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
	Hearing Date: March 21, 2011 at 10:00 a.m. (EST)
	Related Dkt. Nos. 6697 + 6700

OBJECTION TO THE SUPPLEMENTAL DISCLOSURE STATEMENT FOR THE MODIFIED SIXTH AMENDED PLAN OF AFFILIATED DEBTORS BY CLASS REPRESENTATIVES OF DIME LITIGATION TRACKING WARRANTS

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

Broadbill Investment Corp. ("Broadbill"), Nantahala Capital Partners, LP ("Nantahala") and Blackwell Capital Partners, LLC ("Blackwell" and, together with Broadbill and Nantahala, the "Claimants") for themselves and as class representatives of the Dime Litigation Tracking Warrants ("LTWs") make this Objection (the "Objection") to the Proposed Supplemental Disclosure Statement ("Supplemental Disclosure Statement") for the Modified Sixth Amended Plan of Affiliated Debtors dated February 7, 2011 ("Modified Plan"), and represent as follows:

1. On January 7, 2011, the Bankruptcy Court rendered its opinion denying confirmation of the Debtors' Sixth Amended Joint Plan ("Confirmation Opinion"). The Modified Plan purports to address the infirmities raised by the Court in the Confirmation Opinion so as to proffer a confirmable plan of reorganization. The Debtors miss the mark as demonstrated herein.

A. If Claimants establish they hold claims against, rather than equity interests in, Washington Mutual, Inc. ("WMI"), they should be treated as Class 12 (General Unsecured) creditors.

2. The Debtors' prior Disclosure Statement, dated October 6, 2010 (at p. 102), provided that if the Claimants establish they hold claims against, rather than equity interests in, WMI, they will be treated as Class 12 general unsecured creditors. The Claimants argued at the confirmation hearing that a corresponding change needed to be made in the Debtors' plan of reorganization. In the Confirmation Opinion (Pp. 89-90, n. 42), the Court said the plan needed to be clarified to cover this point.

3. In the Modified Plan, at Section 25.1, the Debtors make the appropriate correction: "provided, however, that, to the extent that holders of Dime Warrants are determined, pursuant to a Final Order, to hold Allowed Claims, such Allowed Claims shall be deemed in Class 12 and shall receive the treatment in Article XVI hereof. . .".

4. Section 1.209 of the Modified Plan has different language. It adds the phrase "or as otherwise determined by the Bankruptcy Court" which suggests that the LTW Holders could be put into a class other than Class 12. That additional language ("or as otherwise determined by the Bankruptcy Court") should be stricken. It raises ambiguities as to the LTW Holders' actual treatment under the Modified Plan.

B. If Claimants establish they hold claims against, rather than equity interests in, WMI, the LTW Holders should not have their distributions held up or forfeited because of the Debtors' convoluted scheme relating to elections to be made on the ballots with respect to third party releases.

5. Under the Modified Plan, the LTW Holders will not be receiving a ballot, and therefore, will not be making an election as to whether to give a release to third parties. In the Confirmation Opinion, the Court noted that a failure to make an election should not be viewed as a consent to a third party release (page 84).

6. The Confirmation Opinion also noted that it was unfair to ask parties in interest to elect whether to give a third party release when it was unclear if such party in interest would be receiving a distribution under the plan. (Confirmation Opinion at pp 84-85).

7. Claimants and the Debtors are currently litigating the so-called Broadbill Adversary Proceeding as to whether, among other things, the LTW Holders have claims against the Debtors. It is not clear when a Final Order will be rendered on this issue.

8. Section 32.6 of the Modified Plan provides that if a creditor does not elect to give a third party release within a specified time period, it forfeits its distribution. That provision is unfair to the LTW Holders since (a) they will not get a ballot to make an election, (b) they don't know whether they will be receiving a distribution under the Modified Plan until the Broadbill Adversary Proceeding is decided by Final Order, and (c) they don't know whether such Final Order will be issued before the time period specified in Section 32.6 will expire. This provision is contrary to the Confirmation Opinion and must be stricken.[1]

C. The exculpation provision for the Debtors' Directors and Officers should not apply to the LTW Holders.

9. The Confirmation Opinion provides that the Debtors' directors and officers will not get the benefits of the "exculpation" provision under the plan based on the issues raised by the Claimants in the Broadbill Adversary Proceeding. (Confirmation Opinion at p. 74). The Supplemental Disclosure Statement at p.10 contains the appropriate provision.

