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) **Hearing Date: TBD** **Objection Deadline: TBD**

EMERGENCY MOTION TO STRIKE DECLARATION OF CHARLOTTE CHAMBERLAIN AND TO PRECLUDE HER FROM TESTIFYING AT THE CONFIRMATION HEARING

Plaintiffs, Broadbill Investment Corp., Nantahala Capital Partners, LP and Blackwell Capital Partners, LLC (collectively, "Plaintiffs"), Class Plaintiffs, on behalf of themselves and all holders of Litigation Tracking Warrants ("LTWs"), by their undersigned counsel, hereby file this emergency motion ("Motion") to strike the Declaration ("Declaration") of Charlotte Chamberlain ("Chamberlain") dated, and filed on, November 29, 2010 by the Debtors in the above-captioned cases, and to preclude her from testifying at the Confirmation Hearing scheduled for this week.

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PRELIMINARY STATEMENT

1. On November 29, 2010 the Court held a conference (the "November 29 Conference"), among other things, to discuss scheduling relating to the Debtors' summary judgment motion (the "Summary Judgment Motion") in the above-captioned adversary proceeding. At the November 29 Conference, the Court scheduled oral argument on the already briefed and fully submitted Summary Judgment Motion for December 1, 2010. The Court also scheduled the Confirmation Hearing to commence on December 2, 2010. Further, the Court indicated that it would not allow parties to submit evidence in connection with summary judgment motions before the Court. After the November 29 Conference, the Debtors filed in the above-captioned cases (but not in the above-captioned adversary proceeding)[1] the Declaration and added Chamberlain as a witness for the Confirmation Hearing - - presumably to testify to issues that are the subject of the Summary Judgment Motion. On November 15, 2010, the Debtors filed their list of witnesses for the Confirmation Hearing. Chamberlain was not included on the Debtor's list of witnesses. On or about November 24, 2010, the Debtors filed declarations for their witnesses at the Confirmation Hearing. The Declaration was not filed. No mention of Chamberlain or the Declaration was made by the Debtors at the November 29 Conference.

2. There can only be two purposes for the Debtors filing the Declaration and seeking to call Chamberlain as a witness at the Confirmation Hearing. Either the Debtors are trying to supplement the briefing on their already submitted Summary Judgment Motion - - which would be clearly improper - - or the Debtors are assuming that the Court will deny their Summary Judgment Motion and are seeking an adjudication of the merits of the LTW claims

[1] Though not filed in the above-captioned adversary proceeding, the Declaration includes the adversary proceeding caption.

as part of the Confirmation Hearing. That too would be clearly improper. For the reasons set forth below, the Declaration should be stricken and Chamberlain should be precluded from testifying at the Confirmation Hearing.

ARGUMENT

A. The Declaration Should Not Be Used to Adjudicate the Merits of the LTW Claims as Part of the Confirmation Hearing.

3. As noted above, the Debtors filed their list of witnesses for the Confirmation Hearing on November 15, 2010. Chamberlain was not listed as a witness. Debtors filed declarations for their witnesses for the Confirmation Hearing on or about November 24, 2010. The Declaration was not filed. No mention of Chamberlain or the Declaration was made by the Debtors at the November 29 Conference. For these reasons alone, Debtors may not call Chamberlain as a witness at the Confirmation Hearing and the Declaration must be stricken.

4. Further, as discussed herein, there is no reason why the LTW Holders' claims must be adjudicated as part of the plan confirmation process, particularly when they are subject to a separate and distinct declaratory judgment action pending before this Court and on the eve of a summary judgment hearing. Debtors have acknowledged that their claims objections relating to the LTW Holders' claims have been withdrawn or adjourned *sin die*. Assuming that the Summary Judgment Motion is denied, there is no basis to have this matter heard on the merits the day after the Summary Judgment Motion is denied, especially while multiple discovery requests by the LTW Holders are still pending. Moreover, Class Plaintiffs are entitled to take discovery, including of Chamberlain, before a trial on the merits. By filing the Estimation Motion, Debtors have effectively conceded that the LTW claim adjudication is not a threshold plan confirmation issue. As such, there is no reason to have this matter presented to the Court until discovery has been completed.

