

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re

WASHINGTON MUTUAL, INC., et al.,<sup>1</sup>

Debtors.

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, WILLIAM REED, JR.,  
MICHAEL MURPHY,

Defendants.

Chapter 11

Case No. 08-12229 (MFW)

(Jointly Administered)

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

**SECOND AMENDED ANSWER AND COUNTERCLAIM OF DEFENDANT  
WASHINGTON MUTUAL INC. TO SECOND AMENDED CLASS COMPLAINT**

Washington Mutual, Inc. ("WMI"), as debtor and debtor in possession,  
and a defendant in this adversary proceeding, hereby submits, by and through its counsel,

<sup>1</sup> 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.



this Second Amended Answer and Counterclaim (the “Amended Answer”) to the Second Amended Class Complaint [Docket No. 162] (the “Complaint”) filed by Broadbill Investment Corp., Nantahala Capital Partners, LP, and Blackwell Capital Partners, LLC (collectively, the “Plaintiffs”).

### **GENERAL DENIAL**

Except as otherwise expressly admitted herein, WMI denies each and every allegation in the Complaint, including, without limitation, any allegations contained in the preamble, introduction, prayer, headings, and subheadings of the Complaint. To the extent the allegations in the Complaint seek to impose liability on WMI, 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 Complaint to which no responsive pleading is required shall be deemed as denied. WMI expressly reserves the right to seek to amend and/or supplement this Amended Answer, as may be necessary.

### **SPECIFIC RESPONSES**

#### **PRELIMINARY STATEMENT**

1. This class action relates to the conveyance by Dime Bancorp (“Dime”) to its shareholders of 85% of the net proceeds from a litigation entitled *Anchor Savings Bank FSB v. United States*, No. 95-39C (“Anchor Litigation”). In December 2000, the Dime board of directors (“Dime Board”), in an effort to enhance Dime shareholder returns and to stave off a potential takeover attempt by a rival bank, determined to convey to its shareholders, for no cost, 85% of the net recovery from the Anchor Litigation. The Dime Board concluded that the best way to convey such value, including the most tax efficient structure from the perspective of Dime and Dime shareholders, was through the issuance of what were nominally referred to as

“Litigation Tracking Warrants” (“LTWs”). The LTWs gave holders thereof (“LTW Holders”) the right to payment upon a “Trigger” by either: (i) the distribution of shares of Dime common stock with a market value at the time of distribution equal to 85% of the net recovery in the Anchor Litigation, or (ii) payment of other consideration equal to 85% of such net recovery. Following the combination of Dime and WMI, the right to pursue the Anchor Litigation on behalf of the LTW Holders was transferred to either WMI or its subsidiary, Washington Mutual Bank (“WMB”). WMI assumed Dime’s obligation to pay 85% of the net proceeds of the Anchor Litigation to the LTW Holders.

Answer 1. The statements contained in paragraph 1 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI admits that Dime issued the LTWs in December 2000, that WMB was an indirect subsidiary of WMI and remains one following the FDIC appointment as a receiver for WMB on September 25, 2008, and otherwise denies the allegations contained in paragraph 1 of the Complaint.

2. Dime intended that, upon the issuance of the LTWs, the right to payment of 85% of the net proceeds from the Anchor Litigation would be vested in the LTW Holders, and the LTW Holders’ interest thereto would be senior to any claim to such proceeds by Dime or its subsidiaries.

Answer 2. WMI denies each and every allegation in paragraph 2 of the Complaint.

3. Article IV of the Original Agreement (as herein defined) reflects an acknowledgment by Dime that, since there could be a long time interval before any proceeds from the Anchor Litigation would be collected, certain “Adjustments” inuring for the benefit of the LTW Holders may be mandated. As such, the Original Agreement contained specific provisions which required Adjustments as may be necessary to protect the rights of the LTW Holders to receive 85% of the net recovery in the Anchor Litigation.

Answer 3. The statements contained in paragraph 3 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 3 of the Complaint, and further states that the Original Agreement<sup>2</sup> to which paragraph 3 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

4. Section 4.2(b) of the Warrant Agreement, dated December 21, 2000 (“Original Agreement”) provides that if there were, among other things, a Combination (as defined in the Original Agreement) before a “Trigger” event occurred, the LTW Holders would be entitled to receive the same type and proportion of property that Dime shareholders received in such Combination. When WMI acquired Dime in 2002, it was a Combination within the meaning of the Original Agreement. Pursuant to WMI’s acquisition of Dime, Dime shareholders had the option to elect, for their [C]ombination consideration, either all cash or all stock of WMI. If no election were made, Dime shareholders received Combination consideration equal to approximately 30% in cash and the balance in WMI’s stock. Most Dime shareholders did not select the “all cash” option. By virtue of the WMI/Dime Combination, and the availability of the cash election, as of 2003, LTW Holders were entitled to be paid their share of the 85% net recovery in the Anchor Litigation in the form of cash.

Answer 4. WMI denies each and every allegation in paragraph 4 of the Complaint, and further states: (1) that on or about June 25, 2001, Dime and WMI entered into an Agreement and Plan of Merger, which closed on January 4, 2002 (“Dime-WMI Merger Agreement”), the terms of which speak for themselves; and (2) that the Amended

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<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Complaint.

Agreement to which paragraph 4 refers speaks for itself. WMI respectfully refers the Court to the contents of those documents for the terms thereof.

5. Section 4.2(d) of the Amended Agreement (as herein defined) provides that if there is a Combination, WMI will cause the “Successor Company” to assume the obligations to LTW Holders pursuant to the Amended Agreement. Under the Global Settlement [(“Global Settlement”) between WMI and J.P. Morgan Chase Bank N.A. (“JPMorgan”), (a) WMI is transferring substantially all of its assets to JPMorgan, which constitutes a Combination within the meaning of the Amended Agreement, and (b) JPMorgan is not assuming the obligations to the LTW Holders under the Amended Agreement. WMI’s failure to cause JPMorgan as the Successor Company in a Combination to assume the obligations to the LTW Holders under the Amended Agreement constitutes a breach by WMI of Section 4.2(d) of the Amended Agreement. As such, the LTW Holders have a claim against WMI for 85% of the net recovery in the Anchor Litigation.

