IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
WASHINGTON MUTUAL, INC., et al	:	Case No. 08-12229 (MFW)
Debtors.	:	(Jointly Administered)
	:	Re: D.I. No. 6209

SONTERRA CAPITAL'S **STATEMENT IN SUPPORT OF THE OBJECTION TO CONFIRMATION FILED BY CLASS PLAINTIFFS ON BEHALF OF DIME LTW HOLDERS**

Sonterra Capital Partners and Sonterra Capital, LLC (collectively, "Sonterra"), having previously joined the Objection to the Plan of Confirmation filed by Broadbill Partners, Nantahala Capital Partners and Blackwell Partners (collectively, "Broadbill"), hereby files this Statement in Support of the Objection to the Confirmation Filed by Class Plaintiffs on Behalf of the Dime LTWs.

PRELIMINARY STATEMENT

1. The debtor's proposed Plan of Confirmation (the "Plan") fails to satisfy several threshold requirements under section 1129(a) of the Bankruptcy Code and therefore cannot be confirmed. There are multiple reasons why the Plan unfairly disadvantages the Dime warrant holders and should not be confirmed:

2. **Improper Plan Classification: Not Equity**. The Proposed Plan places the Dime Litigation Tracking Warrants ("LTWs") in Class XXI. This Plan effectively classifies the Dime

LTWs as equity interests that are not entitled to a distribution. This proposed classification of LTWs as equity interests is based on the assumption that the Dime LTWs represent no more than a right to buy stock; more specifically the worthless equity in the debtor. That is manifestly not true. The Dime LTWs are *an asset* spun-out of Dime Savings for the purpose of providing holders with an enduring and inseparable *right to receive value* from the Anchor litigation. The Dime LTW holders have a claim to receive this value, *secured in our opinion*, but certainly *at least an unsecured claim*. The Plan's equity classification is simply wrong, and as discussed below, manifestly unfair and inequitable.

3. **Claim Status: Debtor-Creditor Relationship**. The Dime Warrant Agreement is the contract that establishes a debtor-creditor relationship between the Dime LTW holders and the bank. Under the Warrant Agreement, the bank is obligated to manage the Anchor litigation on behalf of the LTW holders, and then provide the Dime LTW holders with *equivalent value* equal to 85% of the damages. In return for managing the litigation, *effectively providing a service on behalf of the warrant holders*, the warrant holders collect 85% of the award and the bank gets to keep 15% of the value of the award as a fee for services rendered. Under the law, the bank's duty to collect the Anchor proceeds and then provide the holders with equivalent value establishes a debtor-creditor relationship. See *In re Jevic Holding Corp*., 432 B.R. 162 (D DE 2010) (Shannon, J.) ("Where compensation to the non-collecting party is based in the services it performs for the collecting party, independent of the amount charged to the customer, such arrangements are not apportionments at all, but are actually compensation for services rendered. ***This would suggest a debtor-creditor relationship***"). See also *In re Muma*, 322 B.R. 541 (D. DE 2005) (Walrath, J.) (in case where CSX alleged that debtor, NPR, improperly withheld $800,000 from the sale of NPRs accounts receivable, and where CSX argued that the funds represent

payment by NPR customers for shipping services rendered by NPR, court held that even though CSX could have collected directly from the customers, that "did not in any way discharge or modify [NPRs] obligations there under" (citing to Agreement at 8.3). ***Thus, the written agreement between the parties evidences a debtor-creditor relationship")***.

4. **Warrant Agreement Provides LTWs with an Unsubordinated Claim Against WMI**. Because the warrant agreement on its face establishes a debtor-creditor relationship, the LTWs have a claim to 85% of the value of the Anchor damages award. As discussed below, the rights of the warrant holders to receive this value is *converted, by action of the Bankruptcy Code, into a claim against the Company – secured*, in our opinion, but certainly *at least an unsecured claim*.

