IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re WASHINGTON MUTUAL, INC., et al.,[1] Debtors.	Chapter 11 Case No. 08-12229 (MFW) (Jointly Administered)
BROADBILL INVESTMENT CORP., NANTAHALA CAPITAL PARTNERS, LP, and BLACKWELL CAPITAL PARTNERS, LLC, 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, WILLIMA REED, JR., and MICHAEL MURPHY, Defendants.	Adv. Proc. No. 10-50911 (MFW) **Re: Dkt. Nos. 163, 164 and 167**

REPLY IN FURTHER SUPPORT OF MOTION OF AURELIUS CAPITAL MANAGEMENT, LP TO INTERVENE AS A DEFENDANT

Aurelius Capital Management, LP ("Aurelius"), on behalf of certain of its respective managed funds that are creditors of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), respectfully submits this reply to the Plaintiffs'

[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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objection (the "Objection") to Aurelius's motion to intervene as a defendant (the "Motion") in this Adversary Proceeding pursuant to section 1109(b) of the Bankruptcy Code and Federal Rule of Civil Procedure 24(a)(1), made applicable herein by Rule 7024 of the Bankruptcy Rules.[2]

PRELIMINARY STATEMENT

1. Notably, neither the Debtors, the Committee nor any of the newly added Defendants in this Adversary Proceeding object to Aurelius's intervention. The sole objectors are the Plaintiffs, whose interests in this litigation are diametrically opposed to those of the Debtors and their estates.

2. Plaintiffs' objections to Aurelius's intervention are as devoid of merit as they are contrary to the interests of the Debtors' estates. Most fundamentally, Plaintiffs ask this Court to set aside nearly 30 years of directly controlling Third Circuit precedent, which gives creditors, such as Aurelius, the absolute right to intervene in adversary proceedings. Plaintiffs' principal contention – that, because Aurelius is an individual creditor rather than an official committee or other fiduciary, it must demonstrate that its interests are not adequately represented – is contrary to controlling law, as shown below.

3. Moreover, although not legally required, Aurelius *does* have interests that are not adequately represented by the existing Defendants. Aurelius is a holder of the Debtors' PIERS securities, the "fulcrum security" most directly affected by the outcome of this Adversary Proceeding. By contrast, the Debtors have no direct economic interest in the outcome of this Adversary Proceeding, which will not affect the size of the estate but will merely determine the allocation of estate distributions among creditors and purported creditors. Likewise, the Committee represents a wide range of interests, many of which may be completely unaffected by

[2] Capitalized terms not defined herein have the meanings set forth in the memorandum of law filed in support of the Motion ("Opening Brief") (D.I. 164).

the outcome of this Adversary Proceeding. Only one of the Committee's four members represents PIERS holders.

4. Finally, Aurelius's Motion is timely. Despite some earlier discovery and motion practice, this proceeding in key respects started over earlier this month, when the Plaintiffs filed a second amended complaint that added extensive new allegations (expanding the amended complaint from 49 to 103 paragraphs), heavily-revised claims and 13 new defendants. The filing of this substantially new complaint followed the setting of a new pretrial schedule by the Court, under which the parties will have an additional four months to complete discovery. Aurelius filed the Motion on the date set for the filing of new pleadings, and will fold itself into and honor the recently established schedule. It will do nothing that will delay or in any way complicate this proceeding. Indeed, as noted below, Aurelius has an incentive to ensure that this Adversary Proceeding is resolved expeditiously.

5. Plaintiffs' suggestion that Aurelius has acted tardily, by permitting the prior discovery and motion practice to take its course before it sought to intervene, overlooks obvious economic realities. As the parties well know, the Debtors' projections of the recoveries to be received by PIERS holders have declined significantly from 100% (a year ago) to 49% (in the current Disclosure Statement). That recovery could decline even further if the PIERS are diluted by the allowance of the Plaintiffs' baseless claims or if this Adversary Proceeding is not resolved promptly, as the reserves established for Plaintiffs may allow additional postpetition interest to accrue on debt senior to the PIERS. It should surprise nobody that Aurelius is seeking to intervene now to prevent any further and unnecessary reduction in the PIERS recoveries.