Answer 5. WMI denies each and every allegation in paragraph 5 of the Complaint, and further states: (1) that the Global Settlement is incorporated as part of the Debtors’ *Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, dated February 7, 2011 (as further amended, modified or supplemented from time to time, the “Plan”), the terms of which speak for themselves; and (2) that the Amended Agreement to which paragraph 5 refers speaks for itself. WMI respectfully refers the Court to the contents of those documents for the terms thereof.

6. Section 4.4 of the Amended Agreement protects the rights of the LTW Holders by providing that if an “event” occurs prior to the Trigger that would frustrate WMI’s ability to use its common stock as a form of currency to convey to the LTW Holders 85% of the net proceeds of the Anchor Litigation, WMI, acting through the WMI Board, must nonetheless fulfill the intent of the LTWs by providing payment of such value to the LTW Holders by alternative means. A bankruptcy of WMI wherein its stock

is extinguished is such an “Event.” WMI and the WMI Board’s failure to make such necessary adjustments constitute a breach of Section 4.4 of the Amended Agreement. As such, the LTW Holders have [a] claim against WMI and the WMI Board for 85% of the net recovery in the Anchor Litigation.

Answer 6. WMI denies each and every allegation in paragraph 6 of the Complaint, and further states that the Amended Agreement to which paragraph 6 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

7. Section 4.5 of the Amended Agreement provides that if there is a WMI liquidation, WMI is required to make an [adjustment so that LTW Holders are provided property equal to 85% of the net recovery in the Anchor Litigation. WMI’s failure to make such an adjustment constitutes a breach of Section 4.5 of the Amended Agreement.

Answer 7. The statements contained in paragraph 7 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 7 of the Complaint, and further states that the Amended Agreement to which paragraph 7 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

8. Section 6.3 of the Amended Agreement provides that WMB was to retain sole and exclusive control over the Anchor Litigation on behalf of the LTW Holders. That provision and other provisions of the Amended Agreement were, or will be, breached as a consequence of: (a) the purported sale under the Global Settlement of the recovery from the Anchor Litigation to JPMorgan, and (b) the failure of WMI to pay to the LTW Holders, the portion of the purchase price paid or to be paid by JPMorgan for the Anchor Litigation.

Answer 8. WMI denies each and every allegation in paragraph 8 of the Complaint, and further states that the Amended Agreement to which paragraph 8 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

9. Pursuant to WMI's amended plan of reorganization ("Plan"), WMI is seeking to reject its obligations under the Amended Agreement. Such action constitutes a breach of the Amended Agreement, and the LTW Holders have a claim against WMI as a result thereof[.]

Answer 9. The statements contained in paragraph 9 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 9 of the Complaint, and further states that the Amended Agreement and the Plan to which paragraph 9 refers speak for themselves, and WMI respectfully refers the Court to the contents of those documents for the terms thereof.

10. When Dime issued the LTWs in 2000, it announced to the public that it had spun off as a dividend the economic value of 85% of the net recovery in the Anchor Litigation to its shareholders. As a result, Dime's common stock no longer reflected the value of such net recovery in the Anchor Litigation. Instead, the value of such net recovery in the Anchor Litigation was reflected in the LTWs and belonged to the LTW Holders. The transfer of the Anchor Litigation to JP Morgan pursuant to the Global Settlement constituted a "taking" of the LTW Holders' interest in such transferred asset (85% of the net recoveries in the Anchor Litigation). As such, the LTW Holders' interests in 85% of the net recovery in the Anchor Litigation attached to the proceeds paid by JPMorgan to WMI pursuant to the Global Settlement.

Answer 10. The statements contained in paragraph 10 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required,

WMI admits that Dime issued the LTWs in December 2000, and respectfully refers the Court to the contents of the documents governing their issuance. WMI otherwise denies each and every allegation contained in paragraph 10 of the Complaint.

11. By this action, Plaintiffs seek, *inter alia*, relief on behalf of themselves and all members of the Class (as defined below) that: (i) pursuant to Section 4.2(b) of the Original Agreement, the LTW Holders are entitled to be paid 85% of the net recovery in the Anchor Litigation in cash; (ii) based on WMI's breach of Section 4.2(d) of the Amended Agreement and WMI's rejection of the Amended Agreement, the LTW Holders are entitled to a claim equal to 85% of the net recovery in the Anchor Litigation; (iii) if WMI's existing common stock is to be extinguished or cancelled under the Plan, Sections 4.4 and 4.5 of the Amended Agreement mandate that the LTW Holders have claims against WMI in the amount of 85% of the net recovery in the Anchor Litigation; (iv) the LTW Holders have a claim against WMI's Board members for breach of their duty and obligations to the LTW Holders pursuant to Section 4.4 of the Amended Agreement; (v) the sale and transfer of control over, and the recovery from, the Anchor Litigation to JPMorgan constitute a breach and default under the Amended Agreement, and a taking of the LTW Holders interests therein, which give[] rise to a claim in favor of the LTW Holders for WMI's failure to provide the LTW Holders with the proceeds from such sale and transfer; and (vi) the LTWs represent the "right to payment" of 85% of the net recovery in the Anchor Litigation and are "claims" against WMI's estate.

Answer 11. Paragraph 11 of the Complaint contains a request for relief, rather than an allegation of fact. To the extent that a response is required, WMI denies each and every allegation in Paragraph 11 of the Complaint and denies that Plaintiffs are entitled to any relief.

#### **JURISDICTION AND VENUE**

12. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334.



Answer 12. Paragraph 12 of the Complaint contains conclusions of law to which no responsive pleading is required; however, WMI admits that this Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 over defendant WMI.

13. Venue is proper in this District pursuant to 28 U.S.C. § 1409(a). This action constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2). This adversary proceeding is commenced pursuant to 11 U.S.C. § 105, 28 U.S.C. § 2201 and applicable law of the State of New York.

Answer 13. Paragraph 13 of the Complaint contains conclusions of law to which no responsive pleading is required; however, WMI admits that venue is proper pursuant to 28 U.S.C. § 1409(a) with respect to defendant WMI.

## **PARTIES**

### **I. Plaintiffs**

14. Plaintiff Broadbill Investment Corp. (“Broadbill”) is a corporation organized under the laws of the State of Florida, with its principal place of business in Florida.

15. Plaintiff Nantahala Capital Partners, LP (“Nantahala”) is a limited partnership organized under the laws of the State of Massachusetts, with its principal place of business in Connecticut.

16. Plaintiff Blackwell Capital Partners, LLC (“Blackwell”) is a limited liability company organized under the laws of the State of Georgia, with its principal place of business in Connecticut.