5. Moreover, once the Debtors agreed to amend their proposed plan of reorganization to provide that the LTW claims would be treated as "disputed claims" for purposes of the Proposed Plan - - and thereby be entitled to a fully funded cash claims reserve - - the adjudication of the LTW claims no longer was a threshold or "gating" plan confirmation issue. Rather, like many other disputed claims, the allowance of the LTW claims would be decided by the Court after relevant discovery was completed in the above-captioned adversary proceeding and after the Confirmation Hearing relating to the Proposed Plan. Indeed, consistent with that notion, the Debtors filed a Motion on November 17, 2010 (the "Estimation Motion"), among other things, to set the cash reserve for the LTW claims. In the Estimation Motion, the Debtors modified the LTW claims reserve to increase the cash reserve amount from $184 million (set forth in the Debtors' Disclosure Statement) to $250 million. The objection deadline for the Estimation Motion is December 6, 2010 - - after the Confirmation Hearing. The fate of the LTW Holders will be decided in due course in the context of the above-captioned adversary proceeding - - not the Confirmation Hearing

B. The Declaration May Not Be Used to Supplement WMI's Summary Judgment Submissions.

6. The Summary Judgment Motion is fully briefed. WMI could have attempted to submit the Declaration as part of the Summary Judgment Motion and specifically chose not to do so, probably because it would have demonstrated that extrinsic evidence was necessary, that factual issues exist, and that summary judgment is therefore not appropriate. In any event, WMI may not now submit, as an "ambush," the Declaration after the parties have fully briefed the Summary Judgment Motion. At the November 29 Conference, this Court specifically stated that it would not allow parties to introduce witness testimony in connection with summary judgment matters and, instead, that the Court would decide summary judgment matters on the basis of the parties' submissions and oral argument at the December 1, 2010

hearing. The Declaration is untimely and contravenes the Court's decision not to allow outside testimony.

7. Moreover, should the Court consider the Declaration, it demonstrates conclusively why summary judgment in favor of WMI is without merit. The Declaration constitutes extrinsic evidence illustrating why the Amended Agreement cannot be interpreted by analyzing the "four corners" of the document. There exist factual disputes on material issues which preclude summary judgment. Also, introducing a so-called expert report when depositions of fact witnesses have not commenced shows why Class Plaintiffs' Rule 56(f) request is clearly appropriate and should be granted.

8. As indicated in paragraph 2 above, the filing of the Declaration is improper and it must be stricken. But, if the Declaration shows anything, it further makes crystal clear that the Summary Judgment Motion must, as a matter of law, be denied.[2] The Declaration purports to be an "expert report" prepared by a former analyst from Jeffries & Company Inc. See Declaration, at ¶ 3. In her Declaration, Chamberlain touts her experience in reviewing litigation tracking warrants issued by other banks. Significantly, however, her experience does not relate to Dime and the LTWs. See Declaration, at ¶ 4. Chamberlain refers to hearsay conversations with unnamed salespeople and market makers relating to unspecified instruments, claims to have participated in a seminar before the LTWs were issued by Dime, and somehow claims to have divined the intent of the relevant parties who drafted the LTWs from these general life experiences. Declaration, at ¶ 3.[3]

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[2] Class Plaintiffs set forth herein a number of reasons why Chamberlain's assertions in the Declaration are without merit, as a factual and a legal matter. The reasons set forth herein are merely a sample of Class Plaintiffs' reasons and are included herein to clarify the record to the extent Debtors' real intent in filing the Declaration at the 11th hour was to supplement briefing on the Summary Judgment Motion.

[3] Chamberlain conveniently ignores the LTW Holders who have filed pleadings in these cases and who have asserted a different understanding from Chamberlain's.

9. In her Declaration, Chamberlain (i) conveniently ignores Article IV of the Amended Agreement (captioned "Adjustments"), which is central to many of Class Plaintiffs' arguments; (ii) references her experience relating to the Golden State litigation tracking warrants but fails to mention that, in that context, as is the case here, there was a combination after the litigation tracking warrants were issued and, since that combination was payable partly in cash (as is the case here), the litigation tracking warrants in Golden State, were paid, years after the combination, partly in cash; and (iii) states that the principal aim of the issuance of the litigation tracking warrants was to spin out the ownership relating to the pending litigation proceeds from the equity ownership in the bank holding company. Declaration, at ¶ 59. That is true and is reflective of the intent and principles underlying the LTWs. It is also why it is totally improper to strip that value of the Anchor Litigation, already spun out to the LTW Holders for a decade, from the LTW Holders.