6. In short, Aurelius is the party with the incentive both to defeat the claims asserted by the Plaintiffs – so as to prevent dilution of the PIERS by meritless claims – and to resolve this

Adversary Proceeding promptly, so as to avoid the further accrual of postpetition interest that would similarly adversely effect the PIERS. For these reasons, Aurelius's participation in this action will be beneficial to all but the Plaintiffs – as all parties but the Plaintiffs appear to agree. Consequently, even if (contrary to controlling law) Aurelius did not have an absolute right to intervene, its Motion still should be granted.

RESPONSE TO OBJECTION

A. Under Controlling Third Circuit Law, Aurelius Has the Absolute Right to Intervene in This Adversary Proceeding

7. Plaintiffs' Objection fundamentally misstates the law of this Circuit concerning intervention. Plaintiffs contend that, because Aurelius is an individual creditor rather than an official committee or other estate fiduciary, it does not have an absolute right to intervene but, instead, can intervene only upon a showing that its interests are not being adequately represented. (Objection ¶ 6.) The controlling law of this Circuit is to the contrary.

8. As noted in Aurelius's Opening Brief, the Third Circuit has held that creditors have an absolute right to intervene in adversary proceedings under Fed. R. Civ. P. 24(a)(1) and Bankruptcy Code § 1109(b). *Official Comm. of Unsecured Creditors v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445, 457 (3d Cir. 1982) (holding that parties in interest, including individual creditors as well as creditors' committees, have absolute right to intervene in adversary proceedings); *accord, e.g., Phar-Mor, Inc., v. Coopers & Lybrand*, 22 F.3d 1228, 1241 (3d Cir. 1994); *United States of Am. v. State Street Bank & Trust Co. (In re Scott Cable Communications, Inc.)*, Adv. Pro. No. 01-04605, 2002 Bankr. LEXIS 183, at *5-6 (Bankr. D. Del. Mar. 4, 2002).

9. Plaintiffs do not dispute that Aurelius is a holder of the Debtors' PIERS securities, the fulcrum security in these bankruptcy cases. Instead, Plaintiffs attempt to distinguish *Marin* and *Phar-Mor* on the ground that those cases involved the intervention of creditors' committees or estate fiduciaries, rather than individual creditors. (Objection ¶ 3.) But the suggestion that individual creditors have less of a right to intervene than do official committees is belied by the plain language of Section 1109(b), which lists both creditors and official committees as parties in interest, and draws no distinction between them:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, ***a creditor***, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b) (emphasis added); *see also Marin*, 689 F.2d at 449-50 (resting its holding on Section 1109(b)'s plain language); *Phar-Mor*, 22 F.3d at 1241 (same).[3]

10. Crucially, the Third Circuit in *Marin* recognized that its plain language interpretation applies equally to individual creditors. Citing 40 years of practice under the Bankruptcy Act, the Court rejected the argument that permitting individual creditors to intervene in adversary proceedings would cause confusion, disorder and additional expense:

> Appellants are unable to provide any support for their speculation that multitudes of individual creditors and stockholders would intervene in adversary proceedings unless we reject the broad and absolute reading of section 1109(b). *Surely relatively few individuals would have enough interest in the outcome of an adversary proceeding to seek to intervene.*

Id. (emphasis added); *see also, e.g., In re G-I Holdings, Inc.*, 292 B.R. 804, 813 (Bankr. D.N.J 2003) ("By the terms of [Section 1109(b)], even a *de minimis* creditor may be entitled to the

[3] The Third Circuit explained that the "crucial issue is whether we should read 'case' to exclude adversary proceedings." *Marin*, 689 F.2d at 450. The court held that it did not, noting that "the exact language of section 1109(b) . . . grants a right to appear and be heard not in 'a case' but 'on any issue in a case.' It is unlikely that Congress would have used such sweeping language if it had not meant 'case' to be a broadly inclusive term." *Id*.

rights afforded by this subsection."); *Sarah R. Neuman Foundation, Inc. v. Garrity (In re Neuman),* 124 B.R. 155, 160 (S.D.N.Y. 1991) (following *Marin* and holding that individual creditor has "absolute statutory right" to intervene in adversary proceedings).