17. Plaintiffs and each member of the Class (defined below) are beneficial holders and owners of LTWs.

Answers 14-17. WMI is without sufficient information to admit or deny the allegations in paragraphs 14-17 of the Complaint, and therefore denies the allegations in paragraphs 14-17.

## II. Defendant(s)

18. Defendant WMI is, upon information and belief, a corporation organized under the laws of the State of Delaware.

Answer 18. WMI denies each and every allegation in paragraph 18 of the Complaint.

19. According to WMI's Schedules of Financial Affairs filed in February 2009 ("Schedules"), WMI's Board, after WMI's bankruptcy filing, consists of Charles Lillis, David Bonderman, Francis Baier, James Stever, Margaret Osmer McQuade, Orin Smith, Phillip Matt[h]ews, Regina Montoya, Stephen Frank, Stephen Chazen, Thomas Leppert, William Reed, Jr., and Michael Murphy. The Schedules state that each member of the Board has a business address at 1301 Second Avenue, Seattle, Washington 98101.

Answer 19. WMI admits that the documents referenced in paragraph 19 of the Complaint list the identified individuals and make representations with respect to their status as members of WMI's Board, and further states that those documents speak for themselves, and WMI respectfully refers the Court to the contents of those documents for the terms thereof. WMI further alleges that the referenced documents erroneously list Francis Baier as a member of WMI's Board.

### **CLASS ACTION ALLEGATIONS**

20. Plaintiffs bring[] their claims individually and as a collective action on behalf of a class ("Class") defined as "All parties that hold (or hereafter acquire) Litigation Tracking Warrants that were originally issued by Dime Bancorp on December 22, 2000 and relate to the litigation entitled *Anchor Savings Bank FSB v. United States*, No. 95-39C." Collective action treatment is appropriate because Plaintiffs and all members of the Class are similarly

situated with respect to the LTWs and their substantive rights against WMI and the WMI Board are identical.

21. The Class is so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown to Plaintiffs, according to information provided by WMI, there are at least several hundred members of the Class.

22. Common, *i.e.*, identical, questions of law and fact exist with respect to Plaintiffs and the members of the Class, including, but not limited to:

(i) whether Section 4.2(b) of the Original Agreement requires WMI to pay the LTW Holders 85% of the net recovery in the Anchor Litigation in the form of cash since Dime shareholders received in 2002 as part of the WMI Combination an all cash option for their Combination consideration?

(ii) whether the Global Settlement and/or JPMorgan's purchase of the assets of WMB constituted a Combination under the Amended Agreement which required WMI, under Section 4.2(d) of the Amended Agreement, to cause JPMorgan to assume the obligations to the LTW Holders under the Amended Agreement? If so, does WMI's breach of Section 4.2(d) and its rejection of the Amended Agreement entitle the LTW Holders to a claim against WMI equal to 85% of the net recovery in the Anchor Litigation?

(iii) whether Sections 4.4 and 4.5 of the Amended Agreement mandate that the LTW Holders have claims against WMI in the amount of 85% of the net proceeds of the Anchor Litigation, if WMI's existing common stock is to be extinguished or cancelled under the Plan?

(iv) whether WMI's Board breached [its] duty to the LTW Holders under Section 4.4 of the Amended Agreement by not allowing the LTW Holders a claim under the Plan equal to 85% of the net recovery in the Anchor Litigation?

(v) whether the sale and transfer of control over, and the recovery from, the Anchor Litigation to JPMorgan constitutes a breach and default under the Amended

Agreement and a taking of the LTW Holders' interests therein, which give[] rise to a claim in favor of the LTW Holders for the portion of the purchase price paid or to be paid by JPMorgan for the Anchor Litigation?

(vi) whether the LTWs represent the "right to payment" of value and are ["]claims" against WMI' s estate?

23. Plaintiffs' claims are typical of those of the Class. Plaintiffs are members of the Class they seek to represent.

24. Plaintiffs and their respective undersigned counsel have, in effect, been representing the interests of the entire Class since the filing of the initial complaint in this action and will fairly and adequately protect the interests of the Class. Plaintiffs' interests are in no way antagonistic to the interests of other members of the Class. Plaintiffs have retained counsel competent and experienced in complex civil litigation and bankruptcy matters.

25. Concentrating all potential litigation concerning the rights of members of the Class in the above captioned proceeding will obviate the need for unduly duplicative litigation that might result in inconsistent judgments, will conserve judicial resources and the resources of the parties, and is the most efficient means of resolving the rights of members of the Class. Because the LTWs are publicly traded through the Depository Trust & Clearing Corporation ("DTC") under the symbol "DIMEQ", resolution of the above captioned proceeding should be determinative with respect to issues relating to the LTWs (including, without limitation, issues relating to filing individual proofs of claim with respect to the LTWs).

26. Certification of the Class pursuant to Rule 23(b)(1) is appropriate because an adjudication with respect to Plaintiffs' claims would, as a practical matter, be dispositive of the interests of the other members of the Class that are not parties to the above captioned proceeding. Additionally, certification of the Class pursuant to Rule 23(b)(2) is appropriate because WMI has in the past refused to act on grounds generally applicable to the Class, thereby making final declaratory relief with respect to the Class as a whole appropriate.

27. Payment by WMI of the costs associated with the above captioned proceeding, including, without limitation, reasonable fees, expenses and disbursements of Plaintiffs' counsel, is appropriate because: (i) WMI has agreed to the filing of this Amended Complaint and the treatment of the above captioned proceeding as a class action[;] (ii) the Court has suggested that this matter proceed as a class action; and (iii) placing the significant financial burden of litigating a class action on Plaintiffs would be inappropriate under the circumstances.

Answers 20-27. WMI admits that this adversary proceeding, given the particular circumstances present in connection with the bankruptcy and the Plan, is appropriate for class certification under Fed R. Civ. P. 23, but otherwise denies each and every allegation made in paragraphs 20-27 of the Complaint, denies that payment by WMI of costs would be appropriate, and further reserves all rights to dispute Plaintiffs' compliance with particular requirements of Rule 23 and the right to assert all defenses that apply only to individual class members or to particular groups of class members. WMI lacks knowledge and information sufficient to form a belief as to whether the Named Plaintiffs' claims are typical of the claims of the purported class and whether the Named Plaintiffs are adequate representatives of the purported class, and therefore denies those allegations.

