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)
BROADBILL INVESTMENT CORP. NANTAHALA CAPITAL PARTNERS, L.P. and BLACKWELL CAPITAL PARTNERS, LLC	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	Adversary No. 10-50911 (MFW)
	:	
WASHINGTON MUTUAL, INC., et al.,	:	
	:	
Debtors.	:	

MEMORANDUM OF LAW BY *SONTERRA CAPITAL PARTNERS* AND *SONTERRA CAPITAL, LLC* IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION TO STRIKE DEBTOR'S EXPERT DECLARATION

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Sonterra Capital Partners and Sonterra Capital, LLC (collectively, "Sonterra"), having filed a proof of claim in this case, hereby submit this Memorandum of Law in Support of Plaintiffs' Motion to Strike the Declaration of Charlotte Chamberlain filed by debtor filed on November 29, 2010 in support of debtor's motion for summary judgment (the Chamberlain declaration").

SUMMARY OF FACTS

On November 29, 2010, despite the ruling of the court during the conference call with counsel earlier that day, debtor filed a purported "expert" declaration in support of its motion for summary judgment by Charlotte Chamberlain (the "Chamberlain declaration"), a former sell-side analyst with Jefferies & Co, now in the business of providing consulting services at the rate of $600 per hour. The Chamberlain declaration notes that Ms. Chamberlain's previous work experience includes initiating coverage and "publishing research reports on litigation participation securities while at Jefferies in May 1998." See Chamberlain declaration page 17 at para 42. As befitting her role as a sell-side analyst, Ms. Chamberlain also notes that she frequently communicated with Jefferies sales people, traders and clients. See Chamberlain declaration page 3 at para 5 and page 17 para 43. Finally, Ms. Chamberlain also notes that "my regulatory and thrift experience gave me a **unique perspective on the valuation of litigation participation securities** and my employer anticipated that my research reports would attract additional NASDAQ trading revenues to the firm." See Chamberlain declaration page 17 at para 42 (emphasis added).

Despite Ms. Chamberlain's limited experience as a sell-side analyst, with *expertise focused primarily on the valuation of litigation tracking warrants*, the Chamberlain declaration makes a giant leap into the realm of legal opinion, purporting to offer an "expert" opinion on what is the ultimate legal issue in the case: the legal status of the Dime warrants. "I find that the [Dime]

agreements support my view that the Dime LTWs were payable in equity shares and functioned as secondary capital offerings of the issuer, and *thus constitute equity offerings."* See Chamberlain declaration page 18-19, para 48.

Ms. Chamberlain is not a lawyer, has never attended law school and by all accounts has no experience reviewing and analyzing case law, either in bankruptcy or in securities matters.

SUMMARY OF ARGUMENT

This Court Should Exercise its Discretion and Under the Federal Rules of Civil Procedure Strike the Chamberlain Declaration as Untimely, Improperly Offering an Expert Opinion on a Legal Issue and as Unhelpful Because the Declaration Fails to Acknowledge the Unique, Differentiating Features of the Dime Warrants as a Claim to Value Created by the Anchor Litigation Damages Award

This court has considerable discretion to strike an expert declaration where, as here, it violates a host of precepts and fails to meet basic pleading requirements. For the following reasons, the court should exercise its discretion and strike the Chamberlain declaration:

1. **The Chamberlain Declaration is Untimely in Violation of the Federal Rules of Civil Procedure.**

At a minimum the court should strike the Chamberlain declaration as untimely. The federal rules require that the debtor provide counsel with timely notice of an expert declaration. Here, the debtor filed the Chamberlain declaration on November 29, 2010, after the court already ruled in telephonic conference with all counsel that the court would not take live witness testimony and would instead decide the motion for summary judgment on the basis of the briefs and oral argument. At this late hour, because plaintiffs contest, and have no way of confirming the

veracity of the fact assertions in the Chamberlain declaration, it is manifestly untimely and should be stricken from the record.

2. **The Chamberlain Declaration Improperly Offers an "Expert" Opinion on the Ultimate Legal Issue in the Case.**

The expert opinion offered in the Chamberlain declaration is that the Dime warrants are equity securities, and not general unsecured claims. The legal status of the Dime warrants is the ultimate legal issue in this case. Only the court can decide this issue, after hearing argument from counsel. Ms. Chamberlain is not a lawyer. She is not qualified to offer what is essentially a legal opinion on the ultimate legal issue in the case: the legal status of the Dime warrants. The opinion offered in the Chamberlain declaration masquerades as a legal opinion and is manifestly inappropriate. This court should strike the declaration.

