UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
Debtors.	:	**(Jointly Administered)**
	:	**Re: Docket Nos. 5971 & 6560**
	:	**Hearing Date: Feb. 8, 2011 at 10:30 a.m.**
	:	**Obj. Deadline: February 1, 2011 at 4:00 p.m.**

MOTION FOR RECONSIDERATION OF ORDER ESTIMATING MAXIMUM AMOUNT OF LTW CLAIMS FOR PURPOSES OF ESTABLISHING RESERVES

Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors"), file this motion (the "Motion") for reconsideration of the *Order Estimating Maximum Amount of LTW Claims for Purposes of Establishing Reserves* [Docket No. 6560] (the "Estimation Order"), dated January 14, 2010, pursuant to Rule 60 of the Federal Rules of Civil Procedure (the "FRCP") as made applicable to these bankruptcy proceedings by Rule 9024 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and respectfully represent as follows:

Jurisdiction

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

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Background

2. On November 17, 2010, the Debtors filed the *Debtors' Motion to Estimate Maximum Amount of Certain Claims for Purposes of Establishing Reserves Under the Debtors' Confirmed Chapter 11 Plan* [Docket No. 5971] (the "Estimation Motion"). Among other things, the Estimation Motion sought to estimate, solely for purposes of establishing a reserve under the *Debtors' Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* (the "Plan"), the maximum value of disputed claims (the "LTW Claims") held by all holders (the "LTW Holders") of certain Litigation Tracking Warrants at $250 million.

3. On December 6, 2010, Broadbill Investment Corp., Nantahala Capital Partners, LP and Blackwell Partners, L.P., on behalf of themselves and all other LTW Holders, filed the *Objection to Debtors' Motion to Estimate Maximum Amount of Certain Claims for Purposes of Establishing Reserves Under the Debtors' Proposed Chapter 11 Plan* [Docket No. 6243] (the "LTW Objection"). In the LTW Objection, the LTW Holders requested that the reserve with respect to the LTW Claims be set at "not less than $337 million," and relied on a calculation supporting a reserve amount of $337 million. LTW Objection at ¶ 8 (emphasis added). A copy of the LTW Objection is attached hereto as Exhibit A.

4. On January 6, 2011, the Court held a hearing (the "January 6 Hearing") to consider the Estimation Motion and the LTW Objection. During argument, counsel to the LTW Holders stated that, "...I think the reserve should be $337 million." 1/6/11 Hr'g. Tr. 157: 10-11. At the conclusion of the January 6 Hearing, the Court set the reserve for the LTW Claims at $337 million, the same amount requested by the LTW Holders. See 1/6/11 Hr'g. Tr. 158: 22-23

(stating that "I'm going to set the reserve at $337 million"). A copy of the relevant portion of the January 6 Hearing transcript is attached hereto as Exhibit B.

5. Following the January 6 Hearing, however, the Court issued two other opinions that referenced the reserve set for the LTW Claims, but each at different reserve amounts. More specifically, on January 7, 2011, the Court issued an opinion [Docket No. 6528] (the "Confirmation Opinion") denying confirmation of the Plan. At footnote 50 of the Confirmation Opinion, the Court indicated that it had set the LTW Claims reserve at $347 million at the January 6 Hearing. See Confirmation Opinion, n. 50 (emphasis added). Also on January 7, 2011, the Court issued an opinion [Adv. Docket No. 145] (the "Summary Judgment Opinion," and together with the Confirmation Opinion, the "Opinions") denying the *Motion of Defendant Washington Mutual, Inc. for Summary Judgment* [Adv. No. 10-50911, Docket No. 68]. At footnote 3 of the Summary Judgment Opinion, the Court noted that "contemporaneously herewith, the Court is denying confirmation and determining the amount of the reserve for the LTW Holders must be set at $334 million." Summary Judgment Opinion, n. 3 (emphasis added). Neither of these figures were mentioned by the Debtors, the LTW Holders or the Court prior to appearing in the Opinions.

6. On January 13, 2011, following issuance of the Opinions and discussions with the LTW Holders regarding this discrepancy, the Debtors filed the *Certification of Counsel Regarding Order Estimating Maximum Amount of LTW Claims for Purposes of Establishing Reserves* [Docket No. 6546] (the "COC") and a related proposed form of order (the "Proposed Order"). The COC explained that the Debtors believed the differing amounts in the Opinions were inadvertent errors and that the Court had always intended for the reserve to be set at $337 million in accordance with the Court's January 6 ruling. Despite never having previously

requested a reserve of $347 million, due to the discrepancy in the Opinions, the LTW Holders requested that the Debtors leave blank spaces in the Proposed Order attached to the COC so that the Court could fill in the appropriate reserve amount for the LTW Claims.

7. On January 14, 2010, the Court entered the Estimation Order, and filled in the blanks for the reserve amount with $347 million.

Relief Requested

8. The Debtors continue to believe that a reserve of $347 million is inconsistent with and unsupported by the record made at the January 6 Hearing, the Court's January 6 ruling where the Court stated, "I'm going to set the reserve at $337 million," as well as the LTW Holders' own request for the amount of the reserve, as evidenced by the LTW Objection and their statements at the January 6 Hearing. Although a $10 million difference in the reserve may appear small given the size of these cases, such amount is still substantial to holders of already allowed claims and would reduce the amount available for distributions under the Plan to other creditors.

9. Accordingly, pursuant to Bankruptcy Rule 9024,[2] the Debtors respectfully request entry of a revised order, substantially in the form attached hereto as Exhibit C (the "Revised Order"), setting the reserve amount for the LTW Claims at $337 million consistent with the Court's ruling at the January 6 Hearing. In the alternative, the Debtors respectfully request clarification as to the basis for the $347 million figure contained in the Estimation Order.