5. **Anti-dilution Provisions of Article IV Preserve Contractual Right to Receive Value**. The LTWs continuing claim on the value from the Anchor damages award exists even upon the demise of WMI. This claim is guaranteed, moreover, by the anti-dilution provisions of Article IV of the warrant agreement which protects warrant holders against events that reduce the value of their warrants by reducing the value of the Company's common stock. That is the essential intent of Article IV. Sections 4.1, 4.2 and 4.3, however, cover only a limited number of the most common events. Among those events are mergers, acquisitions and other similar transactions and other similar transactions in which the Company's shareholders receive cash and other property for their shares, and the shares are then extinguished and become worthless. These sections ensure that in those cases, warrant holders will continue to receive stock, cash or other valuable *non-equity consideration* property with a value equal to 85% of the litigation proceeds. In this case, the warrant agreement provides in Section 3.1 that warrant holders as a group are entitled to an amount equal to 85% of the Adjusted Litigation Recovery divided by the Adjusted Stock Price. Currently, we believe the Adjusted Stock Price is zero. Since the common stock

has *no value*, it is impossible for the Company to issues shares with a *value* equal to the litigation proceeds. What happens when this occurs? That is, what does the Warrant Agreement require the Company to do when the shares become worthless and the Company is unable to issue shares with the required value? The answer to this question is found in the anti-dilution provisions of Article IV, and specifically in Section 4.4.

6. **Section 4.4 is a Savings Clause that Covers Unanticipated Situations**. To cover all other cases, Section 4.4 was added as a savings clause. Such savings clauses are routine in anti-dilution provisions, in recognition of the fact that no draftsman can anticipate every possible event that might dilute warrant holders (or protect against every possible innovation by companies whose clever lawyers might devote themselves to evading those provisions). Section 4.4 exists to cover situations, such as this case, where the debtor's *unforeseen bankruptcy* will result in the extinguishment of its shares and thus seriously impair the value of the Dime warrants. In this respect, the savings clause in section 4.4 is designed to protect the interests of the Dime LTW holders and their claim to value secured by the Anchor litigation recovery.

7. **Bankruptcy Code Converts Right to Receive Property into a Secured Claim.** Where, as here, WMI equity is rendered worthless by virtue of the bank filing for bankruptcy protection, the WMI Board is required by section 4.4 to make additional adjustments to protect the value of the warrants. One such adjustment that the Board could easily make – and that we believe it must make – is to cause the Dime LTW rights to be exercisable for cash or other property with a value equal to the litigation proceeds. Once the Board has done so, as it must do under the terms of the contract, the warrant holders' right to receive that cash or property will be *converted, by action of the Bankruptcy Code, into a claim against the Company – secured*, in our opinion, but certainly *at least an unsecured claim*.

8. **Dime LTW Claim Status is Consistent with Principles of Contract Construction**. Why must the WMI Board make an adjustment and provide the Dime LTW holders with equivalent value in the form of non-equity consideration? Because any other interpretation would lead to absurd and illegal results, rendering all of the other provisions of Article IV completely irrelevant and making the Warrants essentially worthless on the day that they were issued. This is not permissible under principles of contract construction.

9. **Plan's Classification of the Dime LTWs as Worthless Equity is Illogical**. Under the Plan, the debtor assumes that section 4.4 means that the Company may design and the Board of Directors may, at its pleasure, approve a transaction that is not covered by the other sections of Article IV and that would eviscerate the value of the warrants. There are at least several reasons why a reading that allows the warrant holders' rights to be completely eviscerated in this underhanded way cannot be correct:

i. If this is what section 4.4 means, then why bother with the rest of Article IV at all? If the Court were to adopt the Debtor's interpretation, those provisions would be so easily evaded that they would have no purpose at all, in violation of the basic principle of construction that each provision of a contract is assumed to have some meaning and effect. The Debtor's construction, which violates this fundamental principle, cannot be correct.

ii. Note that anti-dilution provisions of the Dime warrant agreement, including section 4.4, were substantially identical in form to those of the current WMI Amended Agreement. If Debtor's reading were correct, the warrants would have been essentially valueless on the day that they were issued. If section 4.4 allows the Board to make the warrants worthless whenever it chooses to do so, then

holders must assume that the Board will someday make them worthless. Yet, the warrants traded when issued at a price much higher than zero – and it is indisputable that Dime intended for them to trade for much more than zero. It is simply unreasonable to assume that Dime intended to issue worthless securities, and thus this construction by the Debtor of section 4.4 cannot be reasonable.