## **FACTS**

### **III. Background**

#### **A. The Anchor Litigation**

28. Between 1982 and 1985, Anchor Savings Bank FSB ("Anchor FSB") acquired eight failing savings and loan institutions, the deposits of which were insured by the Federal Savings and Loan Insurance Corporation (the "FSLIC"). In acquiring such institutions, Anchor FSB assumed liabilities determined to exceed the assets it acquired by over \$650 million in the aggregate. The difference between the fair values of the assets acquired

and the liabilities assumed in such transactions was recorded on Anchor FSB's books as "goodwill." At the time of these acquisitions, the FSLIC had agreed that Anchor FSB, among other things, could include the value of such "goodwill" in its regulatory capital.

Answer 28. WMI admits that between 1982 and 1985, Anchor FSB merged with eight failing savings and loans under the auspices of the United States Government, assumed liabilities in connection therewith, and was permitted by the United States Government to record on its balance sheet an intangible asset called "supervisory goodwill," or "goodwill," in amounts equal to the difference between the fair market value of the assets acquired and the price paid for the assets. WMI otherwise denies the allegations in paragraph 28 of the Complaint, and alleges that the allegations in paragraph 28 are addressed in the litigation styled *Anchor Savings Bank, FSB v. United States* (the "Anchor Litigation"), Case No. 95-39C (Fed. Cl.), pending before the Honorable Lawrence J. Block in the United States Court of Federal Claims, commenced by Anchor Savings Bank, FSB against the United States of America, and respectfully refers the Court to the pleadings filed in the Anchor Litigation for their contents.

29. When the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") was enacted, Anchor FSB still had over \$500 million of regulatory capital from supervisory acquisitions on its books, including the "goodwill" described in paragraph [28] above. FIRREA, however, required the remaining supervisory goodwill to be eliminated immediately for purposes of calculating tangible capital and to be phased out through December 31, 1994 for other regulatory capital purposes. The elimination of the supervisory goodwill and other components of regulatory capital damaged Anchor FSB by creating severe limitations on its activities and requiring the sale of valuable assets under liquidation-like circumstances[.]

Answer 29. WMI admits that the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), required savings and loan associations, including Anchor Bank FSB, to restrict the use of supervisory goodwill as capital by, among other things, restricting the amortization period for goodwill and creating stricter capital standards. WMI otherwise denies the allegations in paragraph 29 of the Complaint, and alleges that the allegations in paragraph 29 are addressed in the Anchor Litigation, and respectfully refers the Court to the pleadings filed in the Anchor Litigation for their contents.

30. On January 13, 1995, Anchor FSB filed a lawsuit commencing the Anchor Litigation against the United States government in the United States Court of Federal Claims, alleging breach of contract and taking of property without compensation in contravention of the Fifth Amendment to the United States Constitution. Shortly after the Anchor Litigation was commenced, Dime acquired Anchor and The Dime Savings Bank of New York, FSB (“Dime FSB”) acquired Anchor FSB. In connection therewith, the Anchor Litigation was transferred to either Dime or Dime FSB[.] On January 4, 2002, Dime FSB merged into WMB and either WMB or WMI assumed the rights under the Anchor Litigation. WMI assumed Dime’s obligations under the LTWs and the Original Agreement.

Answer 30. WMI admits the allegations in the first sentence of paragraph 30 of the Complaint, admits that immediately before, simultaneously with, or immediately after the commencement of the Anchor Litigation, Dime FSB acquired Anchor FSB, and admits that on January 4, 2002, WMI acquired Dime Bancorp, Inc. WMI otherwise denies the allegations in paragraph 30 of the Complaint.

31. On March 14, 2008, the U.S. Court of Federal Claims issued an order and findings that Anchor was entitled to damages for the lost profits and awarded additional

damages. The Court's order and findings concluded that Anchor FSB had incurred recoverable damages in the amount of approximately \$382 million, plus an undetermined amount for a gross up of Anchor FSB's tax liabilities. On July 16, 2008, the Court reduced the judgment to approximately \$356 million. On March 10, 2010, the Federal Circuit Court of Appeals affirmed the judgment of approximately \$356 million, and also remanded the case to the Court of Federal Claims for further determination of whether that court had made a calculation error and should increase the damage award by as much as an additional \$63 million.

Answer 31. WMI admits that on March 14, 2008, the U.S. Court of Federal Claims issued an opinion and order in the Anchor Litigation, the contents of which speak for themselves, that on July 16, 2008, the U.S. Court of Federal Claims issued an opinion and order in the Anchor Litigation, the contents of which speak for themselves, and that on March 10, 2010, the Federal Circuit Court of Appeals issued an opinion and order in the Anchor Litigation, the contents of which speak for themselves. WMI otherwise denies the allegations in paragraph 31 of the Complaint.

32. The Anchor Litigation Judgment will be, at a minimum: (a) \$356 million, plus (b) an appropriate tax gross up amount, plus (c) post-Judgment interest since the Federal Circuit Court of Appeals decision in March 2010, plus (d) the potential of an additional \$63 million.

Answer 32. WMI denies each and every allegation contained in paragraph 32 of the Complaint.

**B. The LTWs**

33. On December 22, 2000, Dime distributed LTWs to holders of outstanding shares of its common stock. The LTWs were registered under a registration statement dated December 15, 2000 (as amended, the "Registration Statement") and were issued pursuant to the Original



Agreement. A true copy of the Registration Statement is annexed hereto as Exhibit A.

Answer 33. WMI denies each and every allegation contained in paragraph 33 of the Complaint, and respectfully refers the Court to the Original Agreement, and to the registration statement, dated October 20, 2000 (as amended on December 15, 2000, the "Registration Statement"), for their contents. WMI further alleges that, on December 22, 2000, pursuant to the Original Agreement, Dime Bancorp, Inc. distributed litigation tracking warrants (the "LTWs") to its then current shareholders. The LTWs were registered pursuant to the Registration Statement.

34. The LTWs were issued as a tax free dividend to enhance shareholder recoveries.

Answer 34. WMI admits that the Registration Statement provides that the LTWs, as warrants to purchase stock, are non-taxable equity securities whose holders have received significant tax benefits due to their treatment as equity interests rather than other property, and otherwise denies the allegations in paragraph 34 of the Complaint.

35. The LTWs were issued by Dime as part of an overall strategy to gain shareholder support in order to thwart an unwanted takeover attempt by a rival bank.

