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. 6302, 6329**
BROADBILL INVESTMENT CORP. NANTAHALA CAPITAL PARTNERS, L.P. and BLACKWELL CAPITAL PARTNERS, LLC	:	Adversary Proceeding
Plaintiffs.	:	
-against -	:	
WASHINGTON MUTUAL, INC., et al	:	Case No. 10-50911 (MFW)
Debtors.	:	**Re D.I. 122, 127**

***SONTERRA CAPITAL'S* JOINDER IN SUPPORT OF BROADBILL'S EMERGENCY MOTION TO STRIKE EXHIBIT O TO THE SHIFFMAN DECLARATION AND REPLACE IT WITH THE FINAL GOLDEN STATE WARRANT AGREEMENT**

Sonterra Capital Partners and Sonterra Capital, LLC (collectively, "Sonterra"), hereby join Broadbill Partners, Nantahala Capital Partners and Blackwell Partners (collectively,

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"Broadbill") in their "Emergency Motion to Strike Exhibit O of the Shiffman Declaration and Replace it With the Final Golden State Warrant Agreement" (the "Broadbill Motion").

DISCUSSION

After contrasting an incorrect version of the Golden State agreement with the Dime Warrant Agreement, and arguing that the difference between "shall" and "may" provides the Dime Board with discretion to make (or not make) adjustments to the Dime litigation tracking warrants ("Dime LTWs"), WMI now concedes that it made a mistake. Yet, instead of withdrawing the motion, the debtor now argues that this one difference between section 4.5 of the Golden State agreement and section 4.4 of the Dime agreement -- upon which it based its original motion for summary judgment -- no longer matters. Instead, the debtor urges this court to reach the same *paradoxical, if not illogical,* conclusion and find as a matter of law that the Dime Warrant Agreement provided the Board *with discretion* to eviscerate the value of the Dime warrants *even though* Dime added section 4.4 as a "savings clause" to the *mandatory* adjustment provisions of Article IV.

The debtor's argument turns the contract on its head. The debtor's construction of Section 4.4 asks this court to assume that the Dime Board had discretion to eliminate the value of the warrants on day one, even though Dime took careful steps to preserve the value of the Dime warrants throughout the remainder of the Warrant Agreement. The debtor's latest argument is wrong on the facts, wrong on the law and leads to an unfair and inequitable result. Once the Anchor plaintiffs won a $382 million judgment in March 2008 (before WMI filed for bankruptcy), WMI became obligated to collect 100% of the damages award, deduct 15% as a fee for services rendered in managing the litigation, and then provide 85% of the value of the judgment to the Dime LTW holders.

1. Wrong on the Facts

In a remarkable display of audacity, WMIs response to Broadbill's Emergency Motion makes the *new argument* that because Golden State replaced "shall" with "may" in the final version of section 4.5 of its warrant agreement, it actually helps the debtor because it *"only establishes that Golden State Bancorp, like Dime, granted its Board discretion to decide whether or not to make adjustments."* See WMI Response Brief at 2. WMI then argues that *"if Dime had intended to impose any duty upon its board, it would have used "shall" rather than "may" in Section 4.4, and that its choice of "may" instead grants the Board broad latitude to act or to choose not to act as it sees fit."* See WMI Response Brief at 3. As discussed below, this argument finds no factual support in the record.

To this point, Broadbill's Emergency Motion correctly notes that in the Golden State merger with Citicorp, "Golden State's board *recognized its obligations under section 4.5 of the Final Golden State Agreement* and agreed to provide holders of Golden State's litigation tracking warrants with cash and stock whenever the "trigger event" ultimately would occur. This *modified currency for value* payable under the Golden State litigation tracking warrant was intended to be consistent with what Golden State shareholders actually received in connection with the Golden State/Citicorp merger." See Broadbill motion at 5, para. 6 (emphasis added). Thus, "the treatment of the Golden State litigation tracking warrants under the Golden State Merger Agreement demonstrates that the Golden State Board understood that the intent of Section 4.5 of the Final Golden State Agreement was to obligate the Golden State Board to take actions to protect the rights of the Golden State litigation tracking warrant holders." See Broadbill Motion at 6, para 7.

The debtor ignores these facts. Instead, at the end of its response brief the debtor compounds its error when it makes this assertion: *"That Golden State replaced mandatory language in its draft agreement with permissive language in its final agreement* ***is just one more data point*** *showing that the drafters could have made the adjustment mechanism mandatory with a simple language change. No such change was made in the Dime Warrant Agreement, supporting WMIs position that Section 4.4 is unambiguously permissive, not mandatory."* See WMI Response Brief at 4 (emphasis added). This is nothing more than attorney argument. Nowhere – not in its original brief in support of its motion for summary judgment, nor in its latest response brief – does the debtor point to "data points," or facts to discern the intent of the Dime Board when it inserted Section 4.4 into Article IV. Nor can it.