Notice

10. Notice of the Motion has been given to: (a) the U.S. Trustee; (b) counsel for the Official Committee of Unsecured Creditors; (b) counsel for the Official Committee of

[2] With certain modifications not applicable here, Bankruptcy Rule 9024 makes FRCP 60 applicable in bankruptcy proceedings and permits a court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a).

Equity Security Holders; (d) counsel to Broadbill Investment Corp., Nantahala Capital Partners, LP and Blackwell Partners, L.P.; and (e) all persons entitled to receive notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors submit that no other or further notice need be provided.

WHEREFORE, the Debtors respectfully request entry of the Revised Order, or, in the alternative, clarification of the $347 million figure at the earliest of the Court.

Dated: Wilmington, Delaware
January 21, 2011

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ATTORNEYS TO THE DEBTORS
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
Debtors.	:	**(Jointly Administered)**
	:	**Hearing Date: Feb. 8, 2011 at 10:30 a.m.**
	:	**Obj. Deadline: February 1, 2011 at 4:00 p.m.**

NOTICE OF MOTION AND HEARING

PLEASE TAKE NOTICE that on January 21, 2011, the above-captioned debtors and debtors in possession (the "Debtors") filed the **Motion for Reconsideration of Order Estimating Maximum Amount of LTW Claims for Purposes of Establishing Reserves** (the "Motion") with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE that any responses to the Motion must be filed in writing with the Bankruptcy Court, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon and received by the undersigned counsel for the Debtors on or before **February 1, 2011 at 4:00 p.m. (EST).**

PLEASE TAKE FURTHER NOTICE that, in the event that one or more responses to the Motion are timely filed, the Motion shall be considered at a hearing before The Honorable Mary F. Walrath at the Bankruptcy Court, 824 North Market Street, 5th Floor, Courtroom 4, Wilmington, Delaware 19801 on **February 8, 2011 at 10:30 a.m. (EST).**

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

PLEASE TAKE FURTHER NOTICE THAT IF NO RESPONSES TO THE MOTION ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE BANKRUPTCY COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: January 21, 2011
Wilmington, Delaware

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Attorneys for the Debtors and Debtors in Possession

EXHIBIT A

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
	Hearing Date: December 17, 2010 at 10:30 a.m. (EST)

OBJECTION TO DEBTORS' MOTION TO ESTIMATE MAXIMUM AMOUNT OF CERTAIN CLAIMS FOR PURPOSES OF ESTABLISHING RESERVES UNDER THE DEBTORS' PROPOSED CHAPTER 11 PLAN

TO: THE HONORABLE MARY F. WALRATH,
UNITED STATES BANKRUPTCY JUDGE

Broadbill Investment Corp. ("Broadbill"), Nantahala Capital Partners, LP ("Nantahala") and Blackwell Partners, L.P. ("Blackwell" and, together with Broadbill and Nantahala, the "Claimants"), on behalf of themselves and all holders of Litigation Tracking Warrants ("LTWs"), for their Objection (the "Objection") to the Debtors' Motion (the "Motion") to Estimate Maximum Amount of Certain Claims for Purposes of Establishing Reserves under the Debtors' Proposed Chapter 11 Plan (the "Proposed Plan") [Docket No. 5971], respectfully represents:

1. On October 6, 2010, the Debtors filed the Proposed Plan [Docket No. 5548] (the "Proposed Plan"). Under the Proposed Plan, the Debtors will fund a full cash reserve equal to the maximum amount of all Disputed Claims. The Debtors have agreed that the LTW Holders' claim against the Debtors in an amount equal to 85% of the net recovery in the Anchor Litigation is a Disputed Claim and that, if Claimants are successful in the declaratory judgment action before this Court entitled *Broadbill Investment Corp., et al. v. Washington Mutual, Inc.*, Adv.

No. 10-50911 (MWF), the LTW Holders' claims will be treated as general unsecured claims under the Proposed Plan.

2. On November 17, 2010, the Debtors filed the Motion. In the Motion, the Debtors estimate that the maximum amount payable on account of the LTW Holders' claims is $250 million. See Motion, at pp. D-1 - D-6. The formula the Debtors used to calculate this amount is set forth on page 58 of the Disclosure Statement, in footnote 17.

3. On November 19, 2010, the Claimants filed an objection to the Proposed Plan (attached hereto as Exhibit A, the "Plan Objection") on behalf of themselves and all LTW holders. In the Plan Objection, the Claimants objected to the Proposed Plan on, among other reasons, the grounds that the amount of the Debtors' proposed reserve is inadequate. As set forth in the Plan Objection, the Debtors' calculation of the reserve for the LTW Holders' claims is wrong for the following two reasons, and the reserve amount should be no less than $337 million.

A. The Tax Gross-Up Amount.

4. In June 2010, JPMorgan Chase ("JPMorgan") filed a motion in the Court of Federal Claims seeking approval of its calculation of the amount of the tax gross-up relating to the proceeds of the Anchor Litigation. JPMorgan estimated the tax gross-up amount to be between $104 million and $144 million (depending on whether the Court of Federal Claims determined that the Anchor Litigation damage award would be equal to $356 million or $419 million).

5. The Debtors' calculation of the reserve for the LTW Holders omits the tax gross-up portion but deducts $180 million in estimated taxes. See Disclosure Statement, p. 58, fn 17. There are two ways to correct this mistake. One way is to simply ignore the tax reduction of $180 million since the gross-up is intended to make the damage award tax neutral. That would have the effect of adding approximately $153 million to the reserve (85% of $180 million). The alternative way is to include the gross-up of approximately $144 million, which would cause the reserve to increase, subject to the other reserve adjustment discussed below.