10. Incredibly, Chamberlain, who is by no means an expert, also provides a new theory as to what the LTWs are, as a legal matter, that has not been advanced by Debtors. In WMI's summary judgment brief, it calls the LTWs "equity warrants" and then suggests they were the equivalent of "stock options."[4] Chamberlain now says the Court should think of the LTWs as a secondary stock offering. Declaration, at ¶ 36. Chamberlain overlooks that the parties that own the LTWs were never, as a class, owners of WMI stock, there is no purchase price payable by the LTW Holders for the net value of the Anchor Litigation, and, unlike the case in a secondary offering, the net value in the Anchor Litigation goes to the LTW Holders and not WMI. In short, the LTWs are nothing like a secondary offering.

[4] It should be noted that neither assertion was supported by any affidavit with a person of knowledge and the treatises cited by the Debtors support Class Plaintiffs' legal arguments.

11. Finally, Chamberlain's Declaration is factually incorrect or misleading in a number of respects. For example, Chamberlain is wrong as to why the LTWs were issued by Dime. Declaration, at ¶ 24. Chamberlain is wrong that the LTW value is based on the equity value of WMI.[5] Chamberlain is materially misleading when she fails to mention that the Amended Agreement eliminated any purchase price for the LTWs.[6] Declaration, at ¶ 53. Chamberlain undercuts the Debtors' argument that Section 6.3 of the Amended Agreement is clear on its and that the Anchor Litigation is owned by WAMU Bank when she concludes, as Debtors have done in other proceedings, that WMI - - not WAMU Bank - - owns the Anchor Litigation. Declaration, at ¶ 22. Chamberlain is factually wrong that the LTWs only require the issuance of stock, not payments in cash or other assets. Declaration, at ¶ 60. Chamberlain completely ignores Article IV of the Amended Agreement. Chamberlain is factually wrong when she concludes that Class Plaintiffs' statement that the LTWs represent different risks and considerations from common stock was "unsupported." Declaration, at ¶ 64. Class Plaintiffs quoted language taken directly from the Registration Statement for the LTWs. See Registration Statement, at p. 5. Chamberlain is factually wrong about the correlation between the LTW trading price and the WMI stock trading price. In fact, since the Debtors' bankruptcy filing, WMI's common stock has declined in value from $2.26 per share to $0.05 per share. The LTWs have increased in price from $0.13 per share to $0.40. In sum, the Declaration is an offensive charade by Debtors' counsel.

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[5] The Risk Factors in the Registration Statement do not list WMI equity value as a risk, and the Adjusted Recovery formula in the Amended Agreement clearly provides that LTW value is not based on the market value of WMI stock.

[6] Rather, LTW Holders were entitled, without additional consideration, to receive value equivalent to 85% of the net recovery in the Anchor Litigation

12. The Declaration is just another example of WMI's improper procedural tactics throughout this adversary proceeding. WMI filed a motion to dismiss (only to later withdraw it), offered a claims reserve in its proposed plan of reorganization to only Broadbill and then Nantahala (but not to all the LTW Holders), then offered an inadequate claims reserve (only to increase it), and filed an objection to LTW claims (while its motion to dismiss was pending), only ultimately to stay the claims objection proceeding. WMI has "stonewalled" Class Plaintiffs' attempts to conduct the discovery process. Now, it attempts, at the 11th hour, to deprive Class Plaintiffs of the right to adduce their own expert testimony on the merits of Class Plaintiffs' claims. Clearly, for among other reasons, because Chamberlain is not an expert and her assertions are plainly wrong in the Declaration, Class Plaintiffs would certainly wish to proffer expert testimony to the contrary and depose Chamberlain. The Declaration must be stricken in connection with the Summary Judgment Motion.

WHEREFORE, for the reasons stated herein, Class Plaintiffs respectfully request that this Court (i) grant the Motion striking the Declaration and precluding Chamberlain from testifying and (ii) grant such other and further relief as this Court deems just and proper.

Dated: November 30, 2010

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