3. **The Chamberlain Declaration is Unhelpful, since it Ignores Key Facts that Demonstrate that the Dime Warrants do NOT Possess Equity Attributes.**

Even Assuming Ms Chamberlain is a fact witness (which is not permitted under the court's recent admonition to counsel that no witness testimony would be permitted), her declaration is grossly inaccurate and unhelpful to the court. The Chamberlain declaration essentially concedes this point. First, the Chamberlain declaration notes that an essential feature of all equity warrants is that "[s]pecifically, warrants permit the holder to buy the underlying stock of the issuing company **at a fixed exercise price until expiration date**." See Chamberlain declaration at page 20, para 56 (emphasis added). In this case, however, the Dime warrants do not meet the minimal equity requirements set forth in the Chamberlain declaration:

- **The Dime warrants have NO fixed exercise price.** The value of the Dime warrants is based solely on the value of the litigation damages award. The Dime warrants do

not derive their value from, or based on the issuer's equity. The exchange-for-equity mechanism is simply a means for monetizing that value, and in any event is of no moment because it is not the exclusive consideration to be used to provide the Dime warrants with value as is made clear by section 4 and 6 of the Dime warrant agreement.

- **The Dime Warrants have NO "Fixed" Expiration Date; Rather, they Survive Even the Demise of WMI.** As provided in section 4 and section 6 of the Dime warrant agreement, the Dime warrants survive even if WMI does not. **Under the Dime warrant agreement, the Dime warrants have a continuing lien on the value of the Anchor litigation damages award. To this point, the Dime warrant agreement provides that in the event of a combination or reorganization the Dime warrant holders are entitled to receive other securities of equal value or other property or cash.**

4. The Chamberlain Declaration is Deficient Because it Offers the Unsupported Hearsay Opinion of a Sell-Side Analyst with No Experience as an Investor.

Ms Chamberlain is a former sell-side analyst. By all accounts she lacks experience as an investor and therefore is not qualified to offer an opinion as to how a buy-side analyst / investor would determine value here. The buy-side investor would evaluate the investment opportunity here, and *value the Dime warrants*, based on the underlying Anchor litigation damages award, *and the legal documentation in the Dime warrant agreement*. The fact that Jefferies sell-side salespeople have a different view is irrelevant. To the extent that the Chamberlain declaration

relies on former sell-side sales colleagues, the declaration (which is being offered for the truth of all matters asserted therein) is inadmissible as both uncorroborated hearsay and as unfairly prejudicial to the plaintiffs.

5. The Chamberlain Declaration is Deficient Because it Fails to Acknowledge that the Value of the Dime Warrants is Based on the Value of the Anchor Litigation Damages Award and Not on the Basis of WMI Equity

The Chamberlain declaration asserts that the value of the Dime warrants is based on WMI equity. That is facially incorrect based on the plain language of section 4 of the warrant agreement, which plaintiffs argue is breached in this case.

Section 4 makes clear that where, as here, WMI undergoes a reorganization or other event that results in the cancellation of the WMI equity, the Dime warrants must be exercisable for other valuable, non-equity consideration, including other securities, other property or cash. The Chamberlain declaration (and debtor) ignores this reality.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION AND STRIKE THE CHAMBERLAIN DECLARATION AS UNTIMELY, IMPROPER, UNHELPFUL AND UNFAIRLY PREJUDICIAL

A. The Chamberlain Declaration is Untimely and Unfairly Prejudicial

The federal rules require that the debtor provide counsel with timely notice of an expert declaration. Here, the debtor filed the Chamberlain declaration on November 29, 2010, after the court already ruled in telephonic conference with all counsel that the court would not take live

witness testimony and would instead decide the motion for summary judgment on the basis of the briefs and oral argument. The Chamberlain declaration is based on the unsupported opinions of former Jefferies salespeople – none of whom are identified by name, and none of whom can be properly verified. This is incredibly prejudicial to plaintiffs. At this late hour, because plaintiffs have no way of confirming the veracity of the fact assertions in the Chamberlain declaration it is manifestly untimely and should be stricken from the record. See *In re Worldwide Direct*, 316 B.R. 637 (Bankr. D. Del. 2004) (Walrath, J.).