10. By contrast, Section 43.8 of the Modified Plan, while providing for the appropriate carve out of the Claimants, includes the following sentence. "Any of the foregoing parties shall be entitled to rely upon the advice of counsel with respect to their duties and responsibilities under the Plan." This section needs to be clarified so that it is clear that the

[1] To the extent Footnote 17 on page 27 of the Supplemental Disclosure Statement tries to address this issue, the explanation is far from clear, and raises other issues.

above-cited sentence relating to reliance on counsel has no application to the Broadbill Adversary Proceeding and the issues raised by the Claimants. Simply put, the Modified Plan should not decide by "fiat" whether the Debtors' Board of Directors have a valid defense to the claims made by the LTW Holders as to the duty and obligations owed by the Debtors' Board of Directors to them.

D. The provision relating to notice to holders of publicly-traded securities should not apply to the LTW Holders.

11. Pages 28-29 of the Modified Disclosure Statement contains a provision for returning securities in order "to ensure accurate identification of the Entities entitled to receive distributions pursuant to the Modified Plan..." Failure to return securities leads to a forfeiture of any distribution, and once the securities are returned, there can be no further trading in such security.

12. This provision should not apply to the LTW Holders since it is not clear whether the Modified Plan provides for a distribution to the Claimants, and the Broadbill Adversary proceeding may not be decided by Final Order until many months after confirmation. Until such time as it is clear whether the LTW Holders are in Class 12 (General Unsecured class), LTW Holders (a) should not be required to opt into the third party release provision, (b) should not be required to tender their LTWs, and (c) should be entitled to continue trading their LTWs on NASDAQ (wherein an active trading market currently exists for LTWs).

13. The Chart attached as Exhibit C to the Modified Disclosure Statement has no discussion of this provision.

E. Other infirmities to the Modified Plan and Supplemental Disclosure Statement need to be rectified.

14. The Debtors have continually reminded the Court that the alleged "burn rate" in these bankruptcy cases is $30 million a month and therefore, there is a pressing to need to

confirm their plan as soon as possible. Conveniently ignored in the "burn rate reminders" is that the delay in getting to confirmation was caused in large part by the Debtors themselves when they proffered a plan containing provisions relating to, among other things, debtor releases and third party releases which simply were contrary to established law. The Debtors compounded their self-induced problem by (a) delaying the adjudication of legitimate objections to their plan, that were raised in connection with the prior disclosure statement hearing, on the grounds that such objections were more properly dealt with as part of the confirmation hearing, and (b) not including in their plan, a provision which permitted the Court to modify offending provisions so that a defective plan may otherwise be confirmable. The Debtors' legal strategy was clear: start the confirmation train running even if the plan had infirmities, and give the Judge only an "all or nothing" option, and hope that the desire to achieve a "confirmation" will trample over legitimate Section 1129 objections to confirmation raised by aggrieved parties in interest. The Confirmation Opinion showed that this legal strategy was not going to prevail in this Court.

15. Unfortunately, the Debtors do not seem to have fully learned their lesson. In proffering the Modified Plan, they seem to be employing the same flawed strategy again. For example, the Confirmation Opinion raises the question as to whether the PIERS claims are debt or equity (Confirmation Opinion at p. 101). The Court said it was not persuaded by the evidence presented at the prior confirmation hearing on this point. The Equity Committee is taking discovery relating to the validity of the PIERS claims. The Modified Plan assumes that the Debtors are right on this point (that being, the PIERS claims are valid indebtedness) and will prevail on the issue. However, what happens to the Modified Plan if the Debtors are wrong on this issue? Does the Modified Plan simply fail and are we left to hear the Debtors again talk about the mounting "burn rate" as they resolicit another modified plan? Stated differently, why

doesn't the Modified Plan separately provide for the contingency that the Debtors are wrong on the issue so that the Modified Plan can be confirmed notwithstanding how the Court rules on PIERS debt/equity issue. Alternatively, should this type of issue be resolved in connection with the Disclosure Statement hearing so that the same flawed approach relating to the prior confirmation hearing is not repeated again?