6. In a recent pleading filed by JPMorgan Chase in the Court of Federal Claims, it indicated that the amount of the tax gross-up could be impacted based on how it allocates the purchase price for the assets acquired from WaMu Bank and the Debtors. Presumably, that means the more tax basis JPMorgan Chase allocates to the Anchor Litigation, (i) the lesser the tax gain, (ii) the smaller the tax gross-up, (iii) the smaller the amount of the Anchor Litigation judgment, and (iv) the smaller the value of the LTWs. That result would be inequitable and improper. Under the intent and principles of the WMI Agreement (including Section 6.3 thereof), WaMu Bank was not permitted to transfer the Anchor Litigation to third parties unless it was to a successor and, then, only if the interests of the LTW Holders would remain aligned with the interests of the party prosecuting the Anchor Litigation. Transfer of the ownership to the Anchor Litigation was not supposed to impact the value of the LTWs based on tax considerations or otherwise. Section 4.4 of the WMI Agreement was intended to correct any unforeseen circumstance where LTW value was not being preserved in accordance with the intent and principles of the WMI Agreement. Based on the foregoing, the LTW Holders have a claim against the Debtors to the extent that the value of the LTWs has been, or will be, negatively impacted by the transfer of the Anchor Litigation to JPMorgan Chase.

B. The Tax Rate.

7. The Debtors' calculation of the reserve uses an effective tax rate of 45.5%. JPMorgan Chase in its pleading for the tax gross-up said that it is taxed at a rate of 38.757%. The JPMorgan Chase rate is what the Debtors should have used in calculating the reserve. There is no reason for two different rates. This change in rates would have reduced the tax reduction amount from approximately $180 million to $153 million. This difference would add $27 million to the LTW Holders claim reserve.

8. Taking into account these adjustments, the amount of the reserve should be not less than $337 million, calculated as follows:

Amount of Judgment: $419 million (not including tax gross-up or tax reduction)
Minus legal expenses: $22 million
Multiplied by .85%

Net Reserve: $337 million

9. On December 6, 2010, the Claimants served a Rule 30(b)(6) deposition notice and document request (the "Deposition Notice") on the Debtors. The Deposition Notice seeks information relating to the Debtors' calculation of the claims reserve relating to the LTW Holders' claims - - specifically, how the Debtors reached the purported $250 million maximum claims reserve amount. The Claimants reserve the right to amend and/or supplement this Objection following the deposition scheduled in the Deposition Notice.

WHEREFORE, for all the reasons cited above, the Claimants respectfully request that this Court (i) deny the Motion unless and until the changes requested herein by the Claimants are made and (ii) grant such other and further relief as this Court deems just and proper.

Dated: December 6, 2010

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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

OBJECTION TO CONFIRMATION FILED BY CLASS PLAINTIFFS ON BEHALF OF THE LTW HOLDERS

Broadbill Investment Corp., Nantahala Capital Partners, L.P. and Blackwell Partners, LLC, on behalf of themselves and all holders of LTWs (as herein defined) (collectively, the "**Claimants**" or the "**LTW Holders**"), by their undersigned counsel, for their objection to the Debtors' proposed Sixth Amended Plan of Reorganization, dated October 6, 2010 (as amended, the "**Proposed Plan**"), respectfully represent:

FACTUAL BACKGROUND - BASIS OF LTW CLAIMS

1. The Claimants hold litigation tracking warrants ("**LTWs**") originally issued by Dime Bancorp, Inc. ("**Dime**") which entitle the Claimants to receive 85% of the net recovery from the Anchor Litigation[1]. The Anchor Litigation has not been fully resolved but, at a minimum, a judgment has been entered in 2008 in favor of the plaintiff for approximately $356 million. The Claimants believe that the Anchor Litigation judgment will ultimately exceed $500 million.

2. The Proposed Plan puts the LTWs in Class XXI and provides that they are equity securities of WMI, which are not entitled to a distribution under the Proposed Plan.

[1] Terms used herein and not otherwise defined shall have the meanings ascribed to them in the Debtors Disclosure Statement, dated October 6, 2010 (as amended, the "**Disclosure Statement**").

3. The Claimants disagree with the Debtors' assertion. As set forth in the pleadings filed by the Claimants in the declaratory judgment action before this Court entitled *Broadbill Investment Corp., et al. v. Washington Mutual, Inc.*, Adv. No. 10-50911 (MWF) (the "**Action**"), the LTW Holders hold non-subordinated claims against Washington Mutual, Inc. ("WMI"). Among other things:

(a) By transferring the Anchor Litigation to JPMC without requiring JPMC to assume the obligations of WMI under the WMI Agreement (as herein defined), WMI has breached its contractual obligations to the LTW Holders.

(b) By transferring the Anchor Litigation to JPMC under the Global Settlement pursuant to the Proposed Plan free and clear of the LTW liens, claims and interests, WMI has breached its contractual obligations to the LTW Holders.

(c) By submitting the Proposed Plan which provides for the cancellation of the LTWs for no compensation or consideration, WMI has breached its contractual obligations to the LTW Holders.

(d) As further explained *infra*, by not paying LTW Holders cash as required by Sections 4.2(b) and (c) of the WMI Agreement, WMI has breached its contractual obligations to the LTW Holders.

(e) As further explained *infra*, by not making the "Adjustment" required under Section 4.4 of the WMI Agreement, WMI and its Board of Directors have breached their contractual obligations to the LTW Holders.

(f) By rejecting its obligations under the WMI Agreement pursuant to the Proposed Plan, WMI has breached its contractual obligations to the LTW Holders.