iii. We also note that the registration statement for the warrants *nowhere disclosed the risk* (which the Debtor asserts existed all along) that the Dime board could at any time decide to render the warrants worthless. The failure to disclose this risk – if it existed – would have been a violation of federal and state securities law, in opposition to the basic principle of construction that each provision of a contract is assumed to have been intended to comply with the law. The Debtor's construction, which would mean that Dime in issuing its registration statement had knowingly violated the law, thus cannot be correct.

10. **Plan's Classification is Inconsistent with Article VI: "Holders not Stockholders".** The Plan's classification of the Dime LTWs as equity is improper for yet another reason. Article VI, section 6.1 of the Amended WMI Warrant Agreement, underscores, as did the Dime agreement before it, that the Dime LTW holders have no equity rights. In contrast, to equity, section 6.1 provides that the LTWs possess none of the traditional attributes associated with equity securities: "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*). . . . See WMI Warrant Agreement, section 6.1, Broadbill Objection to Plan, Exhibit H.

11. **Plan's Equity Classification is Inconsistent with Article VII: Curing Ambiguity.** Finally, the Plan's classification of the Dime LTWs as equity is improper for another reason: it is completely at odds with section 7.2's power of amendment. Section 7.2 provides that the Warrant Agreement *may be amended without consent of the Dime LTW holders* (just like section 4.4 which provides for action by the Board to protect the LTW holders without their prior consent – "then the Board *may* make, *without the consent of the Holders*, such adjustments to the terms of Article IV . . . ."). To this point, section 7.2 provides that "This Agreement may be amended by the parties hereto without the consent of any Holder for the purpose of curing any ambiguity, or of curing, correcting or supplementing any defective provision contained herein or making any other provisions with respect to matters or questions arising under this Agreement as the Company and the Warrant Agent may deem necessary or desirable; **provided, however, that such action will not affect adversely the rights of the Holders. Any Amendment or supplement to this Agreement that has an adverse effect on the interests of the Holders will require the written consent of the Holder's of a majority of the outstanding Warrants."** See WMI Warrant Agreement, section 7.2, Broadbill Objection to Plan, Exhibit H (emphasis added).

12. **Plan is Inequitable: Can't Sever the Warrants from the Anchor Litigation**. The inequity in this Plan is further compounded by the fact that the WMI Board illegally severed the contract rights of the warrant holders from the Anchor litigation. The warrant agreement makes clear that the Dime LTW holder's right to receive value is *inseparable* from the Anchor

litigation. Moreover, the contract establishes unequivocally that the WMI Board cannot unilaterally take steps that impair or eviscerate the rights of the LTW warrant holders. And yet – inexplicably -- the WMI Board finds itself in the "awkward" position of having to defend the fact that it literally gave away 100% of the Anchor award, worth potentially $600 million, to JP Morgan, while keeping for itself what it now argues are worthless equity rights. *At a minimum, the debtor's conduct raises troubling questions about the debtor's good faith.* Under these circumstances, the Plan, as presently constituted, violates applicable provisions of the bankruptcy code and cannot, at this time, be approved.

JURISDICTION AND VENUE

13. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are Bankruptcy Code Sections 105(a) and 362. Relief is warranted under Bankruptcy Rule 3001.

BACKGROUND

14. In 1995, Anchor Savings filed its lawsuit against the FDIC (the "Anchor litigation," or the "goodwill litigation"). In 2000, Dime Savings acquired Anchor and succeeded to Anchor's claims in the Anchor litigation.

15. On December 18, 2000, the Dime Board announced that it had declared "a distribution to common stockholders of a substantial portion of Dime's economic interest in its pending "goodwill" lawsuit against [the FDIC]." See Broadbill Objections, Exhibit B. On December 20, 2000, Dime announced that Dime common stock would reflect the value of the LTWs though December 29, but "commencing January 2, 2001, Dime's common stock [would] trade on the

New York Stock exchange without the value of the LTWs." See Broadbill Objections, Exhibit C.