Answer 35. WMI is without knowledge or information sufficient to form a belief as to the allegations in paragraph 35 of the Complaint, and on that basis denies them.

36. The LTWs were specifically structured so that there would be no immediate tax consequences for the Dime shareholders upon receipt of the LTWs. The LTWs were also structured so that expenses relating to the Anchor Litigation would be capitalized by Dime, and not immediately expensed, thus minimizing the impact of the costs of the Anchor Litigation on Dime's current earnings.

Answer 36. With respect to the first sentence of paragraph 36 of the Complaint, WMI admits that the Registration Statement provides that the LTWs, as warrants to purchase stock, are non-taxable equity securities whose holders have received significant tax benefits due to their treatment as equity interests rather than other property, and otherwise denies the allegations in the first sentence of paragraph 36 of the Complaint. With respect to the remaining allegations in paragraph 36 of the Complaint, WMI is without knowledge or information sufficient to form a belief as to those allegations, and on that basis denies them.

37. Dime shareholders did not pay anything to receive the LTWs.

Answer 37. WMI is without knowledge or information sufficient to form a belief as to the allegations in paragraph 37 of the Complaint, and on that basis denies them.

38. Dime's Board believed that any potential purchaser of the bank, and/or the equity market itself, would not properly incorporate the value of the full benefit of the Anchor Litigation into the market capitalization of Dime's common stock, and that it therefore made sense to separately spin off 85% of the value of the Anchor Litigation to the Dime shareholders.

Answer 38. WMI is without knowledge or information sufficient to form a belief as to the allegations in paragraph 38 of the Complaint, and on that basis denies them.

39. Credit Suisse First Boston trademarked the term "litigation tracking warrant" and marketed it to banks which had "goodwill" litigation claims (such as the Anchor Litigation) against the United States government.

Answer 39. WMI is without knowledge or information sufficient to form a belief as to the allegations in paragraph 39 of the Complaint, and on that basis denies them.

40. When the LTWs were issued Dime issued a press release dated December 18, 2000 stating that it had distributed to its shareholders, in the form of LTWs, a substantial portion of Dime's economic interest in the Anchor Litigation. A true copy of the December 18, 2000 press release is annexed hereto as Exhibit B.

Answer 40. WMI admits that on December 18, 2000, Dime issued a press release, a copy of which is attached as Exhibit B to the Complaint, and otherwise denies each and every allegation in paragraph 40 of the Complaint, and further states that the press release to which paragraph 40 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document.

41. On December 20, 2000, Dime issued a press release stating that once the LTWs were issued, Dime's common stock would no longer reflect the value embedded in the LTWs. A true copy of the December 20, 2000 press release is annexed hereto as Exhibit C.

Answer 41. WMI admits that on December 20, 2000, Dime issued a press release, a copy of which is attached as Exhibit C to the Complaint, and otherwise denies each and every allegation in paragraph 41 of the Complaint, and further states that the press release to which paragraph 41 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document.

42. On January 4, 2002, Dime merged into WMI and WMI assumed Dime's obligations under the LTWs. On March 11, 2003, WMI and Mellon Investor Services LLC entered into the 2003 Amended and Restated Warrant Agreement ("Amended Agreement" and together with the Original Agreement, individually and collectively, the "Agreements"), which amended and restated the terms of the Original Agreement. The LTW Certificates incorporate the terms and conditions of the then applicable Agreement.

Answer 42. WMI denies each and every allegation contained in paragraph 42 of the Complaint, and further states: (1) that on or about June 25, 2001, Dime and WMI entered into the Dime-WMI Merger Agreement which closed on or about January 4, 2002, the terms of which speak for themselves; and (2) that the Agreements to which paragraph 42 refer speak for themselves. WMI respectfully refers the Court to the contents of those documents for the terms thereof.

43. The Amended Agreement provides that the LTWs have no ex[er]cise price and, thus, that the LTW Holders would not have to pay anything to receive their share of the Adjusted Litigation Recovery (as defined in the Amended Agreement).

Answer 43. The statements contained in paragraph 43 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 43 of the Complaint, and further states that the Amended Agreement to which paragraph 43 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

44. Pursuant to an Agreement, dated as of January 4, 2002 (the "January 2002 Agreement"), WMI confirmed that the LTW Holders would retain their Section 4.2(b) rights under the Original Agreement. As noted, Section 4.2(b) guaranteed the LTW Holders the same type of property received by Dime shareholders in the event of a Combination. The Dime/WMI merger was a Combination within the meaning of the Original Agreement and gave Dime shareholders the election to take cash for their Combination consideration. A true copy of the January 2002 Agreement is annexed hereto as Exhibit D.

Answer 44. The statements contained in paragraph 44 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required,

WMI denies each and every allegation contained in paragraph 44 of the Complaint, and further states that the January 2002 Agreement and Original Agreement to which paragraph 44 refers speak for themselves, and WMI respectfully refers the Court to the contents of those documents for the terms thereof.

45. Under the January 2002 Agreement, WMI contractually agreed to make all Article IV adjustments (which includes the adjustments mandated by Article 4.4).

Answer 45. The statement contained in paragraph 45 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 45 of the Complaint, and further states that the January 2002 Agreement to which paragraph 45 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

46. The Registration Statement plainly states that the intent in issuing, and the principles underlying the issuance of, the LTWs was to pass the value of the net proceeds of the Anchor Litigation to the LTW Holders. The Registration Statement, at page 1, states: “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 stockholders . . .*” (Emphasis added.)

Answer 46. WMI denies each and every allegation contained in paragraph 46 of the Complaint, and further states that the Registration Statement to which paragraph 46 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

47. The Registration Statement also is clear that the LTWs are not stock warrants, equity securities or equity interests in Dime. The Registration Statement, at page 5, states:

“An investment in the LTWs involves different risks and considerations from an investment in the common stock of a savings and loan holding company such as Dime Bancorp.”

Answer 47. WMI denies each and every allegation contained in paragraph 47 of the Complaint, and further states that the Registration Statement to which paragraph 47 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

48. The Registration Statement does not list as a potential risk to the LTW Holders that Dime may go bankrupt and its shares could be worthless, thus, if the LTWs were only payable in Dime stock, the LTWs would be worthless.