4. The following facts and circumstances illustrate the basis for the LTW Holders' claims against the Debtors:

(a) The Registration Statement, dated December 15, 2000 ("**Registration Statement**"), issued in connection with the Dime LTWs, at page 1, provides the following question and answer: "Why are we distributing the LTWs? We are distributing the LTWs in an effort to pass along the potential value of our claim against the government to our existing shareholders." **Exhibit A** is a copy of the Registration Statement.

(b) In a press release issued by Dime on December 18, 2000 (**Exhibit B**), Dime announced that its Board of Directors "has declared a distribution of a substantial portion of Dime's economic interest in its pending 'goodwill' litigation against the United States through the issuance of Litigation Tracking Warrants."

(c) In a further press release dated December 20, 2000 (**Exhibit C**), it was reported on behalf of Dime that once the LTWs were issued, Dime's common stock would trade on the New York Stock Exchange without the value of the LTWs.

(d) On March 12, 1998, in a meeting held by the Joint Committee of the SEC and the AICPA, the participants discussed "litigation tracking warrants" in the context of certain accounting issues. The highlights of the meeting (**Exhibit D**) described that "litigation tracking warrants" were issued because the issuer "does not believe the trading value of its shares in the market properly included the value of the contingent asset." The members of the Committee believed that "litigation tracking warrants," once issued, effectively separated the contingent asset from the remainder of the company--an issuance of "litigation tracking warrants" had the same economic effect of a spin-off of the contingent asset.

(e) The term "Litigation Tracking Warrants" is a trademarked term owned by Credit Suisse First Boston and was a financial product marketed by it to prospective clients, such as Dime.

(f) The structure of the LTWs make it clear that the LTWs are not true equity warrants. The LTWs do not provide for the purchase of a specific number of shares of stock at a strike price for a specified time -- which are three fundamental requisite elements of an equity warrant. See *Reiss v. Financial Performance Corp.*, 764 NE 2d 958 (NY 2001).

(g) The Dime shareholders never "purchased" the LTWs -- they were given to them on a tax-free basis.

(h) The LTWs were drafted in a particular way in order that there not be a tax consequence to the Dime shareholders when they received the LTWs. The Claimants believe that tax driven aspects of the WMI Agreement are not dispositive of the intent of the parties and the purpose of the LTWs. The Debtors, without expressly adopting this position, have implicitly conceded the point in other proceedings. For example, Section 6.3 of the WMI Agreement provides, in part, that: "The Bank (WAMU Bank, as herein defined) will retain sole and exclusive control of the (Anchor) Litigation and will retain 100% of any recovery from the Litigation". In the face of that language, the Debtors have:

(i) filed pleadings in the JPMC Adversary Proceeding stating that WMI--and not WAMU Bank -- owns the Anchor Litigation and is entitled to the recovery therefrom. **(Exhibit E)**

(ii) filed a pleading, through counsel, before the Court of Federal Claims that the real party in interest was WMI and not WAMU Bank. **(Exhibit F)**

(iii) filed a Form 8-K with the SEC dated March 21, 2008 in which it referred to the Anchor Litigation as WMI's litigation, and stated that WMI "was a party to the litigation as a result of its acquisition of Dime Bancorp. . ." **(Exhibit G)**

(iv) structured the Global Settlement with the assumption that WMI has an interest in the Anchor Litigation in order to utilize Section 363(f) of the Bankruptcy Code so that the Anchor Litigation could be transferred to JPMC free and clear of the rights and claims of the LTW Holders. Disclosure Statement at p. 57.

(i) There is no "exercise price" for the LTWs. Rather, LTWs are to be exchanged for 85% of the net recovery in the Anchor Litigation. (See WMI Agreement, dated March 11, 2003, ("**WMI Agreement**") -- **Exhibit H**)

(j) The common stock of WMI was traded on the New York Stock Exchange. The LTWs were traded on NASDAQ. LTW Holders as a class were former Dime shareholders -- they never were WMI shareholders. Many LTW Holders purchased on the open market and thus were never shareholders of either Dime or WMI. The price of the LTWs was a function of the anticipated recovery in the Anchor Litigation. The value of the LTWs was not impacted by the financial performance of WMI. LTW holders did not receive an equity upside in the financial performance of WMI. By contrast, the value of the equity securities of WMI was driven by the financial performance of WMI.

(k) The Risk Factors in the Registration Statement (**Exhibit A**) do not mention that the issuer (Dime) could file for bankruptcy and its common stock could be rendered worthless, and thus the LTWs would be rendered worthless.

(l) The Registration Statement makes clear that the LTWs are not stock warrants, equity securities or equity interests. In particular, the Registration Statement says at page 5: "An investment in the LTWs involves different risks and considerations from an investment in the common stock of a savings and loan company such as Dime Bancorp."

(m) When the Debtors commenced their bankruptcy cases, they did not include the LTW Holders in their Notice of Filing of List of Equity Holders. Main Docket No. 59. The List of Equity Holders sets forth the names of all known holders of WMI's equity

securities, and includes a comprehensive 700 page list of WMI's common and preferred stockholders.

(n) The Disclosure Statement does not list the LTWs as part of the Debtors capital structure or as "equity." See Disclosure Statement at pp. 42-43.

(o) Creditors of WMI did not extend credit to WMI based on the value of the Anchor Litigation. That contingent asset was dedicated to the LTW Holders before WMI acquired the Dime. Stated differently, WMI acquired the Dime subject to the rights of the LTW holders to 85% of the net recovery of the Anchor Litigation.