B. The Chamberlain Declaration Improperly Offers an "Opinion" on a Legal Issue

The most egregious flaw in the Chamberlain declaration is that it improperly offers a legal opinion on the ultimate issue in the case: the legal status of the Dime warrants, either as equity interests, or as an unsecured claim. This is the ultimate legal issue in the case. It is manifestly inappropriate for debtor to submit a declaration that purports to offer an "expert" opinion but essentially is a legal opinion by a non-lawyer.

Courts routinely strike expert declarations when they improperly venture into the realm of legal opinion. Recently, a federal judge in Delaware did just that in *Brigham & Women's Hospital et al v. Teva*, No. 08-cv-464 (D. Del. 2009) (Bartle, J.). This court should recognize that the Chamberlain declaration is simply a vehicle for "dressing-up" debtor's argument in the guise of a fancy expert declaration. The court should reject it and strike the Chamberlain declaration from the record.

C. The Chamberlain Declaration is Unhelpful Because it is Based on Uncorroborated Hearsay from a Former Sell-side Analyst with No Experience as an Investor

The Chamberlain declaration is flawed because it offers inaccurate and highly misleading testimony.

Not only is the so-called "expert" opinion here based on unsupported and unfairly prejudicial hearsay, but it is, in fact, inaccurate. Ms. Chamberlain discusses the "market's" view of litigation tracking warrants as equity securities, and opines that in this case the market would value the Dime warrants based on WMI equity value. That is manifestly incorrect. The only "expert" qualified to make that determination is an *investor*. The *buy-side investor* would only value the Dime warrants on the basis of the value of the Anchor litigation damages and would never value the warrants based on the stock price of WMI. Thus, the Chamberlain declaration is *grossly inaccurate* and, as discussed below, unhelpful because, as discussed below, it ignores the key differentiating features of the Dime warrants.

D. Reference to Other Litigation Tracking Warrants is Inappropriate and is a Red Herring Designed to Divert the Court's Attention from the Unique Features of the Dime Warrants that Provide a Claim to the Value Created by the Anchor Litigation Damages Award

Lastly, the Chamberlain declaration goes on at-length about warrants issued by other failed S&Ls, as if all litigation tracking warrants are the same. They are not.

As discussed below, the Dime warrants provide for a continuing claim on the value of the Anchor litigation recovery by virtue of the fact that in the event that WMI undergoes a reorganization or combination, the Dime warrants can be exchanged for other valuable, non-equity consideration, including other securities of equivalent value, other property, or cash. This

means that the Dime warrants have an unsecured claim on the value of the Anchor litigation damages award which survives even of WMI does not. Nowhere is this addressed in the Chamberlain declaration, and yet it is essential to the outcome of this case. In fact, as discussed below, it is outcome determinative.

II. THE CHAMBERLAIN DECLARATION IGNORES SECTIONS 4 AND 6 OF THE WARRANT AGREEMENT WHICH ESTABLISH THAT THE DIME WARRANTS HAVE AN UNSECURED CLAIM TO THE VALUE CREATED BY THE ANCHOR DAMAGES AWARD IRRESPECTIVE OF WHETHER WMI SURVIVES AS AN ENTITY OR HAS REGISTERABLE STOCK

A. Section 4 of the Warrant Agreement Makes Clear that the Parties to this Contract Intended to Protect and Preserve the Value of the Warrants

Section 4 of the warrant agreement makes clear that the Dime warrants represent a continuing lien on the value of the Anchor damages award, and in that regard are properly classified as having an unsecured claim to the value created by the litigation damages.[1] This is underscored by section 4 of the Dime warrant agreement which provides that if the warrants are not exercisable for stock because stock would not provide the Dime holders with value, the Dime **warrants must be exercisable for other valuable, non-equity consideration.**

[1] Of course, as discussed in the memorandum of law filed by Sonterra in support of plaintiffs' opposition to the motion for summary judgment, section 6.1 of the Dime warrant agreement is captioned "*Holders not Stockholders.*" That section makes clear that the Dime warrant holders have none of the rights afforded to WMI equity holders so long as the warrants remain outstanding. The so-called trigger event, moreover, referred to in debtor's brief further proves this point. The Dime warrants cannot be classified as equity in the first instance because until the cash from the judgment is transferred to WMI, WMI cannot – and in fact has not – issued equity to the litigation trust warrants. Moreover, that cannot happen because WMI equity has been delisted and cannot comply with Registration requirements. Therefore, the Dime warrants cannot be treated as equity.

Section 4.1 of the Dime warrant agreement makes this point crystal clear: in a combination -- where WMI equity is cancelled -- the warrant holder is entitled to receive **other "property:"**

> Except as provided in section 4.2c, in the event of a Combination, the Holders will have the right to receive upon exercise of each warrant the number of shares of capital stock or other securities **or an amount of property** equal to the Adjusted Litigation recovery.....