11. In holding that the plain language of Section 1109(b) gives all parties in interest the right to intervene in an adversary proceeding, the Third Circuit necessarily dispensed with any requirement that an intervenor show that its interests are not adequately represented by the existing parties. Following *Marin*, district courts in this Circuit have reversed bankruptcy courts when they have imposed such a requirement. For example, in *Official Comm. of Unsecured Creditors v. Mellon Bank, N.A. (In re Allegheny Int'l, Inc.),* 107 B.R. 518 (W.D. Pa. 1989), an equity committee attempted to intervene in an adversary proceeding. The bankruptcy court permitted the committee to intervene as to certain claims, but it denied intervention as to other claims because the court found the committee's interests were already adequately represented. *Id*. at 521. The district court reversed, holding that, under *Marin*, the committee had the absolute right to intervene as to all claims.[4] *Id*.; *see also Neuman*, 124 B.R. at 160 (permitting individual creditor to intervene in adversary proceeding without showing that interests are not adequately represented).

12. Plaintiffs largely ignore *Marin* and *Phar-Mor* and, instead, base their Objection on the remarkable contention that, nearly 30 years after deciding these cases, the Third Circuit overruled these long-standing precedents in an unpublished two-page panel decision that makes

[4] The Second Circuit has likewise followed the Third Circuit's decisions in *Marin* and *Phar-Mor*. *See Term Loan Holder Committee v. Pzer Group, L.L.C. (In re Caldor Corp.)*, 303 F.3d 161 (2d Cir. 2002). There, the Second Circuit held that the plain and unambiguous terms of Section 1109(b) afford parties in interest, including creditors, an unqualified right to intervene in adversary proceedings and that, as a result, it need not consider the same policy concerns raised by Plaintiffs here – the potential impact of permitting all creditors a right to intervene in adversary proceedings. *Caldor*, 303 F.3d at 175. In any event, the *Caldor* court noted that the Third Circuit in *Marin* "considered such policy concerns 'unrealistic.'" *Id*. (quoting *Marin*, 689 F.2d at 453).

no mention of either of these two cases. (*See* Objection at ¶ 4) (citing *Stone & Webster, Inc. v. Saudi Arabian Oil Co. (In re Stone & Webster, Inc.)*, 335 Fed. Appx. 202 (3d Cir. Feb. 6, 2009)). Of course, Third Circuit precedent may not be overruled without *en banc* consideration. *See Phar-Mor*, 22 F.3d at 1233 (expressly holding that *Marin* is binding precedent that cannot be overruled without *en banc* review); *see also* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit § 9.1 (*en banc* consideration is required to overrule precedential opinions). The suggestion that the *Stone & Webster* panel meant to overrule *Marin* and *Phar-Mor* is even more outlandish when one considers that *Stone & Webster* was an unpublished decision, *see* Third Circuit Local Appellate Rule 5.7 ("The court by tradition does not cite to its not published opinions as authority"), and that this unpublished decision did not even mention either of the two Third Circuit precedents that it supposedly overruled, *see Stone & Webster*, 335 Fed. Appx. at 204 (no citation to either *Marin* or *Phar-Mor)*.

13. Of course, *Stone & Webster* did not in any way overrule either *Marin* or *Phar-Mor*. To the contrary, this unpublished decision simply applied a black letter legal principle – that only a party in interest is entitled to intervene – to facts that (as the court noted) were somewhat convoluted. Specifically, the Third Circuit affirmed the denial of an intervention motion filed by a bank lender on the ground that, while the bank was a creditor of certain non-debtor parties, it was not a creditor *of the debtors* and, consequently, was "not a party in interest to the litigation." *Stone & Webster*, 335 Fed. Appx. at 204.[5] In the present case, it is undisputed

[5] The bank that sought to intervene in *Stone & Webster* was a *former* lender to the debtor, whose claims against the debtor had been assumed by a purchaser under an asset purchase agreement. *Saudi Am. Bank v. Saudi Arabian Oil Co. (In re Stone & Webster, Inc.)*, Case No. 06-399-SLR, 2007 U.S. Dist. LEXIS 63941 at *3-4 (D. Del. Aug. 29, 2007). The debtor subsequently commenced an adversary proceeding, and the former lender sought to intervene on the ground that it held a secured claim against one of the non-debtor parties. *Id.* at *5-6. The Bankruptcy Court denied intervention, and both the District Court and the Third Circuit affirmed, holding that the would-be intervenor had no claim against the debtor and therefore was not a party in interest. The Third Circuit noted, in its affirmance, that a contrary holding

that Aurelius is a creditor and party in interest, and consequently *Stone & Webster* is in no way inconsistent with the relief Aurelius seeks.