16. After the SEC approved the creation and registration of Dime's litigation tracking warrants, the SEC, referring to the value inherent in the Anchor litigation, noted that Dime "does not believe the trading value of its shares in the market properly included the value of the contingent asset." See Broadbill Objections, Exhibit D. Similarly, the SEC noted that "[SEC] Staff believed that the instrument [LTWs] effectively separated the combined entity into two components: the effective contingent asset and the remainder of the company." See Broadbill Objections, Exhibit D.

17. In March 2008, the United States Federal Court of Claims rendered its judgment in the Anchor Savings v. FDIC litigation. The trial court found the FDIC liable to Anchor and awarded THE Anchor plaintiffs $356 million in damages. In 2010, the United States Court of Appeals for the Federal Circuit affirmed the verdict, on both liability and damages and remanded with instructions that the trial court determine whether an additional $63 million is owed to plaintiffs.

18. In 2008, the FDIC placed WMI into receivership and sold WMIs assets to JP Morgan.

19. On September 26, 2008 (the "Commencement Date"), the Debtors commenced the Chapter 11 Cases. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. On October 3, 2008, the Court entered an order, pursuant to Bankruptcy Rule 1015(b), authorizing the joint administration of the Chapter 11 Cases.

20 After WMI filed for bankruptcy, JP Morgan intervened in the Anchor litigation arguing that when it purchased WMIs assets from the FDIC in 2008, it assumed the right to prosecute the Anchor litigation.

21 To date, JP Morgan has failed to amend the Warrant Agreement.

22. On October 6, 2010, the Debtors filed the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan") and a related disclosure statement (the "Disclosure Statement"). The Plan contains an Amended and Restated Settlement Agreement, dated October 6, 2010 (the "Global Settlement Agreement"), that resolves certain disputes among the Debtors, JPMorgan Chase, the Federal Deposit Insurance Corporation and certain other parties in interest.

23. The Disclosure Statement does not list the LTWs as part of the debtor's capital structure. See Disclosure Statement at 42-43.

24. The debtor also failed to include the WMI Warrant Agreement in the list of assumable executory contracts in the Plan Supplement. The debtor is thus rejecting its obligations under the WMI Agreement.

25. The WMI Trustee has since reserved $250 million to cover claims attributed to the DIME LTWs.

OBJECTIONS TO CONFIRMATION OF THE PLAN

I. The Plan Fails to Satisfy the Confirmation Requirements of Section 1129(a) of the Bankruptcy Code and Cannot be Confirmed

A. The Plan Improperly Classifies the Dime LTWs as Equity Instead of Property Rights with an Unsubordinated Claim to the Value from the Anchor Litigation

26. The Proposed Plan puts the Dime LTWs in Class XXI, and improperly classifies the Dime LTWs as "equity" interests. However, the Dime LTWs are not equity interests, but instead are *property rights* that provide Dime LTW Holders with *an asset* created by Dime Savings to provide holders with value; that is, *a continuing right to receive* 85% of the value of the Anchor litigation proceeds. We know this from the statements made by Dime Savings and the SEC when the LTWs were created and distributed to Dime stockholders:

- On December 18, 2000, the Dime Board announced that it had declared "a distribution to common stockholders **of a substantial portion of Dime's economic interest in its pending "goodwill" lawsuit** against [the FDIC]." See Broadbill Objections, Exhibit B.
- On December 20, 2000, Dime announced that Dime common stock would reflect the value of the LTWs though December 29, but "commencing January 2, 2001, Dime's common stock [would] trade on the New York Stock exchange **without the value of the LTWs.**" See Broadbill Objections, Exhibit C.
- After the SEC approved the creation and registration of Dime's litigation tracking warrants, the SEC, referring to the value inherent in the Anchor litigation, noted that Dime "does not believe the trading value of its shares in the market properly included **the value of the contingent asset**." See Broadbill Objections, Exhibit D.