(p) When WMI purchased the Dime, it offered Dime shareholders their choice of cash (up to $1.4 billion) or stock (92.3 million shares) It appears as though Dime shareholders electing cash received their entire merger consideration in cash. WMI's purchase of Dime was a Combination within the meaning of the Dime Agreement dated as of December 21, 2000 ("**Dime Agreement**") (**Exhibit I**). Under Sections 4.2 (b) and 4.2 (c) of the Dime Agreement, if there was a Combination, LTW Holders were required to get the same type of consideration offered to Dime shareholders. For this case, that means LTW holders are entitled to elect to receive cash -- not stock -- for their share of the net recovery in the Anchor Litigation. Under Section 4.2(d) of the Dime Agreement, WMI assumed the obligations of Dime, including the Sections 4.2 (b) and (c) obligations. And, under Section 7.2 of the Dime Agreement, WMI was prevented from unilaterally changing the provisions of Sections 4.2 (b) and (c) without the consent of the LTW Holders -- a consent which was never sought, nor given. Bottom line, by virtue of the Dime/WMI merger, the LTWs are payable in cash, not stock of WMI.

(q) The Debtors' position that the LTW Holders are holders of equity securities is also belied by the terms of the WMI Agreement itself, which expressly envisions

several scenarios in which LTW Holders would receive their value in forms other than WMI stock. Specifically, the WMI Agreement provides that the LTW holders may receive "other [non-common stock] securities," "property" or "cash." (See, Sections 4.2, 4.3, 4.4 and 4.5 thereof.)

(r) The Debtors dispute that, even though WMI was a bank holding company, the 2008 transaction in which JPMC acquired the assets of Washington Mutual Savings Bank ("**WAMU Bank**") was a subsequent Combination within the meaning of the WMI Agreement. The Debtors also dispute that the WMI sale of assets to JPMC pursuant to Sections 363 and 365 of the Bankruptcy Code as part of the Global Settlement was a Combination within the meaning of the WMI Agreement. If either of those transactions was a Combination -- as the Claimants contend -- then the Debtors were required pursuant to Section 4.2(d) of the WMI Agreement to cause JPMC to assume the LTW obligations. The Debtors have admitted in discovery that they never asked JPMC to assume the LTW obligations. Instead, the Debtors did the exact opposite and breached the WMI Agreement. The Debtors structured the Global Settlement to provide for certain liabilities relating to assets purchased by JPMC to be assumed by JPMC. Disclosure Statement at p. 12. However, with regard to the Anchor Litigation to be purchased by JPMC and the related obligations to the LTW Holders, the Debtors expressly sought a different result. Under the Global Settlement, the Debtors are seeking relief under Section 363(f) of the Bankruptcy Code such that the Debtors' interests in the Anchor Litigation will be sold to JPMC "free and clear of the liens, claims and interests of the LTW Holders." Disclosure Statement at p. 57. There is no reason for the Debtors to structure the Global Settlement so as to ensure the protection of Section 363(f), if the Debtors and JPMC did not believe that Section 4.2(d) of the WMI Agreement could impose LTW obligations on a successor

company such as JPMC. The Debtors have two "Goodwill" Litigations. The Debtors claimed to own both and that JPMC owned none. Under the Global Settlement, the Debtors are retaining one (American Savings Bank) and selling one to JPMC (Anchor Litigation) pursuant to Section 363(f) of the Bankruptcy Code. It is not coincidental that the litigation which the Debtors seek to sell (as compared to retaining) free and clear of liens, claims and interests, has LTW obligations relating thereto.

(s) The Debtors failed to include the WMI Agreement in the list of assumable executory contracts in their Plan Supplement. Thus, the Debtors are rejecting their obligations under the WMI Agreement. This action results in a claim for the LTW Holders against the Debtors.

(t) Section 4.4 of the WMI Agreement, captioned "Other Events," puts an affirmative duty on the Debtors Board of Directors to act in "good faith" to do what is required to carry forward the "essential intent and principles" of the WMI Agreement -- that being, to provide 85% of the net recovery in the Anchor Litigation to the LTW Holders. That requirement is an express obligation of the Debtors' Board of Directors directly to the LTW Holders. The Debtors' Board of Directors never considered this issue. The Board's counsel never advised the Board of its duties to the LTW Holders pursuant to Section 4.4 of the WMI Agreement. The Debtors' Board breached its duty to the LTW Holders by proffering a Proposed Plan seeking to deprive the LTW Holders of their right to receive 85% of the net recovery of the Anchor Litigation and in derogation of its express Section 4.4 obligation to the LTW Holders.

(u) Significantly, the WMI Board has a special duty to the LTW Holders since the Agent under the WMI Agreement is an agent for the Debtors and not the LTW Holders. *See* WMI Agreement, Section 5.2. In this case, the Agent has done nothing of substance to protect

the LTW Holders, and has not been instructed by the Debtors to do anything of substance to protect the LTW Holders.

(v) The Proposed Plan improperly seeks a release for the WMI Board from the third party claims of the LTW Holders for, among other things, the breach of their Section 4.4 liability to the LTW Holders.

CONFIRMATION OBJECTIONS

A. The Proposed Plan Should Conform to the Agreements Made by the Debtors In the Disclosure Statement.

5. A material portion of the Claimants' objection to the Proposed Plan was satisfied based on (a) numerous objections made by the Claimants to the Debtors' prior versions of the Disclosure Statement, and (b) changes ultimately made by the Debtors to the Disclosure Statement. In essence, the Debtors agreed to treat the LTW claims as Disputed Claims under the Proposed Plan and reserve a distribution for the LTW Holders in the event their claims were allowed in full.

6. Specifically, the Debtors agreed that:

(a) If Broadbill prevailed in the Action, the LTW Holders would be treated as general unsecured creditors under the Proposed Plan. Disclosure Statement at p. 58.