14. In sum, the Third Circuit's holdings in *Marin* and *Phar-Mor* remain binding precedent in this jurisdiction. As a result, Aurelius has an unconditional right to intervene in this adversary proceeding, regardless of whether its interests would otherwise be adequately protected.

B. Aurelius's Interests Are Not Adequately Protected in This Adversary Proceeding

15. Even if (contrary to law) Aurelius were required to show that its interests are not adequately protected, such a showing is easily made.

16. Most significantly, Aurelius has a more direct financial stake than either the Debtors or the Committee in the outcome of this Adversary Proceeding. Aurelius is a holder of the Debtors' PIERS securities. As set forth in the disclosure statement (the "Revised Supplemental Disclosure Statement") (Case No. 08-12229, D.I. 6966) for the Debtors' currently-proposed plan of reorganization (the "Modified Sixth Amended Plan") (Case No. 08-12229, D.I. 6694), holders of PIERS are projected to recover approximately 49% of the allowed amount of their claims. (Revised Supplemental Disclosure Statement at 29.) The allowance of additional claims on account of the Debtors' litigation tracking warrants ("LTWs"), as sought by the Plaintiffs here, would significantly dilute and thereby reduce recoveries to PIERS holders. Moreover, as a result of the Plaintiffs' litigation, the Debtors have been required to reserve for the LTWs claim in the amount of $337 million (D.I. 6701). The establishment of that reserve may delay distributions to the Debtors' legitimate creditors, thereby allowing additional postpetition interest to accrue to the detriment of the PIERS holders, including Aurelius.

"would permit every secured creditor to intervene in *its debtor's* [i.e., its obligor's] litigation," regardless of whether that obligor was itself a debtor under the Bankruptcy Code. *Stone & Webster*, 335 Fed. Appx. at 204 (emphasis added).

17. By contrast, the Debtors, while fiduciaries, have no direct economic interest in the outcome of this Adversary Proceeding. The outcome of this proceeding will not affect the size of the Debtors' estates. Instead, it will merely affect the size of the Debtors' claims pool, thereby affecting the recoveries of the Debtors' creditors.

18. Nor does the Committee have as direct an economic interest in the outcome of this Adversary Proceeding as Aurelius. While the indenture trustee for the PIERS securities does serve on the Committee, it is only one Committee member out of four. Like all creditors' committees, the Committee represents multiple constituencies, with divergent interests and concerns. As a result, it does not have (and cannot be expected to have) the direct financial incentive that Aurelius has, as a holder of the fulcrum security most affected by this Adversary Proceeding, to bring this Adversary Proceeding to a successful and prompt conclusion.

19. No criticism of the Debtors or of the Committee is intended by Aurelius. The Debtors and the Committee are each ably performing their respective roles in this case, and if permitted to intervene, Aurelius commits that it will work closely with them to present a coordinated defense of this suit. As a party with a direct financial stake in ensuring a successful and prompt resolution of this Adversary Proceeding, Aurelius should be permitted to participate directly in the litigation in furtherance of these goals.

20. Plaintiffs' suggestion that Aurelius's intervention would delay this Adversary Proceeding could not be further from the truth. As noted above, the reserve established for the LTWs' claims threatens to increase postpetition interest to the detriment of PIERS holders. The longer it takes to resolve the LTW dispute, the greater the adverse impact on the PIERS holders' recoveries by virtue of the additional accrual of such postpetition interest. As a result, Aurelius

is motivated to see this Adversary Proceeding resolved promptly – and as discussed below, there is no reason whatsoever to expect that Aurelius's intervention will delay proceedings in this suit.

21. Accordingly, there is ample reason to permit Aurelius to intervene in this Adversary Proceeding, wholly apart from its right to intervene under Section 1109(b) as a matter of law. It is not surprising, therefore, that neither the Debtors nor the Committee has objected to the Motion.

C. The Motion is Timely

22. The timeliness of a party-in-interest's intervention is determined after considering all circumstances, including (i) how far the proceeding has progressed, (ii) the prejudice that might flow from any resultant delay, and (iii) the reason for the delay in seeking intervention. *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501, 506 (3d Cir. 1976). Those considerations decidedly support the conclusion that Aurelius's intervention is timely, notwithstanding Plaintiffs' protestations to the contrary.

23. *First*, as set forth in the Opening Brief in support of the Motion (at ¶ 20), this Adversary Proceeding is at a relatively early stage. Notwithstanding the discovery and motion practice that has occurred to date, this action essentially re-started just three weeks ago, with the filing of a Second Amended Complaint (D.I. 162) that embodies sweeping and fundamental revisions to the prior amended complaint.