- Similarly, the SEC noted that "[SEC] Staff believed that the instrument [LTWs] effectively separated the combined entity into two components: the effective **contingent asset** and the remainder of the company." See Broadbill Objections, Exhibit D

27. This undisputed evidence establishes that the Dime LTWs as property rights, spun-out from Dime to provide holders with a continuing, unsubordinated claim to the value generated from the Anchor litigation damages award.

28. Thus, the Dime LTW holders have a claim to the value from the litigation award, *secured* in our opinion, but certainly *at least an unsecured claim*. The Plan ignores this reality. Instead, the Plan will unjustly enrich other creditors at the expense of the Dime LTW holders, and therefore cannot be confirmed.

B. The Plan Ignores the Fact that the Dime LTW Warrant Agreement Establishes a Debtor-Creditor Relationship between the Dime LTWs and the Bank

29. The Dime Warrant Agreement is the contract that establishes a debtor-creditor relationship between the Dime LTW holders and the bank. Under the Warrant Agreement, the bank is obligated to manage the Anchor litigation on behalf of the LTW holders, and then provide the Dime LTW holders with *equivalent value* equal to 85% of the damages. In return for managing the litigation, *effectively providing a service on behalf of the warrant holders*, the warrant holders collect 85% of the award and the bank gets to keep 15% of the value of the award as a fee for services rendered. Under the law, the bank's duty to collect the Anchor proceeds and then provide the holders with equivalent value establishes a debtor-creditor relationship. See *In re Jevic Holding Corp*., 432 B.R. 162 (D DE 2010) (Shannon, J.) ("Where compensation to the non-collecting party is based in the services it performs for the collecting party, independent of the amount charged to the customer, such arrangements are not

apportionments at all, but are actually compensation for services rendered. ***This would suggest a debtor-creditor relationship***"). See also *In re Muma*, 322 B.R. 541 (D. DE 2005) (Walrath, J.) (in case where CSX alleged that debtor, NPR, improperly withheld $800,000 from the sale of NPRs accounts receivable, and where CSX argued that the funds represent payment by NPR customers for shipping services rendered by NPR, court held that even though CSX could have collected directly from the customers, that "did not in any way discharge or modify [NPRs] obligations there under" (citing to Agreement at 8.3). ***Thus, the written agreement between the parties evidences a debtor-creditor relationship")***.

C. The Plan Ignores the Provisions of the Contract that Preserve and Protect the LTWs Continuing Claim to 85% of the Value of the Anchor Damages Award

30. The Proposed Plan assumes that the Dime LTWs should be treated as *no more than* a right to buy stock in WMI; hence equity. We respectfully disagree. The Dime LTWs are not a right to buy anything; rather, they are a right to receive something for free. This is because the warrants *represent an asset spun-off* by Dime Savings for the purpose of conveying the right to the value from the Anchor litigation. The only consideration warrant holders are required to pay is a nominal price equal to the par value of the shares received – in the event that shares are issued at all – upon exercise of the warrants. This provision exists in order to ensure the corporate law requirement that the par value be paid in cash.

31. Further to this point, the Dime Warrant Agreement promises to provide a *specific value* to warrant holders, not a certain number of shares. This intent is clear from the four corners of that Agreement. The number of shares to be issued under the Warrant Agreement is not fixed. Rather, the Agreement specifically provides that warrant holders are entitled to receive shares

that have *a certain value*. Section 3.1 makes this clear in unambiguous terms. The fact that the Warrant Agreement does not provide for issuance of a fixed number of shares establishes conclusively that the Dime LTWs are not equity interests.

32. To this point, section 3.1 says that warrant holders are entitled to shares of common stock with a *market value* equal to 85% *of any litigation recovery*. Without going through a tedious exposition of the precise definitions used in the Warrant Agreement, Section 3.1 states that warrant holders as a group are entitled to an amount equal to 85% of the Adjusted Litigation Recovery divided by the Adjusted Stock Price. Currently, the Adjusted Stock Price is essentially zero. Of course, since the common stock has *no value*, it is impossible for the Company to issues shares with a *value* equal to the litigation proceeds.