16. In a similar vein[2], in the Confirmation Opinion, the Court left open the issue as to whether post-petition interest should accrue at the contract rate for the benefit of certain creditors or whether the federal judgment rate should apply to all creditors. (Confirmation Opinion at p. 94). In the Confirmation Opinion, the Court raised the question as to whether certain "conflicts of interest" may impact which interest rate should apply. The Equity Committee is taking discovery on the "conflicts of interest" issue. The Court also raised the *additional* issue whether there were other "equitable reasons" why the lower federal judgment rate should be used but indicated the issue need not be decided since confirmation of the plan was being denied. The Modified Plan takes the position that contract rate applies which inures essentially to the members of the Creditors Committee but not the full general unsecured class and unquestionably redounds to the detriment of the junior classes who are receiving nothing under the plan. Again, what happens if the Debtors are wrong on the federal judgment rate issue? Does the Modified Plan simply fail because the Debtors have not accounted for the possibility they could be wrong on this issue? Certainly, they were wrong on the "third party release" and other issues in the prior versions of their plan of reorganization. And, there clearly is ample law to suggest the Debtors are wrong again on this issue. The Confirmation Opinion has an entire section referring to cases on both sides of the "post-petition interest" spectrum. The Confirmation Opinion suggests that

[2] There may be other issues left open in the Confirmation Opinion, or other ambiguities in the Modified Plan, which require that the Court have greater flexibility in resolving issues so that there could be a plan of reorganization confirmed in a timely manner.

there is no clear black and white answer, and the matter may lie in the discretion of the Court (Confirmation Opinion at pp. 90-93). In a situation where the public shareholders of a bank holding company are being wiped out as a result of the greatest financial crisis that this country has experienced since the Great Depression, do the equities warrant using the lower federal judgment rate? The PIERS group has argued that they bargained for this higher return during plan negotiations and it is a large number which impacts their otherwise **sizeable** recovery. Seemingly lost in the conversation is that it is indeed a large number as well to the lower classes (including long term, individual, good faith investors) who are otherwise getting **no** recovery if the higher contract interest rate is used.

17. Aside from the concerns relating to the "inflexibility" of the Modified Plan which will hinder the ability of the Court to promptly confirm a "fair and equitable" plan, the Claimants have a concern regarding the new provision in the Modified Plan which withdraws the Registration Rights Offering. That action means that the Reorganized Debtors may not have any additional capital to better utilize their $5 billion net operating loss and thus, this "reorganization" is nothing more than the preservation of a relatively small, non-filed liquidating entity, with a self liquidating insurance portfolio, which may be sold at any time. In a circumstance where there are so many long term public investors getting nothing, is that the best which could be done by the Debtors in monetizing and maximizing a $5 billion net operating loss?

18. In addition, Section 43.18 of the Modified Plan provides that the fees of certain creditors may be paid upon application to the Court. The requirement to file a fee application was mandated by the Court's ruling in the Confirmation Opinion (Page 109). Certain of those creditors were formerly parties to the Global Settlement, but refused to extend the deadlines

therein, forcing the remaining parties to modify the Global Settlement to preserve the transaction. Putting aside whether the aforesaid actions impact the propriety of paying the now misnamed "Settling Noteholders", the Supplemental Disclosure Statement should provide the range of the proposed payments to such creditors for their attorneys' fees. Certainly, the parties in interest who are now getting nothing under the Modified Plan, or the entities who hold the "fulcrum" security, would want to know the estimate of this number.

19. Finally, the Liquidation Analysis (Exhibit D to the Supplemental Disclosure Statement) assumes that Late Filed Claims are paid, since the Analysis provides for post-petition interest being paid to unsecured creditors. However, no estimated range is given for the Late Filed Claims. This omitted information should be provided.

WHEREFORE, the Claimants request that the Court deny approval of the Supplemental Disclosure Statement until the infirmities raised by this Objection are adequately addressed, and that they be granted such other and further relief as is just under the circumstances.

Dated: March 8, 2011
Wilmington, Delaware

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	)	

CERTIFICATE OF SERVICE

I, Scott J. Leonhardt, hereby certify that on or before the 8h day of March 2011, I served a copy of the foregoing, *Objection to the Supplemental Disclosure Statement for the Modified Sixth Amended Plan of Affiliated Debtors by Class Representatives of Dime Litigation Tracking Warrants* upon the following parties in the manner listed below:

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