By contrast, the Dime Class Plaintiffs can point to several examples of parole or extrinsic evidence to support the conclusion that the drafters of the Dime Warrant Agreement intended to *convey an asset* to the warrant holders in the form of litigation tracking rights and then take affirmative steps to preserve the value of that asset through the mandatory adjustment provisions of Article IV and the savings clause of Section 4.4. We previously identified several examples of parole evidence for the court, but because the debtor has used its response to re-argue its *misguided* view of the contract, it is worth mentioning them again. These include: (1) press releases by Dime's Board stating that Dime was conveying its *economic interest* in the Anchor litigation; (2) statements by the SEC Staff that Dime intended to separate the value of its stock from the value of the *contingent asset*; (3) not identifying a WMI bankruptcy in the risk factor section of the Registration Statement as a possible means of losing all value in the warrants; and (4) Broadbill's latest argument directed to the intent of the Golden State Board, which even the

debtor concedes must have been noticed by the Dime Board when it drafted the Warrant Agreement.

2. <u>Wrong on the Law</u>

The debtor's argument also fails as a matter of law. Under established principles of contract construction, the contract must be construed as a whole in which the rights and obligations of the parties are defined, and where each clause is presumed to have purpose and effect. In this case, the debtor misconstrues the purpose of the Warrant Agreement and then, from this error, proceeds to misconstrue the significance of Section 4.4 as a savings clause.

The purpose of the Warrant Agreement is to preserve the value of the Dime litigation tracking warrants. The debtor's response brief, however, mistakenly assumes that the Dime warrants provide *no more than* a right to buy stock in WMI. But that's not true. The warrants are not a right to buy anything; rather <u>*they are a right to receive something for free*</u>, namely 85% of the value of the Anchor damages award which the LTW holders paid for when they bought the Dime warrants in the market, or received them when Dime Savings spun-out the value of its economic interest in the Anchor litigation to its shareholders. Thus, the Dime Warrant Agreement promises to provide a *specific value* to warrant holders, but <u>not</u>, as the debtor contends, a certain number of shares.

We believe that this intent is clear from the four corners of the Warrant Agreement. Starting with the formula in section 3.1, the Warrant Agreement makes clear that the warrant holders are entitled to an amount equal to 85% of the Adjusted Litigation Recovery divided by the Adjusted Stock Price. Currently, we believe that the Adjusted Stock Price is zero. Since WMIs common stock has no value, it is now impossible for WMI to issue shares with a value equal to the litigation proceeds. Under these circumstances, the court, construing the Warrant

Agreement in light of the purpose and intent of the drafters, must ask what does the Warrant Agreement require WMI to do when its shares become worthless and the Company is unable to issue shares *with the required value?* Again, the contract provides the answer.

We believe that the answer to this question is found in the antidilution provisions of Article IV, and specifically within sub-section 4.4. The seamless fabric of Article IV, which the debtor rents asunder through its unsupported interpretation of Section 4.4, provides that in the face of known corporate events, WMI must preserve the value of the warrants even if that entails providing the Dime warrant holders with other valuable, non-equity consideration. This is unambiguous from Sections 4.1, 4.2 and 4.3. 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 antidilution 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.

In this case, 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 these circumstances, we believe the Board is ***required*** to make additional antidilution 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 this, 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 state law, into a claim against the Company – secured, in our opinion, but certainly at least an unsecured claim.

Finally, why do we say "required" and "must" 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. That is not a permissible means of construing the contract, and moreover, it is completely inconsistent with the extrinsic, or parole evidence in this case.

Thus, the only logical and permissible conclusion to draw *as a matter of contract law* is that the *mandatory* adjustment provisions of Article IV, of which Section 4.4 is a part, require WMI to preserve the value of the Dime warrants *in all circumstances*, including those known corporate events specified in Sections 4.1, 4.2 and 4.3, as well as unknown, unforeseen and perhaps unlikely events through the savings clause of Article IV, Section 4.4.

3. Unfair, Inequitable and Illegal

Lastly, the debtor's response brief ignores the stark reality that in March 2008, even before WMI filed for bankruptcy, the federal trial court awarded Anchor $382 million in damages (a few months later the court adjusted the award to $356 million). **At this point, the Dime LTWs were "in the money." They had value.** And yet, *inexplicably*, the debtor gave away 100% of this value to JP Morgan in a "settlement agreement" where it now appears that the rights of the Dime warrant holders were barely, if ever, discussed. That cannot be fair, it cannot be equitable and, under the Dime Warrant Agreement, it is illegal because the debtor violated its contractual obligation to marshal and safeguard the value of the Anchor damages award (*less a 15% fee to manage the litigation*) for the sole benefit of the Dime warrant holders.

CONCLUSION

For these reasons, Sonterra joins Broadbill in requesting that this court grant the Motion and grant such other and further relief as the court deems just and proper.

Dated: December 14, 2010
Wilmington, Delaware

Respectfully submitted,

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