33. What happens when this occurs? That is, what does the Warrant Agreement require the Company to do when the shares become worthless and the Company is unable to issue shares with the required value? **The answer to this question is found in the anti-dilution provisions of Article IV, and specifically in Section 4.4.**

1. <u>Anti-dilution Provisions of Article IV and the "Savings Clause" of Section 4.4</u>

34. The anti-dilution provisions of Article IV protect warrant holders against events that reduce the value of their warrants by reducing the value of the Company's common stock. That is the essential intent of Article IV. Sections 4.1, 4.2 and 4.3, however, cover only a limited number of the most common events. To cover all other cases, Section 4.4 was added as a savings clause. Such savings clauses are routine in anti-dilution provisions, in recognition of the fact that no draftsman can anticipate every possible event that might dilute warrant holders or

protect against every possible innovation by companies whose clever lawyers devote themselves to evading those provisions.[1]

35. Beginning with sections 4.1, 4.2 and 4.3, one must ask, what do they do? They identify certain events that would reduce or eliminate the value of the warrants and ensure that the warrants' value will be preserved. Among those events are mergers, acquisitions and other similar transactions in which the Company's shareholders receive cash and other property for their shares, and the shares are then extinguished and become worthless. These sections ensure that in those cases, warrant holders will continue to receive stock, cash or other property with a value equal to 85% of the litigation proceeds.

36. What happens in other cases, not expressly covered by the first three sections of Article IV, that likewise extinguish the Company shares and make them worthless, or that otherwise seriously impair the value of the warrants? Section 4.4 exists to address those situations. Specifically, section 4.4 states:

> "[I]f any event occurs as to which the foregoing provisions of this Article IV are not strictly applicable . . . then the Board may make, without the consent of the Holders, such adjustments to the terms of this Article IV, in accordance with [the] essential intent and principles [of such provisions], as will be reasonably necessary, in the good faith opinion of such Board, to protect such purchase rights as aforesaid."

[1] The Debtor's argument that section 4.4 was a savings clause for the benefit of the Company is simply wrong. In the first place, the entire purpose of an anti-dilution provision is to protect warrant holders, not the Company. In the second place, as we argue at length below, that reading by the Debtor would lead to absurd and illegal outcomes that cannot possibly have been intended.

See WMI Warrant Agreement, Section 4.4, Broadbill Objections, Exhibit H.

37. There is no question that the bankruptcy of the company, making its shares worthless, is an event not covered by sections 4.1, 4.2 and 4.3. Under those circumstances, the Dime LTW holders believe the Board is ***required*** to make additional anti-dilution adjustments to protect the value of the warrants. One such adjustment that the Board could easily make – and that we believe it ***must*** make – is to cause the rights to be exercisable for cash or other property with a value equal to the litigation proceeds. Once the Board has done so, as it must do under the terms of the contract, the warrant holders' right to receive that cash or property will be converted, by action of the Bankruptcy Code, into a bankruptcy claim against the Company – secured, in our opinion, but certainly at least an unsecured claim.

38. Why is the WMI Board "required" to act in the interest of the dime LTW holders and "must" provide the LTWs with other *valuable non-equity consideration* when, as the Debtor never tires of pointing out, the word used in the Agreement is "may"? Because any other interpretation would lead to absurd and illegal results, rendering all of the other provisions of Article IV completely irrelevant and making the Warrants essentially worthless on the day that they were issued.

39. According to the Debtor's reading of section 4.4 implied in the Plan Classification, section 4.4 means that the Company may design and the Board of Directors may, at its pleasure, approve a transaction that is not covered by the other sections of Article IV and that would eviscerate the value of the warrants. Without much thought, the LTW holders can imagine at least one simple transaction that would accomplish this purpose (and no doubt that a competent corporate lawyer could think of many more). The company could issue a massive stock dividend

to existing shareholders that exhausts all of the remaining shares of stock authorized for issuance. It would then have no further shares to issue to holders upon exercise of their warrants. If the number of shares issued in the dividend were large enough, the value of the shares, as diluted could be less than one cent per share. In that event, the company would be unable to issue shares at all (if the authorized shares were exhausted), making the warrants worthless, or the warrants would become worthless because the one-cent exercise price of the warrants would be greater than the value of the shares to be issues. Neither of these cases is covered by sections 4.1, 4.2 or 4.3, and according to debtors, the Board would have no duty under the Warrant Agreement to protect the value of the warrants in either case.