See Warrant Agreement, Section 4.1b (emphasis added).

In addition, Section 4.2c provides that the Dime warrant holders actually have a right to cash when/if WMI receives cash in exchange for its shares:

> In the event of a Combination where consideration is payable to holders of the Common Stock in exchange for their shares solely in cash, **the Holders [DIMEQ warrant holders] will have the right to receive upon exercise of each warrant cash in the amount equal to the value of the Adjusted Litigation Recovery.....**

See Warrant Agreement, Section 4.2c (emphasis added).

Section 4 of the Dime warrant agreement thus makes clear that the purpose of this agreement – which is a contract between the Dime warrant holders and WMI – is to preserve the value of the Dime warrants *to the litigation recovery* and to provide the Dime warrant holders with a continuing claim to the value of the Anchor litigation damages award. Under this contract, regardless of the form of consideration – equity, other securities, other property or cash -- the Dime warrant holders are entitled to 85% of the value of the Anchor litigation damages award, and WMI is entitled to keep 15% of the value for prosecuting the litigation.

This is especially so now that WMI has filed for bankruptcy. Under these circumstances, section 4.4 of the Dime warrant agreement provides:

> Other Events. 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 purchase rights of the Holders of the Warrants in accordance with the essential intent*** and principles of such provisions, then the Board may make, without the consent of the Holders, such an adjustment 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 of aforesaid.

See Warrant Agreement, Section 4.4 (emphasis added).

Under section 4.4 of the Dime warrant agreement, the purpose of the warrant agreement is to preserve and safeguard value of the Dime warrants for the benefit of the Dime warrant holders.

B. The Debtor's Interpretation of Section 4 of the Warrant Agreement Makes No Sense and is Inconsistent with the Plain Meaning of the Terms of the Agreement

If there is any ambiguity in the term "may" in section 4.4, then there must be a factual inquiry into the intended meaning of the term "may" as well as the meaning of the term "essential intent and principles" as used in the Dime warrant agreement. This alone precludes summary judgment.

Even assuming the court discerns the intent of the terms "may" and "essential intent and principles" there are at least three examples of parole evidence that supports the plaintiffs

argument that the intent of the warrant agreement was to preserve the value of the warrants created by the litigation damages award (with no parole evidence supporting the debtor's position). These include the following:

a. The Dime warrants were a product designed and marketed by an investment bank for the stated purpose of giving value to warrant holders for the potential successful outcome of the Anchor litigation.

b. Dime's public descriptions of the Dime warrants explicitly described the intended purpose as being to give the value to the warrant holders *as an asset*.

c. Nowhere in the risk factors section of the Dime warrant agreement does WMI disclose to the warrant holder that WMI could – at its whim – engage in a complex financial transaction to deprive the warrants of all value. If that was the true intention of WMI in the amended warrant agreement, then the law would have required WMI to disclose this unseemly reality in the warrant agreement as a "risk factor."

C. The Chamberlain Declaration Ignores this Court's Inherent Equity Power

The contract between the Dime warrant holders and WMI is set up so that (1) the Dime warrant holders receive 85% of the value of the Anchor litigation damages award, and (2) in exchange for prosecuting the litigation, WMI (or its successors) is entitled to 15% of the value of the damages award. Upon the trigger event, WMI had the option to convert the award into equity via a shelf offering. Since WMI has filed for bankruptcy, however, there can be no exchange of value other than through the distribution of cash or other property of equivalent value. Under these circumstances, the Dime warrants cannot be equity interests.

Moreover, to accept the debtor's argument is to allow WMI to garner the full value of the Anchor litigation damages when, by contract, the bank is only entitled to 15% of the value.

Under the unique circumstances of this case, to prevent an unjust conversion, this court should strike the Chamberlain declaration and find that the Dime warrants have an unsecured claim for value inherent in the Anchor damages award. See *In re Etoys*, 2007 U.S. Dist. LEXIS 13146 (D. Del. 2007) ("It is well established, however, that the bankruptcy courts possess broad discretion to fashion appropriate remedies when confronted with such violations").

CONCLUSION

For the foregoing reasons the court should strike the Chamberlain declaration, deny the motion for summary judgment and rule in favor of the DIME LTW Class on all issues.

Dated: December 1, 2010
Wilmington, Delaware

Respectfully submitted,

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