(b) The Debtors agreed that LTW Holders' claims should be treated as "disputed claims." *Id.*

(c) The Debtors agreed that the Liquidating Trustee would reserve up to approximately $183.9 million on account of the LTW claims which they contended was the maximum amount payable to the LTW Holders. The Debtors also acknowledged that the Court could set a higher reserve than $183.9 million and that Broadbill had contended that the reserve should be in a greater amount than $183.9 million. *Id.*

7. The Debtors previously agreed to conform the agreement reflected in the Disclosure Statement into the Proposed Plan. Through inadvertence, the Debtors did not do that. In a pleading filed by the Debtors on November 17, 2010 to estimate the maximum amount of

the LTW claims (the "Estimation Motion"), the Debtors appear to reconfirm the understanding reflected in the Disclosure Statement where they state on Exhibit D that if Broadbill prevails in the Action, the LTW Holders would be treated as "General Unsecured Claims pursuant to the Plan." Accordingly, the Debtors should explicitly conform the above cited provisions of the Disclosure Statement and the Allocation Motion into the Proposed Plan.

B. The Reserve Set For the LTW Holders Claims Is Too Low.

8. Footnote 17 of page 58 of the Disclosure Statement sets forth the Debtors' calculation as to the maximum amount of the LTW claims ($183.9 million). In the Estimation Motion, the Debtors concede they made a mistake and the number should be $250 million. The Debtors' calculation is wrong for the following two reasons and the reserve amount should be no less than $337 million:

(a) **The Tax Gross-Up Amount.** In June 2010, JPMC filed a motion in the Court of Federal Claims seeking approval of its calculation of the amount of the tax gross-up **(Exhibit J)** relating to the proceeds of the Anchor Litigation. JPMC stated that the Court of Federal Claims already had ruled that a tax gross-up was appropriate. JPMC estimated the tax gross-up amount to be between $104 million and $144 million.

The Debtors' calculation of the reserve for the LTW Holders omits the tax gross-up portion but deducts $180 million in estimated taxes. There are two ways to correct this mistake. One way is to simply ignore the tax reduction of $180 million since the gross-up is intended to make the damage award tax neutral. That would have the effect of adding approximately $153 million to the reserve (85% of $180 million). The alternative way is to add the gross-up of approximately $144 million, which would cause the reserve to increase, subject to the other reserve adjustment discussed below.

In a recent pleading filed by JPMC in the Court of Federal Claims, it indicated that the amount of the tax gross-up could be impacted based on how it allocates the purchase price for the assets acquired from WAMU Bank and the Debtors. Presumably, that means the more tax basis JPMC allocates to the Anchor Litigation, the less tax gain, the smaller tax gross-up, the smaller amount of the Anchor Litigation judgment, and the reduced amount of the value of the LTWs. That result would be inequitable and improper. Under the intent and principles of the WMI Agreement (including Section 6.3 thereof), WAMU Bank was not permitted to transfer the Anchor Litigation to third parties unless it was to a successor and, then, only if the interests of the LTW Holders would remain aligned with the interests of the party prosecuting the Anchor Litigation. Transfer of the ownership to the Anchor Litigation was not supposed to impact the value of the LTWs based on tax considerations or otherwise. Section 4.4 of the WMI Agreement was intended to correct any unforeseen circumstance where LTW value was not being preserved in accordance with the intent and principles of the WMI Agreement. Based on the foregoing, the LTW Holders have a claim against the Debtors to the extent that the value of the LTWs has been, or will be negatively impacted by the transfer of the Anchor Litigation to JPMC.

(b) **The Tax Rate**: The Debtors' calculation of the reserve uses an effective tax rate of 45.5%. JPMC in its pleading for the tax gross-up said that it is taxed at a rate of 38.757%. Exhibit I, at p.7. The JPMC rate is what the Debtors should have used in calculating the reserve. There is no reason for two different rates. This change in rates would have reduced the tax reduction amount from approximately $180 million to $153 million. This difference would add $27 million to the LTW Holders claim reserve.

9. Taking into account these adjustments, the amount of the reserve should be not less than $337 million, calculated as follows:

Amount of Judgment: $419 million (not including tax gross-up or tax reduction)
Minus legal expenses: $22 million
Multiplied by .85%
Net Reserve: $337 million

C. The Third Party Releases in the Proposed Plan Are Improper.

10. The Proposed Plan contemplates giving third party releases to, among others, the Debtors Board of Directors and JPMC. The Plan further provides that creditors can opt in to giving a third party release by checking a box on the ballot. The LTW Holders did not get a ballot. Presumably that was either because they were put in Class XXI which would not be entitled to a distribution, or because they are considered disputed creditors, pursuant to the agreement reflected in the Disclosure Statement. In either event, having not gotten a ballot, it must be presumed that the LTW Holders have opted out of giving a third party release.

11. The Debtors state that notwithstanding this ballot "check the box" procedure, they still will seek a Court order binding all parties in interest to release individual claims against third parties. Assuming the LTW Holders were paid in full (i.e., received 85% of the net recovery of the Anchor Litigation, plus other damages for breach of the WMI Agreement), that would be fine, and there would be no need for a release. If the LTW Holders do not get paid in full, however, they are entitled to preserve their full rights and remedies against all third parties. This would include the Debtors' Board of Directors who, under such circumstances, breached their obligations to the LTW Holders pursuant to Section 4.4 of the WMI Agreement.

12. As for third party claims against JPMC, it would appear that the duty was on the Debtors to cause JPMC to assume the LTW obligations and that any claim for such breach, or

any successor liability claim against JPMC, would attach to the proceeds of the Global Settlement. Presumably, the reserve established for the LTW claims would cover this alternative theory of recovery.

