . . from filing claims as creditors when the debtor does fail." Official Committee of Unsecured Creditors v. American Capital Financial Services, Inc. (In re Mobile Tool International, Inc.), 306 B.R. 778 (Bankr. D. Del. 2004) (emphasis added) (holding that claims based on ownership of promissory notes were not subject to Section 510(b)). This is so because "equity investors choose to participate in profits and, in exchange, assume the risk of business failure," Raven Media Invs., LLC. v, DirecTV Latin Am., LLC (In re DirecTV Latin Am., LLC.), 2004 WL 302303, at *3 (D. Del. Feb. 4, 2004) (citing Telegroup, 281 F.3d, at 142), and "[t]he statute was designed to prevent *stockholders* from reaping the benefit of unlimited profits without also fully accepting the inherent risks of ownership, namely loss of their investment." In re Mobile Tool International, 306 B.R. at 782 (emphasis added).[17]

Here, LTW Holders did not bargain for the potential for equity profit (and did not take any equity risk). The value of the LTWs would be unaffected if Dime's or WMI's common

[17] Thus, where, for example, an issuer redeems stock in exchange for a promissory note or issues a note as a dividend, the note "would not exist" but for the stockholders' ownership of such stock. Yet, case law is clear that such note is not subject to subordination under Section 510(b). See In re MarketXt Holdings Corp., 361 B.R. 369, 389 (Bankr. S.D.N.Y. 2007) and the cases cited therein.

stock was valued at $0.01 per share or $100.00 per share - - LTW Holders were to receive the value of the net proceeds of the Anchor Litigation regardless of the underlying value of the Dime or WMI equity. WMI's common stock was traded on the New York Stock Exchange and the LTWs were traded on NASDAQ. The market price of the LTWs was a function of the anticipated recovery in the Anchor Litigation (rather than the financial performance of WMI or the value of WMI's common stock).

In addition, in order for a claim to be subject to Section 510(b), "there must *obviously* be some nexus or causal relationship between the claim and the sale of the security." Telegroup, 281 F.3d at 138 (emphasis added). The Court of Appeals for the Third Circuit has applied a "hypothetical securities fraud test" to determine whether claims should be subordinated under Section 510(b). DirecTV, 2004 WL 302303, at *3. Under this test, subordination is not proper "where the claim lacks any causal relationship to the purchase or sale of stock and when subordinating the claims would not further the policies underlying § 510(b)." Telegroup, 281 F.3d at 144. In addition to the requirements above, a court should also look at whether the claimant sought to hold an equity interest in the debtor, See DirecTV, 2004 WL 302303, at *3, because the risk of business failure simply should not be imposed upon a party that did not contract for it. Id., at *4.

Here, holders of LTWs are not stockholders or equity holders. Section 6.1 of the Amended Agreement states:

> Holders 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.

The Registration Statement states:

> An investment in the LTWs involves different risks and considerations from an investment in the common stock of a savings and loan holding company such as Dime Bancorp.[18]

Plaintiffs' claims also do not have a "nexus or causal relationship between the claim and the sale of a security." Plaintiffs' claims are based on breaches of the Amended Agreement that do not relate in any way to the "purchase" or "sale" of either the LTWs or WMI's common stock. The LTWs were issued for no consideration. As such they were neither purchased by the original holders of LTWs nor sold by Dime. Further, the LTWs have no exercise or purchase price. See Exhibit R to the Silverstein Declaration, § 3.1. An LTW Holder must simply surrender the LTW to WMI in order to receive property equal to 85% of the net value of the Anchor Litigation recovery. Id., § 3.4. As such the LTW Holders have no right to "purchase" anything by virtue of their LTW ownership and WMI has no obligation to "sell" anything upon surrender of the LTWs.

Subordination of Plaintiffs' claims would not further the policies underlying Section 510(b). As stated above, "[t]he statute was designed to prevent stockholders from reaping the benefit of unlimited profits without also fully accepting the inherent risks of ownership, namely

[18] Finally, as highlighted by WMI in its Motion to Dismiss, the LTWs have no liquidation preferences or rights to dividends or distributions. See Motion to Dismiss, at p. 15.

loss of their investment." Mobile Tool International, 306 B.R. at 782. The only risk of loss that the LTW holders accepted was an adverse ruling in the Anchor Litigation.[19] The Amended Agreement specifically states that LTW Holders are not "stockholders." See Exhibit R to the Silverstein Declaration, § 6.1. Further, the Risk Factors contained in the Registration Statement do not mention that the issuer could file for bankruptcy and its common stock would be rendered worthless. See Exhibit P to the Silverstein Declaration. The Amended Agreement governing the LTWs does not provide that the LTWs will be rendered worthless or cancelled if WMI's equity is cancelled.[20] It is clear that Defendant took ample measures to ensure that the LTW Holders were on notice that they were not equity holders in WMI. Defendant cannot now seek to render the LTWs worthless based on a bogus claim that the LTW Holders knowingly "accepted the inherent risks of ownership."

[19] Indeed, now that the Anchor Litigation has a minimum value of approximately $356 million - - and a maximum value of $419 million, plus the tax gross-up amount in excess of $100 million - - the risk that the LTW Holders bore no longer exists.

[20] In fact, the Amended Agreement contains a mechanism for providing value to LTW Holders if an event - - such as a bankruptcy filing - - occurs for which the "successor" provisions of Amended Agreement would not adequately protect the rights of the LTW Holders. See Exhibit R to the Silverstein Declaration, § 4.4.

CONCLUSION

Defendant has not met its burden under Rule 56(a). Genuine issues of material fact unquestionably exist in this Adversary Proceeding with respect to, among other things, the intent of the Dime Board in issuing the LTWs, proper interpretation of the related documentation, and the actions taken (or not taken) by WMI's Board since its Chapter 11 filing. The Motion is also procedurally premature, as the discovery process in this Adversary Proceeding is in its "infancy," due, in large part, to Defendant's misconduct. Finally, Defendant's arguments on the merits of Plaintiffs' claims either mischaracterize the facts or misstate applicable law. Defendant's motion for summary judgment must be (i) denied under Rule 56(a) or (ii) denied pursuant to Rule 56(f) to allow Plaintiffs to complete the discovery process. Accordingly, Plaintiffs respectfully request that this Court (i) deny Defendant's Motion for summary judgment pursuant to Rule 56 of the Federal Rules and (ii) grant such other and further relief as this Court deems just and proper.

[Signature Page Follows]

Dated: November 17, 2010

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