Answer 48. WMI denies each and every allegation contained in paragraph 48 of the Complaint, and further states that the Registration Statement to which paragraph 48 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

49. If the LTW Holders were assuming the possible risk that the Dime common stock could be rendered worthless, and thus, the LTWs rendered worthless, that risk would have been required to be disclosed in the Registration Statement. No such risk was disclosed in the Registration Statement.

Answer 49. The statements contained in paragraph 49 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 49 of the Complaint, and further states that the Registration Statement to which paragraph 49 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

50. The WMI Board assumed an affirmative duty to the LTW Holders pursuant to Section 4.4 of the Amended Agreement. That duty – to protect the rights of the LTW Holders in accordance with the essential intent and principles of the LTWs – could not be waived by the WMI Board. If the WMI Board would have retained the right to waive its Section 4.4 obligations, such a risk would have been required to be disclosed in the Registration Statement. No such risk was disclosed in the Registration Statement.

Answer 50. The statements contained in paragraph 50 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 50 of the Complaint, and further states that the Registration Statement to which paragraph 50 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

51. Under the LTWs, Dime was to receive 15% of the net recovery in the Anchor Litigation in exchange for administering the Anchor Litigation for the benefit of the LTW Holders. The remaining 85% of the net recovery in the Anchor Litigation was spun off as a tax free dividend to Dime shareholders when the LTWs were issued. “Net recovery” is after expenses relating to the Anchor Litigation and LTWs, and after payment of taxes relating to the Anchor Litigation recovery. Neither expenses or taxes were intended to be additional profit opportunities, for the Dime. Stated differently, consistent with the intent of the LTWs, only such out of pocket expenses and taxes were properly deductible for purposes of calculating the net recovery of the Anchor Litigation.

Answer 51. The statements contained in paragraph 51 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 51 of the Complaint, and further states that the Amended Agreement to which paragraph 51 apparently refers

speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

**C. The Sale to JPMorgan and the Debtors' Proposed Plan**

52. On September 25, 2008, the FDIC was appointed as a receiver for WMB and immediately took possession of WMB's assets. The FDIC promptly sold substantially all the assets of WMB to JPMorgan.

Answer 52. WMI admits that on September 25, 2008, the FDIC was appointed as a receiver for WMB, and it then promptly entered into that certain Purchase and Assumption Agreement, Whole Bank, effective September 25, 2008 ("Purchase and Assumption Agreement"), to which WMI refers the Court for its terms. WMI otherwise denies the allegations in paragraph 52 of the Complaint.

53. On September 26, 2008, WMI and WMI Investment Corp[.] (collectively, the "Debtors") each commenced a Chapter 11 [c]ase with this Court. The Debtors thereafter filed the Plan under which the [Debtors] propose that (a) the L[T]W Holders receive no distribution, and (b) the LTWs be extinguished on the Effective Date (as defined in the Plan). The Plan also provides that holders of WMI common stock receive no distribution under the Plan and the shares of WMI common stock be deemed extinguished on the Effective Date.

Answer 53. WMI admits to the allegations in the first sentence of paragraph 53. WMI denies the remaining allegations in paragraph 53 of the Complaint, and respectfully refers the Court to the Plan for a description of the proposed treatment of the LTWs pursuant to the Plan.

54. The Plan provides for the rejection of the Debtors' obligations under the Amended Agreement.



Answer 54. WMI denies each and every allegation contained in paragraph 54 of the Complaint, and further states that the Plan and Amended Agreement to which paragraph 54 refers speak for themselves, and WMI respectfully refers the Court to the contents of those documents for the terms thereof.

55. The Plan also incorporates a Global Settlement with JPMorgan. Under the Global Settlement, WMI is selling substantially all of its assets to JPMorgan. Included in the asset sale is the Debtors' purported interest in the Anchor Litigation. Under the Plan, any claims or interests in the assets sold to JPMorgan (which presumably include the LTW Holders' interests in 85% of the net recovery in the Anchor Litigation), will attach to the proceeds paid by JPMorgan to the Debtors.

Answer 55. WMI admits to the allegations in the first sentence of paragraph 55. WMI denies the remaining allegations in paragraph 55 of the Complaint, and respectfully refers the Court to the Plan for a description of the proposed treatment of the LTW Holders' interests pursuant to the Plan and Global Settlement.

56. JPMorgan is paying the Debtors in excess of \$6 billion for the Debtors' assets. Under the Plan, after the Global Settlement is consummated, the Debtors will have less than \$200 million in remaining assets.

Answer 56. WMI denies each and every allegation contained in paragraph 56 of the Complaint, and further states that the Plan to which paragraph 56 refers speaks for itself, and WMI respectfully refers the Court to the contents of the Plan for the terms thereof.

57. Under the Global Settlement, JPMorgan is also assuming hundreds of millions of dollars of liabilities owed by WMI relating to the assets sold to it by WMI.

Answer 57. WMI denies each and every allegation contained in paragraph 57 of the Complaint, and further states that the Global Settlement to which paragraph 57 refers

speaks for itself, and WMI respectfully refers the Court to the contents of the Global Settlement for the terms thereof.

58. Under the Global Settlement, JPMorgan is not assuming the obligations owed to LTW Holders under the Amended Agreement. In the context of negotiating the Global Settlement, WMI and the WMI Board never asked JPMorgan to assume the obligations to the LTW Holders under the Amended Agreement.

Answer 58. WMI denies each and every allegation contained in paragraph 58 of the Complaint, and further states that the Global Settlement to which paragraph 58 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

59. At the time of the Global Settlement, WMI had a net operating loss of approximately \$5 billion, and would not have been required to pay any taxes on account of the Anchor Litigation recovery. WMI has admitted that it has no realistic way of utilizing at least \$1 billion of the \$5 billion of net operating losses.

Answer 59. The statement contained in paragraph 59 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI admits that at the time of the Global Settlement, WMI had a net operating loss of approximately \$5 billion, and otherwise denies each and every allegation contained in paragraph 59 of the Complaint.

## **FIRST CAUSE OF ACTION**

### **Declaratory Judgment (Section 4.2(b) of the Agreements) (WMI Only)**

60. Plaintiffs repeat and reallege all of the preceding allegations of the Amended Complaint as though set forth fully herein.

Answer 60. WMI incorporates by reference its responses to the allegations contained in paragraphs 1-59 of the Complaint.

61. Section 4.2(b) of the Agreements provides that if there were a Combination prior to a Trigger, the LTW Holders would be entitled to receive the same type and proportion of property that Dime shareholders received in such Combination.