13. In any event, at the present time, pending the final outcome of the Action, the Debtors are proffering a Proposed Plan that would pay nothing to the LTW Holders. Assuming the Debtors' position is sustained -- which the LTW Holders believe won't happen -- then it would be improper to release third party claims held by the LTW Holders. A party in interest who receives nothing under a plan of reorganization, and who is deemed to have voted against the plan, can not be required to give a third party release. In *Continental Airlines*, 203 F3d 203 (3rd Cir 2000), the Third Circuit held that the third party non-consensual releases under the plan were not permissible because there was no finding that they were "necessary" or supported by fair consideration paid to the objecting party. By definition, not paying anything to a party-in-interest under a plan is "no consideration" to such party. Similarly, in *Coram Healthcare Corp.* 315 B.R. 321 (Bankr. Del 2004), this Court refused to confirm a plan with non-consensual third party releases.

14. The Examiner's Report described the Releases under the Proposed Plan as "unduly broad and inappropriate" (p. 20).

D. The Proposed Plan Can't Pay Post Petition Interest Ahead of Subordinated Non-Equity Claims or Late Filed Claims

15. Under the Proposed Plan, the Debtors are paying postpetition interest on unsecured claims. The only basis to do so is if the Debtors are solvent. Under Section 1127(b)(7) of the Bankruptcy Code, a plan of reorganization can not be confirmed if the so-called "best interests" test is not satisfied. The "best interests" test requires that impaired parties in interest need to receive value under a plan of reorganization at least equal to what they would have

received under Chapter 7 of the Bankruptcy Code. Under Section 726 of the Bankruptcy Code, payment on account of late filed claims or non-equity based subordinated claims, comes ahead of payments for postpetition interest on unsecured claims.

16. The Debtors have objected to the LTW claims based on, among other things, an alternative theory premised on Section 510(b) of the Bankruptcy Code. There is no basis to do so since, among other things, the damages which the LTWs seek do not arise out of a purchase and sale of the equity securities of the Debtors. Moreover, the LTWs are not equity securities at all: there is no strike price, specific number of shares, or defined time period which circumscribe how the LTWs are effectuated, the LTWs value is not based on the financial performance of the Debtors, the LTW Holders did not seek or receive economic upside based on the financial performance of the Debtors, and the creditors of the Debtors did not advance money to the Debtors based on the strength of the Anchor Litigation, which is a contingent asset that had been spun off years before WMI acquired Dime.

17. If the Court were to hold -- as it should -- that LTWs are not equity of the Debtors, then Section 510(b) should not be used as an alternative means to challenge the LTW claims. For, among other reasons, the "best interests" test does not permit post-petition interest to be paid ahead of subordinated non-equity based claims.

18. Similarly, in the Action, the Debtors have raised the defense of late filed claims or non-filed claims with respect to certain LTW Holders even though, (a) the Debtors did not provide any notice to the LTW Holders of the claims bar date, (b) an LTW Holder purported to timely file a class claim on behalf of all LTW Holders, (c) by agreeing to the filing of the Action as a class action, the Debtors effectively waived this proof of claim argument, and (d) the rejection of the WMI Agreement under the Proposed Plan triggers a new claims bar date for the

LTW Holders which has not yet expired. Late filed claims get paid under the "best interests" test ahead of post petition interest on unsecured claims.

19. If the Debtors seek confirmation of the Proposed Plan which contorts the priority scheme of Section 726 of the Bankruptcy Code, incorporated into Chapter 11 through the "best interests" test under Section 1129(a)(7) of the Bankruptcy Code, it must be estopped from challenging the LTW claims on Section 510(b) or filing of proof of claim grounds. Otherwise, the Proposed Plan cannot be confirmed.

20. Exhibit C to the Disclosure Statement is the Debtors liquidation analysis. (**Exhibit K**) It is provided to show how the Debtors have satisfied the "best interests" test under Section 1129(a)(7) of the Bankruptcy Code. Exhibit C states that in a liquidation all classes of claims would get paid in full except the PIERS claims. That class is receiving in the Chapter 11 scenario $216 million less than their principal. Even under the "skewed" Chapter 7 analysis proffered by the Debtors, the PIERS class would receive $499 million less than their principal. By contrast, the liquidation analysis shows that in Chapter 11 the Debtors are paying in excess of $615 million of postpetition interest, and in the Chapter 7 scenario, they would pay in excess of $732 million of postpetition interest. Clearly, the payment of postpetition interest is not solely due to the implementation of subordination provisions in intercreditor agreements. There is an additional material amount which is being paid solely because the Debtors are solvent and paying postpetition interest on unsecured claims.

21. In sum, the Proposed Plan cannot be confirmed if it pays post petition interest on unsecured claims unless the Debtors concede that the Section 510(b) and proof of claim argument do not apply to LTWs.

E. The Election To Receive Reorganized Common Stock Should Have Been Given to the LTW Holders.

22. General unsecured creditors with allowed claims are given the right to elect to take their distribution in reorganized common stock. *See* Proposed Plan, Section 16.2. The election was to be made on a ballot, but as noted, the LTW Holders did not receive a ballot. It is believed that the election right has value and this value should have been shared with similarly situated creditors (such as the LTW Holders). In the Debtors' motion to abandon its stock interest in WAMU Bank, the Debtors indicate that such action could trigger a $5 billion worthless stock loss deduction, and that some portion of the net operating loss triggered by this stock loss deduction could be preserved for the Reorganized Debtors. If that can be accomplished, depending on the valuation given the reorganized stock, this election can be quite valuable. The LTW Holders should not be deprived of a form of consideration given to similarly situated creditors under the Proposed Plan merely because the LTWs are being treated as disputed claims and those objections have not yet been resolved.