40. There are <u>at least several reasons</u> why a reading that allows the warrant holders' rights to be completely eviscerated in this underhanded way <u>cannot be correct</u>:

i. If this is what section 4.4 means, then why bother with the rest of Article IV at all? If the Court were to adopt the Debtor's interpretation, those provisions would be so easily evaded that they would have no purpose at all, in violation of the basic principle of construction that each provision of a contract is assumed to have some meaning and effect. The Debtor's construction, which violates this fundamental principle, cannot be correct.

ii. Note that anti-dilution provisions of the Dime warrant agreement, including section 4.4, were substantially identical in form to those of the current Wamu Amended Agreement. If Debtor's reading were correct, the warrants would have been essentially valueless on the day that they were issued. If section 4.4 allows the Board to make the warrants worthless whenever it chooses to do so, then holders must assume that the Board will someday make them worthless. Yet, the warrants traded when issued at a price much

higher than zero – and it is indisputable that Dime intended for them to trade for much more than zero. It is simply unreasonable to assume that Dime intended to issue worthless securities, and thus this construction by the Debtor of section 4.4 cannot be reasonable.

iii. We also note that the registration statement for the warrants *nowhere disclosed the risk* (which the Debtor asserts existed all along) that the Dime board could at any time decide to render the warrants worthless. The failure to disclose this risk – if it existed – would have been a violation of federal and state securities law, in opposition to the basic principle of construction that each provision of a contract is assumed to have been intended to comply with the law. The Debtor's construction, which would mean that Dime in issuing its registration statement had knowingly violated the law, thus cannot be correct.

41. There is one last point that we ought to make in anticipation of a possible objection that the Debtor may raise to our discussion above. Section 3.1 requires the Company to issue stock with a value equal to the amount of the litigation proceeds. A close reading of the defined term "Closing Price" in section 1.1 of the Warrant Agreement will reveal that the value of the stock is defined under certain circumstances as being the price quoted for the stock in the organized public securities markets. We should note that there are in fact quotes of a few pennies available for WMI's common stock. However, these quotes are not made on any organized market. Moreover, despite the prices that uninformed or hopeful investors may quote, the Debtor knows for a certainty that the Company's common stock is in fact worthless because it will extinguished upon emergence from bankruptcy, if the Debtor's plan is confirmed. For the reasons stated at length above, we believe the issuance to warrant holders of worthless stock would not satisfy the

essential intent of the Warrant Agreement that the warrant holders are entitled to receive value, in stock, cash or other property, equal to 85% of the amount of the litigation proceeds. Thus, we believe that under section 4.4, the Debtor cannot evade the essential intent of the Agreement by relying on these penny-stock quotes.

D. **Plan Classification Inconsistent with Article VI: "Holders not Stockholders"**.

42. The Plan's classification of the Dime LTWs as equity is improper for yet another reason. Article VI, section 6.1 of the Amended WMI Warrant Agreement, underscores, as did the Dime agreement before it, that the Dime LTW holders have no equity rights. In contrast, to equity, section 6.1 provides that the LTWs possess none of the traditional attributes associated with equity securities: "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*). . . . See WMI Warrant Agreement, section 6.1, Broadbill Objection to Plan, Exhibit H.