Answer 61. The statement contained in paragraph 61 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 61 of the Complaint, and further states that the Agreements to which paragraph 61 refers speak for themselves, and WMI respectfully refers the Court to the contents of those documents for the terms thereof.

62. When WMI acquired Dime in 2002, it was a Combination within the meaning of the Original Agreement.

Answer 62. The statement contained in paragraph 62 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 62 of the Complaint, and further states that the Original Agreement to which paragraph 62 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

63. WMI affirmed the LTW Holders' rights under Section 4.2(b) as part of the January 2002 Agreement.

Answer 63. The statement contained in paragraph 63 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required,

WMI denies each and every allegation contained in paragraph 63 of the Complaint, and further states that the January 2002 Agreement to which paragraph 63 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

64. Pursuant to WMI's acquisition of Dime, Dime shareholders had the option to elect for their Combination consideration either all cash or all stock of WMI. If no election were made, Dime shareholders would receive Combination consideration equal to approximately 30% cash and the balance in WMI's stock.

Answer 64. WMI denies each and every allegation in paragraph 64 of the Complaint, and further states that the terms of the Dime-WMI Merger Agreement speak for themselves, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

65. Most Dime shareholders did not select the all cash option.

Answer 65. WMI lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 65 of the Complaint, and on that basis denies them.

66. The LTWs issued by Dime were modeled after the LTWs issued by Golden State Bancorp ("Golden State"), which owned Glendale Federal Bank ("Glendale"). The Golden State LTWs have a substantially identical provision to Section 4.2(b) in the Agreements.

Answer 66. WMI denies each and every allegation in paragraph 66 of the Complaint, and further states that the Agreements and the documents containing the alleged provisions governing the Golden State LTWs speak for themselves, and WMI respectfully refers the Court to the contents of those documents for the terms thereof.

67. Glendale sued the United States Government alleging similar claims as that alleged in the Anchor Litigation.

Answer 67. WMI is without knowledge or information sufficient to form a belief as to the allegations in paragraph 67 of the Complaint, and on that basis denies them.

68. Glendale was subsequently acquired by Citibank before there was a recovery in the Glendale litigation against the US government. The merger consideration paid to the Golden State shareholders was part cash and part Citibank stock.

Answer 68. WMI is without knowledge or information sufficient to form a belief as to the allegations in paragraph 68 of the Complaint, and on that basis denies them.

69. When Citibank ultimately recovered in the litigation against the United States Government years later, it paid their LTW holders part cash and part stock in the same proportion as that paid to Golden State stockholders years earlier. That same result is mandated in this case.

Answer 69. WMI denies each and every allegation in the last sentence of paragraph 69 of the Complaint. WMI is without knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 69 of the Complaint, and on that basis denies them.

70. By virtue of the WMI/Dime Combination, and the availability of the cash election, as of 2003, the LTW Holders were entitled to be paid their share of the 85% net recovery in the Anchor Litigation in the form of cash.

Answer 70. The statement contained in paragraph 70 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 70 of the Complaint.

## **SECOND CAUSE OF ACTION**

**Declaratory Judgment (Breach of Section 4.2(d) of the Amended Agreement)  
(WM[I] and WMI Board)**

71. Plaintiffs repeat and reallege all of the preceding allegations of this Amended Complaint as though fully set forth herein.

Answer 71. WMI incorporates by reference its responses to the allegations contained in paragraphs 1-70 of the Complaint.

72. Section 4.2(d) of the Amended Agreement provides that if there is a Combination, WMI shall cause the Successor Company to assume the obligations to the LTW Holders under the Amended Agreement.

Answer 72. The statement contained in paragraph 72 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 72 of the Complaint, and further states that the Amended Agreement to which paragraph 72 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

73. The sale of the WMI assets to JPMorgan was such a Combination.

Answer 73. The statement contained in paragraph 73 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 73 of the Complaint.

74. The Global Settlement with JPMorgan was such a Combination.

Answer 74. The statement contained in paragraph 74 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 74 of the Complaint.

75. JPMorgan is a Successor Company as defined in the Amended Agreement.

Answer 75. The statement contained in paragraph 75 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies knowledge and information as to the allegations contained in paragraph 75 of the Complaint, and on that basis denies them, and further states that the Amended Agreement to which paragraph 75 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

76. JPMorgan did not assume the LTW obligations as part of the aforesaid Combinations.

Answer 76. The statement contained in paragraph 76 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 76 of the Complaint and further states that the Purchase and Assumption Agreement and Global Settlement to which paragraph 76 impliedly refers speak for themselves, and WMI respectfully refers the Court to the contents of those documents for the terms thereof.

77. Neither the WMI Board, nor WMI, in general, ever asked JPMorgan to assume the LTW obligations.

Answer 77. WMI denies each and every allegation contained in paragraph 77 of the Complaint, and further answers by incorporating its response to Interrogatory No. 18 of WMI's responses to Plaintiffs' Interrogatories dated October 29, 2010.

78. WMI's failure to cause JPMorgan to assume the LTW obligations is a breach of Section 4[.]2(d) of the Amended Agreement. The WMI Board's failure to ask JPMorgan to assume the LTW obligations is a breach of their duty to LTW Holders under Section 4.4 of the Amended Agreement.

Answer 78. The statements contained in paragraph 78 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 78 of the Complaint.

79. In view of the foregoing, the LTW Holders have a claim against WMI and the WMI Board for[] 85% of the net recovery in the Anchor Litigation.

Answer 79. The statement contained in paragraph 79 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 79 of the Complaint.

### **THIRD CAUSE OF ACTION**

#### **Declaratory Judgment (Sections 4.4 and 4.5 of the Agreements) (WMI and WMI Board)**

80. Plaintiffs repeat and reallege all of the preceding allegations of this Amended Complaint as though set forth fully herein.

Answer 80. WMI incorporates by reference its responses to the allegations contained in paragraphs 1-79 of the Complaint.

81. The Plan would cancel all of WMI's common stock which, if confirmed, would make it impossible for WMI to pay to the LTW Holders the value of the net proceeds of the Anchor Litigation in WMI common stock.