CONCLUSION

23. Almost 10 years ago, Dime announced that it would spin off 85% of the net recovery in the Anchor Litigation to its shareholders. The LTWs and the Dime Agreement were the vehicle through which this value transfer to the LTW Holders was effectuated. For its 15% share, Dime assumed the obligation to manage the Anchor Litigation for the benefit of the LTW Holders, and Dime's Board affirmatively assumed obligations to the LTW Holders. When WMI purchased Dime, it, and its Board, assumed Dime's obligation to the LTW Holders. WMI acquired the Dime and the Anchor Litigation subject to the rights already transferred to the LTW Holders. By paying for the Dime/WMI merger in both cash and stock, WMI became obligated to

offer that same type of consideration to the LTW Holders. Consequently, the LTWs are payable in cash at the election of the LTW Holders.

24. WMI has consistently claimed that it owns the Anchor Litigation. Under the Proposed Plan, WMI seeks to monetize the Anchor Litigation by selling it to JPMC free of the LTW obligations which is a clear violation of the WMI Agreement. Then, under the Proposed Plan, WMI intends to give the monetized proceeds to its other creditors -- not the LTW Holders (as it was required to do). WMI's goal under its Proposed Plant is to utilize this circular flow of assets (from WMI to JPMC back to WMI), so that its other creditors will be paid their principal in full, post petition interest on their unsecured claims, and their attorneys fees, while the claims of the LTW Holders, resulting from these contractual breaches by WMI, will be paid nothing. That is improper, especially since WMI had a duty to act for -- not against -- the interests of the LTW Holders. WMI contends that even if the WMI Agreement makes clear that the "intent and principles" of the LTWs was to give 85% of the value of the Anchor Litigation to the LTW Holders (which it unquestionably does), and in good faith the Board recognizes that an Adjustment needs to be made to effectuate that intent, it could (a) cavalierly ignore its duty to the LTW Holders if it chooses to and make no Adjustment, and (b) construct a scheme through the Proposed Plan to destroy the value already given to the LTW Holders by a predecessor to WMI. The Action and the LTW claims reserve is intended to thwart WMI's improper scheme, and to compensate the LTW Holders for their valid claims.

25. For all of the reasons cited above, the Proposed Plan should not be confirmed unless the changes requested by the Claimants are made.

26. The Claimants also request that the Court grant it such other and further relief as is just.

Dated: November 19, 2010
New York, New York

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EXHIBIT B

THE COURT: I think I sustained an objection to the testimony, but I'm not sure I was dealing with an exhibit.

MR. STROCHAK: It was Exhibit F, Your Honor. It was the -- Exhibit F, the agreement concerning litigation and tracking warrants and replacement warrant agent. I don't think there's any testimony and I don't think there's anything in this exhibit that's relevant to anything that's been presented here.

MR. STEINBERG: Your Honor, I actually think it's very relevant. It is the essence of my argument as to why I think the reserve should be 337 million dollars.

THE COURT: I'm going to admit it.

(Debtors' Exhibits 1 through 15 were hereby received into evidence as of this date.)

(LTW Exhibits A through I were hereby received into evidence as of this date.)

MR. STROCHAK: Argument, Your Honor?

THE COURT: No.

MR. STROCHAK: I'm happy to address any questions you have. I'm happy to present something if you'd like me to, but it sounds like you don't.

THE COURT: No. I'm going to set the reserve at the 337 million. That's the maximum they would get if they win, and there is a basis for that. To the extent you win, you get the money back. But to the extent I set it at your lower

EXHIBIT C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
Debtors.	:	**(Jointly Administered)**
	:	**Re: Docket Nos. 5971, 6560 & ____**

REVISED ORDER ESTIMATING MAXIMUM AMOUNT OF LTW CLAIMS FOR PURPOSES OF ESTABLISHING RESERVES

Upon considering (i) the motion (the "Motion") of Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment" and together with WMI, the "Debtors"), dated November 17, 2010, for an order estimating the maximum amount of certain claims for purposes of establishing certain reserves under the Debtors' proposed chapter 11 plan of reorganization, (ii) the objection to the Motion filed by Broadbill Investment Corp., Nantahala Capital Partners, LP and Blackwell Capital Partners, LLC, dated December 6, 2010, on behalf of themselves and all holders (the "LTW Holders") of Litigation Tracking Warrants (the "LTWs"), (iii) the Debtors' omnibus response to objections to the Motion, dated December 14, 2010; and (iv) the Debtors' motion for reconsideration of the *Order Estimating Maximum Amount of LTW Claims for Purposes of Establishing Reserves* [Docket No. 6560] (the "Original Order"), dated January 14, 2010; and the Court having held a hearing to consider the Motion on January 6, 2010 (the "Hearing"); at the conclusion of the Hearing the Court having estimated the maximum amount of the LTW Holders' claims (the "LTW Claims") at $337 million; and the Court finding that (a)

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

the Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 157 and 1334 and (b) the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having determined that legal and factual bases establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the Hearing and in the Opinion,

It is hereby ORDERED as follows:

1. This Order shall supersede the Original Order in all respects.

2. The LTW Claims are hereby estimated in the aggregate maximum amount of $337 million for the purposes of determining the reserves to be set for the LTW Claims.

3. The estimated amount of $337 million is the maximum amount for which the LTW Claims can be allowed in the bankruptcy proceeding regardless of the outcome of any pending objection or defense to the claim, state or federal court litigation, or other proceeding.

4. The estimation of the LTW Claims is without prejudice to the rights, defenses and objections of the Debtors to the merits of the LTW Claims and, by estimating the LTW Claims, this Court is not making a determination that the Debtors or the Debtors' estates are liable on account of the LTW Claims in any amount.

5. The rights of the Debtors to object to, and defend against, the LTW Claims are preserved.

6. This Order shall be effective and enforceable immediately upon entry.

7. This Court retains jurisdiction to interpret, implement, and enforce the provisions of this Order.

Dated: January __, 2011
Wilmington, Delaware

THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE