

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

WASHINGTON MUTUAL, INC., et al.,¹

Debtors.

BROADBILL INVESTMENT CORP.,
NANTAHALA CAPITAL PARTNERS, LP,
AND BLACKWELL CAPITAL PARTNERS,
LCC, individually and on behalf of all holders of
Litigation Tracking Warrants originally issued
by Dime Bancorp,

Plaintiffs,

v.

WASHINGTON MUTUAL, INC., CHARLES
LILLIS, DAVID BONDERMAN, FRANCIS
BAIER, JAMES STEVER, MARGARET
OSMER MCQUADE, ORIN SMITH, PHILLIP
MATTHEWS, REGINA MONTOYA,
STEPHEN FRANK, STEPHEN CHAZEN,
THOMAS LEPPERT, WILLIAM REED, JR.,
MICHAEL MURPHY,

Defendants.

Chapter 11

Case No. 08-12229 (MFW)

(Jointly Administered)

Adv. Pro. No. 10-50911 (MFW)

**RESPONSE OF PLAINTIFFS BROADBILL INVESTMENT CORP.,
NANTAHALA CAPITAL PARTNERS, LP AND BLACKWELL CAPITAL PARTNERS,
LLC TO SECOND AMENDED ANSWER AND COUNTERCLAIM OF
DEFENDANT WASHINGTON MUTUAL, INC.²**

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.

² On March 24, 2011 the Official Committee of Unsecured Creditors joined in the Second Amended Answer and Counterclaim of Defendant. (D.I. 174.) Accordingly, this Response also serves as the Response of Plaintiffs Broadbill Investment Corp., Nantahala Capital Partners, LP, and Blackwell Capital Partners, LLC to the Joinder of the Official Committee of Unsecured Creditors of Washington Mutual, Inc., and WMI Investment Corp. in the Second Amended Answer and Counterclaim of Defendant Washington Mutual Inc. to Second Amended Class Complaint.



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Plaintiffs Broadbill Investment Corp., Nantahala Capital Partners, LP, and Blackwell Capital Partners, LLC (collectively, “Plaintiffs”) hereby submit, by and through their undersigned counsel, this Response (the “Response”) to the Second Amended Answer and Counterclaim (the “Counterclaim”) of Defendant, Washington Mutual, Inc. (“WMI” or the “Defendant”) to Plaintiffs’ second amended class complaint [Docket No. 162] (the “Amended Complaint”).

GENERAL DENIAL

Except as otherwise expressly admitted herein, Plaintiffs deny each and every allegation in the Counterclaim, including, without limitation, any allegations contained in the preamble, introduction, prayer, headings, and subheadings of the Counterclaim. To the extent the allegations in the Counterclaim seek to impose liability on Plaintiffs, they are specifically denied. Pursuant to Rule 8(b)(6) of the Federal Rules of Civil Procedure, as made applicable to this action by Rule 7008 of the Federal Rules of Bankruptcy Procedure, averments in the Counterclaim to which no responsive pleading is required shall be deemed as denied. Plaintiffs expressly reserve the right to seek to amend and/or supplement this Response, as may be necessary.

SPECIFIC RESPONSES

1. This Court has jurisdiction over this Counterclaim pursuant to 28 U.S.C. §§ 157 and 1334.

Answer 1. Paragraph 1 of the Counterclaim contains conclusions of law to which no responsive pleading is required; however, Plaintiffs admit that this Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334.

2. Venue is proper in this Court under 28 U.S.C. § 1409.

Answer 2. Paragraph 2 of the Counterclaim contains conclusions of law to which no responsive pleading is required; however, Plaintiffs admit that venue is proper pursuant to 28 U.S.C. § 1409.

3. Plaintiffs allegedly are holders of LTWs.³

Answer 3. Plaintiffs admit that they are holders of LTWs.

4. Counts I-V of the Complaint seek declaratory and equitable relief to the effect that Plaintiffs are entitled to claims against the Debtors' estates for, *inter alia*, an alleged breach of the Amended Agreement.

Answer 4. Plaintiffs admit that the First, Second, Third, Fourth and Fifth Causes of Action in the Second Amended Complaint seek, among other things, declaratory and equitable relief to the effect that all holders of LTWs, including Plaintiffs, are entitled to claims against the Debtors' estates for, among other things, a breach of the Amended Agreement.

5. Section 101(5) of the Bankruptcy Code provides that a "claim" is a "right to an equitable remedy for breach of performance, if such breach gives rise to a right to payment" 11 U.S.C. 101(5).

Answer 5. Plaintiffs admit that Section 101(5)(B) of the Bankruptcy Code provides that one type of "claim" is a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."

7. Plaintiffs assert "claims" against WMI in Counts I-V of the Complaint.⁴

Answer 7. Plaintiffs admit that the First, Second, Third, Fourth and Fifth Causes of Action in the Amended Complaint contain, among other things, assertions that all holders of LTWs, including Plaintiffs, hold "claims" against Defendant.

8. Plaintiffs' asserted claims are based on securities that the Plaintiffs purportedly hold, namely, the LTWs, which are – subject to the terms of the Amended Agreement, including the occurrence of certain conditions precedent that still have not occurred as of the date hereof – exercisable for shares of WMI common stock.

³ Capitalized terms used and not otherwise defined herein shall have the meaning assigned to such terms in the Amended Complaint.

⁴ Paragraph 6 was omitted from the Counterclaim.

Answer 8. Plaintiffs admit that their claims against Defendant are based on Plaintiffs' ownership of LTWs and that the LTWs are subject to the terms of the Amended Agreement. Plaintiffs deny each and every other allegation in paragraph 8 of the Counterclaim.

9. Plaintiffs in Counts I-V of the Complaint assert claims for damages arising from the purchase or sale of securities.

Answer 9. Plaintiffs deny each and every allegation in paragraph 9 of the Counterclaim.

10. WMI denies any and all liability on Counts I-V of the Complaint, but should the Court find that Plaintiffs are entitled to any relief, Plaintiffs' claims are subject to mandatory subordination to all claims or interests that are senior to or equal to WMI's common equity interests in accordance with section 510(b) of the Bankruptcy Code.

Answer 10. Plaintiffs are without sufficient information to admit or deny that WMI denies any and all liability with respect to the First, Second, Third, Fourth and Fifth Causes of Action in the Second Amended Complaint and therefore deny such allegations in paragraph 10 of the Counterclaim. Plaintiffs deny each and every other allegation in paragraph 10 of the Counterclaim.

WHEREFORE, Plaintiffs request that (i) the Counterclaim and each cause of action therein be dismissed with prejudice, (ii) Plaintiffs be awarded costs of suit and attorneys' fees herein and (iii) the Court order such other and further relief for Plaintiffs as the Court may deem just and proper.

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Dated: April 8, 2011

COZEN O'CONNOR

/s/ Simon E. Fraser

Mark E. Felger (No. 3919)

Simon E. Fraser (No. 5335)

1201 N. Market Street, Suite 1400 Wilmington, DE
19801

Telephone: (302) 295-2000

Facsimile: (302) 295-2013

-and

ANDREWS KURTH LLP

Paul N. Silverstein

Jeremy B. Reckmeyer

450 Lexington Avenue

New York, NY 10017

Telephone: (212) 850-2800

Facsimile: (212) 850-2929

Counsel to Broadbill Investment Corp.

THE ROSNER LAW GROUP LLC

/s/ Scott J. Leonhardt

Frederick B. Rosner (DE # 3995)

Scott J. Leonhardt (DE #4885)

824 Market Street -Suite 810

Wilmington, DE 19801

Telephone: 302-319-6301

Leonhardt@teamrosner.com

-and-

KING & SPALDING

Arthur Steinberg

1185 Avenue of the Americas

New York, NY 10036

Telephone: 212-556-2100

Facsimile: 212-56-2222

*Counsel for Nantahala Capital Partners, LP and
Blackwell Capital Partners, LLC*