24. The amendments made by the March 1, 2011 Second Amended Complaint have more than doubled the length of the complaint, increasing it from 49 paragraphs to 103 paragraphs. At the same time, the Second Amended Complaint named *13 new defendants*, and it added three new causes of action: (i) a new cause of action alleging that the Debtors breached Section 4.2(b) of the Warrant Agreement, which Plaintiffs allege entitles them to cash (*id*. ¶¶ 60-

70); (ii) a new cause of action alleging that Section 4.2(d) of the Warrant Agreement was breached, both as a result of JPMorgan's purchase of the assets of WaMu Bank and by the Global Settlement Agreement (*id*. ¶¶ 71-79); and (iii) a new of cause of action alleging that Section 4.5 of the Warrant Agreement entitles the LTW holders to a payment equal to 85% of the net proceeds of the Anchor Litigation (*id.* ¶¶ 87-89).

25. Having just amended their allegations and claims in such a wholesale fashion, the Plaintiffs' contention that Aurelius waited too long to seek to intervene strains credulity, to say the least. Plaintiffs' other contentions concerning the supposedly far-advanced stage of this suit are equally insubstantial:

- Plaintiffs contend that significant discovery has already taken place. (Objection ¶ 7.) In fact, Aurelius understands the only discovery that has occurred to date is the production of certain documents by the Debtors. The much more substantial additional discovery contemplated by the just-entered scheduling order – namely, additional document productions, interrogatory responses, depositions, and responses to requests to admit, to be followed by the preparation of expert reports (Scheduling Order ¶¶ 3-6) – is still to come.
- While the Court has already denied a motion for summary judgment, the Court has set a deadline for a new summary judgment motion, to be filed in August after the completion of discovery and to be followed by a September 2011 trial. The fact that an initial summary judgment motion has already been ruled on does not make Aurelius's intervention motion untimely. *See, e.g.*, *Metro Concrete Corp. v. DeFillipis Tower Crane Corp. (In re Metro Concrete Corp.)*, 157 B.R. 215, 219 (Bankr. E.D.N.Y. 1993) (granting intervention after denial of summary judgment).

26. *Second*, permitting Aurelius to intervene will not delay the resolution of this adversary proceeding or result in any prejudice, as Plaintiffs suggest (Objection ¶ 13). As noted above, Aurelius is motivated to see this Adversary Proceeding resolved promptly, since any delay in the resolution of this proceeding threatens to affect the recoveries of PIERS holders as reserves are maintained and postpetition interest accrues. If permitted to intervene, Aurelius will coordinate closely with the other Defendants and will do nothing that will in any way delay the completion of these proceedings as scheduled.

27. *Finally*, Aurelius should not be criticized for awaiting the resolution of the pending summary judgment motion and choosing to intervene at this stage of the case. As already noted, projected recoveries on account of PIERS claims have decreased significantly. The disclosure statement that was filed with the Court shortly after this adversary proceeding was commenced projected that the PIERS securities would recover 100% on account of their claims. (*See* Disclosure Statement for the Second Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code, dated May 21, 2010 (D.I. 4242) at 25.) In contrast, the Debtors are now projecting that PIERS holders will recover 49% – less than half of what was projected nearly one year ago. (Revised Supplemental Disclosure Statement at 29.) Aurelius is taking action now to ensure that this Adversary Proceeding is resolved correctly and promptly to avoid any further and unnecessary reduction in the PIERS recoveries.

28. Accordingly, the Motion is timely within the meaning of Federal Rule 24(a), and Aurelius should be permitted to intervene in this Adversary Proceeding.

WHEREFORE, for the reasons set forth above and in the Opening Brief, Aurelius respectfully requests that this Court (a) grant the Motion and permit Aurelius to intervene as a defendant in the Adversary Proceeding, and (b) grant such other relief as the Court deems proper.

Dated: March 22, 2011

BLANK ROME LLP

/s/ Victoria A. Guilfoyle

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CERTIFICATE OF SERVICE

I, *Victoria A. Guilfoyle*, hereby certify that on March 22, 2011, I caused a copy of the **Reply in Further Support of Motion of Aurelius Capital Management, LP to Intervene as a Defendant** to be served upon the parties listed below in the manner indicated.

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