E. **Plan Classification is Inconsistent with Article VII: Curing Ambiguity.**

43. Finally, the Plan's classification of the Dime LTWs as equity is improper for another reason: it is completely at odds with section 7.2's power of amendment. Section 7.2 provides that the Warrant Agreement *may be amended without consent of the Dime LTW holders* (just like section 4.4 which provides for action by the Board to protect the LTW holders without their prior

consent – "then the Board *may* make, *without the consent of the Holders*, such adjustments to the terms of Article IV . . . ."). To this point, section 7.2 provides that:

> This Agreement may be amended by the parties hereto without the consent of any Holder for the purpose of curing any ambiguity, or of curing, correcting or supplementing any defective provision contained herein or making any other provisions with respect to matters or questions arising under this Agreement as the Company and the Warrant Agent may deem necessary or desirable; **provided, however, that such action will not affect adversely the rights of the Holders. Any Amendment or supplement to this Agreement that has an adverse effect on the interests of the Holders will require the written consent of the Holder's of a majority of the outstanding Warrants."**

See WMI Warrant Agreement, section 7.2, Broadbill Objection to Plan, Exhibit H (emphasis added).

F. Proper Classification of Dime LTWs: Unsubordinated Claim.

44. This now brings us full-circle to the purpose and intent of the warrant agreement. The warrant agreement preserves *the right to receive a specified value* created by the Anchor litigation damages award. Consistent with the purpose and intent of the warrant agreement, the warrants represent *an asset spun-off* from Dime Savings for the benefit of investors. Importantly, the warrants are NOT a right to receive stock. They are a *right to receive a specified value*, hence an unsubordinated claim, which ***may*** be paid in the form of stock, but if

that value cannot be provided in the form of stock, it ***must*** be paid in cash, property or other valuable *non-equity* consideration. Thus the Dime LTWs have a *claim against the Company – secured*, in our opinion, but certainly *at least an unsecured claim*.

CONCLUSION

The court should reject the Plan as presently constituted as being unfair and inequitable toward the plaintiff Class of Dime LTW holders. Then court should re-classify the Dime LTWs as having a *secured claim*, and if not that, then certainly at least an *unsecured claim*.

Dated: December 6, 2010
Wilmington, Delaware

Respectfully submitted,

PINCKNEY, HARRIS & WEIDINGER, LLC

By: */s/ Donna L. Harris*

Donna L. Harris (No. 3740)
1220 N. Market Street, Suite 950
Wilmington, Delaware 19801
(302) 504-1497 (Telephone)
dharris@phw-law.com

and

Axicon Partners, LLC
Attn. Robert T. Scott, Esq.
1325 Avenue of the Americas, 27 Floor
New York, New York 10019

Counsel to Sonterra Capital Partners and Sonterra Capital, LLC

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	
WASHINGTON MUTUAL, INC., *et al.*,	:	Case Nos. 08-12229 (MFW), *et seq.*
	:	
Debtors.	:	(Jointly Administered)

CERTIFICATE OF SERVICE

I, Donna L. Harris, hereby certify that on December 6, 2010, copies of the foregoing STATEMENT IN SUPPORT OF THE OBJECTION TO CONFIRMATION FILED BY CLASS PLAINTIFFS ON BEHALF OF DIME LTW HOLDERS were served, as set forth below, upon the following:

Via Facsimile
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Attn: Brian S. Rosen, Esq.

Via Facsimile
Richards Layton & Finger P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19899
Attn: Mark D. Collins, Esq.

Via Facsimile
Quinn Emanuel Urquhart & Sullivan, LLP
55 Madison Avenue, 22nd Floor
New York, NY 10010
Attn: Peter Calamari, Esq.

Via Hand Delivery
The Office of the United States Trustee for the District of Delaware
844 King Street, Suite 2207
Wilmington, DE 19899-0035
Attn: Jane Leamy, Esq.

Via Facsimile
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
Attn: Fred S. Hodara, Esq.

Via Facsimile
Pepper Hamilton LLP
Hercules Plaza
Suite 5100
1313 North Market Street
Wilmington, DE 19801
Attn: David B. Stratton, Esq.

Via Facsimile
Susman Godfrey, L.L.P.
1201 Third Avenue, Suite 3800
Seattle, WA 98101
Attn: Justin A. Nelson, Esq.

Via Facsimile
Ashby & Geddes, P.A.
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899
Attn: William P. Bowden, Esq.

/s/ Donna L. Harris
Donna L. Harris (DE Bar No. 3740)