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)
BROADBILL INVESTMENT CORP.,	Adversary Proceeding Case No. 10-50911 (MFW)
Plaintiff,	
v.	
WASHINGTON MUTUAL, INC.,	
Defendant.	
NANTAHALA CAPITAL PARTNERS, LP, and BLACKWELL CAPITAL PARTNERS, LLC,	
Intervenor-Plaintiffs,	
v.	
WASHINGTON MUTUAL, INC.,	
Defendant-in-Intervention.	

DEFENDANT'S RESPONSE TO PLAINTIFFS' EMERGENCY MOTION TO STRIKE EXHIBIT O TO THE SHIFFMAN DECLARATION AND REPLACE IT WITH THE FINAL GOLDEN STATE WARRANT AGREEMENT

Brian S. Rosen, Esq.
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Mark D. Collins (No. 2981)
Chun I. Jang (No. 4790)
Travis A. McRoberts (No. 5274)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

Attorneys for Defendant

Dated: December 13, 2010
Wilmington, Delaware

Washington Mutual, Inc. ("WMI"), defendant herein, respectfully submits this response (the "Response") to Plaintiffs' Emergency Motion To Strike Exhibit O To The Shiffman Declaration And Replace It With The Final Golden State Warrant Agreement, dated December 10, 2010 (the "Motion"), and states as follows:

PRELIMINARY STATEMENT

WMI consents to supplementing the record with the correct copy of the final Golden State Warrant Agreement. WMI was unaware that there were two publicly-filed versions of the Golden State Warrant Agreement and that it had inadvertently referenced the earlier-filed draft version in its opening brief, until Plaintiffs raised the issue to this Court for the first time. In reality, however, Plaintiffs' Motion not only clarifies the record, but is helpful for it actually supports WMI's motion for summary judgment: the fact that Golden State Bancorp chose to replace "shall" with "may" in its provision analogous to Section 4.4 here only establishes that Golden State Bancorp, like Dime, granted its Board discretion to decide whether or not to make adjustments.

ARGUMENT

As WMI has established, the plain language of Section 4.4 of the Amended Warrant Agreement makes clear that the Board "may" make adjustments if in its discretion it deems such adjustments necessary, and thus renders invalid Plaintiffs' argument that Section 4.4 imposes a duty upon WMI. *See* Memo at 27-30; Reply at 15-16; Shiffman Decl. at Ex. P, § 4.4 (Warrant Agreement); Shiffman Decl. at Ex. R, § 4.4 (Amended Warrant Agreement). In its opening brief, WMI compared this language to that of an analogous provision in a publicly-filed version of the Golden State Warrant Agreement, which – in contrast to Section 4.4 – actually required adjustments in similar circumstances by providing that "the Board *shall* make

adjustments." *See* Memo at 8; Golden State Bancorp, Inc., Registration Statement (Form S-4) (Apr. 3, 1998), at Ex. 4.7 (emphasis added). This comparison was merely meant to illustrate 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.

However, when WMI made this comparison, it was unaware that there were *two* publicly-filed versions of the Golden State Warrant Agreement: an undated draft version attached to Golden State Bancorp's Form S-4 filed on April 3, 1998; and a later-filed, final version attached to Golden State Bancorp's Form 10-K filed for the period ending June 30, 1998. *See* Golden State Bancorp, Inc., Registration Statement (Form S-4) (Apr. 3, 1998), at Ex. 4.7; Golden State Bancorp, Inc., Annual Report (Form 10-K) (Sept. 18, 1998), at Ex. 4.5. WMI inadvertently cited the earlier-filed version (which uses "shall" rather than "may") in its opening brief rather than the final version (which, like Dime's Warrant Agreement, uses "may" rather than "shall"). *Compare* Golden State Bancorp, Inc., Registration Statement (Form S-4) (Apr. 3, 1998), at Ex. 4.7, § 4.5, *with* Golden State Bancorp, Inc., Annual Report (Form 10-K) (Sept. 18, 1998), at Ex. 4.5, § 4.5. WMI did not become aware of the existence of the final version until Plaintiffs raised the issue to the Court last week, after failing to raise it in their initial opposition brief, in their sur-reply brief, or in the oral arguments on summary judgment that recently took place.

Now that WMI is aware that it inadvertently attached the draft version, it does not oppose the Motion, both because inclusion of the Golden State Warrant Agreement as executed will clarify the record and because Plaintiffs' arguments based thereon have no effect whatsoever on WMI's Section 4.4 argument. Section 4.4 of the Dime Warrant Agreement is permissive, not

mandatory. That Golden State Bancorp 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 WMI's position that Section 4.4 is unambiguously permissive, not mandatory.

CONCLUSION

For the reasons stated herein, WMI consents to supplementation of the record with the final version of the Golden State Warrant Agreement.

Dated: December 13, 2010
Wilmington, Delaware

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One Rodney Square
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Brian S. Rosen, Esq.
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New York, NY 10153
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Attorneys for Defendant