Answer 81. WMI denies each and every allegation in paragraph 81 of the Complaint, and further states that the Plan to which paragraph 81 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

82. Section 4.4 of the Agreements provides: "If any event occurs as to which the foregoing provisions of this Article IV are not strictly applicable or, if strictly applicable, would not, in the good faith judgment of the Board, fairly



and adequately protect the rights of the Holders of the LTWs in accordance with the essential intent and principles of such provisions, then the Board may make, without the consent of the Holders, such adjustments to the terms of this Article IV, in accordance with such essential intent and principles, as will be reasonably necessary, in the good faith opinion of such Board, to protect such purchase rights as aforesaid.”

Answer 82. WMI denies each and every allegation contained in paragraph 82 of the Complaint, and further states that the Agreements to which paragraph 82 refers speak for themselves, and WMI respectfully refers the Court to the contents of those documents for the terms thereof.

83. Cancellation of WMI’s common stock would be an “event” within the meaning of Section 4.4 of the Agreements. WMI and its Board must therefore act to protect the rights of the LTW Holders.

Answer 83. The statements contained in paragraph 83 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 83 of the Complaint, and further states that the Agreements to which paragraph 83 refer speak for themselves, and WMI respectfully refers the Court to the contents of those documents for the terms thereof.

84. The “essential intent and principles” referred to in Section 4.4 of the Agreements is for the LTW Holders to be paid 85% of the net proceeds of the Anchor Litigation.

Answer 84. The statements contained in paragraph 84 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 84 of the Complaint, and further states that the Agreements to which paragraph 84 refer speak for themselves, and

WMI respectfully refers the Court to the contents of those documents for the terms thereof.

85. WMI confirmed its obligations to the LTW Holders to make Section 4.4 Adjustments in the January 2002 Agreement.

Answer 85. The statement contained in paragraph 85 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 85 of the Complaint, and further states that the January 2002 Agreement to which paragraph 85 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

86. Thus, under Section 4.4 of the Amended Agreement, if WMI's common stock is to be cancelled, WMI and its Board of Directors must allow a claim in WMI's Chapter 11 case in favor of the LTW Holders in an amount equal to 85% of the net proceeds of the Anchor Litigation.

Answer 86. WMI denies each and every allegation in paragraph 86 of the Complaint, and further states that the Amended Agreement to which paragraph 86 refers speaks for itself, and respectfully refers the Court to the contents of the Amended Agreement for the terms thereof.

87. Section 4.5 of the Amended Agreement refers to a liquidation of WMI. That section mandates that an adjustment for the benefit of the LTW Holders be made if required as a result of such event.

Answer 87. The statements contained in paragraph 87 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 87 of the Complaint, and

further states that the Amended Agreement to which paragraph 87 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

88. The cancellation of the WMI stock by virtue of the Plan mandates that an adjustment be made to preserve what had been given to the LTW Holders -- that being 85% of the net recovery in the Anchor Litigation.

Answer 88. The statements contained in paragraph 88 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 88 of the Complaint.

89. WMI and WMI's Board breached their duty and obligation to the LTW Holders by providing in the Plan that the LTW Holders receive no distribution, and that the LTW Holders be deprived of what had been given to them as a dividend by Dime 85% of the net recovery in the Anchor Litigation.

Answer 89. The statements contained in paragraph 89 of the Complaint constitute legal conclusions and therefore require no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 89 of the Complaint.

#### **FOURTH CAUSE OF ACTION**

##### **Declaratory Judgment (Breach of Section 6.3 of the Amended Agreement) (WMI Only)**

90. Plaintiffs repeat and reallege all of the preceding allegations of this Amended Complaint as though set forth fully herein.

Answer 90. WMI incorporates by reference its responses to the allegations contained in paragraphs 1-89 of the Complaint.

91. Section 6.3 of the Amended Agreement requires WMB to retain control over the recovery from the Anchor

Litigation for the benefit of the LTW Holders: “[WMB] will retain sole and exclusive control of the [Anchor] Litigation and will retain 100% of any recovery from the [Anchor] Litigation[.]”

Answer 91. WMI denies each and every allegation contained in paragraph 91 of the Complaint, and further states that the Amended Agreement to which paragraph 91 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

92. Section 6.3 of the Amended Agreement exists to protect the LTW Holders from the sale or transfer of the Anchor Litigation which could eliminate or avoid the occurrence of a Trigger and thereby frustrate the intent and purpose of the LTWs and the Agreements. LTWs require that 85% of the net recovery in the Anchor Litigation be transferred to the LTW Holders.

Answer 92. WMI denies each and every allegation in paragraph 92 of the Complaint, and further states that the Amended Agreement to which paragraph 92 refers speaks for itself, and respectfully refers the Court to the contents of that document for the terms thereof.

93. In or about September 2008, the FDIC, in its capacity as receiver for WMB, sold to JPMorgan substantially all of WMB’s assets, including, allegedly, control over and any recovery from the Anchor Litigation.

Answer 93. WMI denies each and every allegation contained in paragraph 93 of the Complaint.

94. Under the Global Settlement, WMI sold (or intends to sell) to JPMorgan substantially all of its assets, retroactive to September 2008, including allegedly, control over any recovery of the Anchor Litigation.

Answer 94. The statement contained in paragraph 94 of the Complaint constitutes a legal conclusion and therefore requires no response. To the extent any answer is required, WMI denies each and every allegation contained in paragraph 94 of the Complaint, and further states that the Global Settlement to which paragraph 94 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the terms thereof.

95. The receipt of proceeds or value from the sale or transfer of the Anchor Litigation by WMI should be deemed a “Trigger” event under the Amended Agreement; otherwise, such sale or transfer could have made the occurrence of a “Trigger” an impossibility. Upon receipt of such value for the Anchor Litigation, WMI should have transferred (or must transfer) that value to the LTW Holders.

Answer 95. WMI denies each and every allegation contained in paragraph 95 of the Complaint, and further states that the Amended Agreement to which paragraph 95 refers speaks for itself, and WMI respectfully refers the Court to the contents of that document for the definition of “Trigger.”

96. Section 6.3 of the Amended Agreement was breached (or will be breached) when control over, and any recovery from, the Anchor Litigation was allegedly sold (or will be sold) to JPMorgan. The LTW Holders are entitled to receive the value of 85% of the net proceeds on account of such sale or transfer to JPMorgan.

Answer 96. WMI denies each and every allegation in paragraph 96 of the Complaint, and further states that the Amended Agreement to which paragraph 96 refers speaks for itself, and respectfully refers the Court to the contents of the Amended Agreement for the terms thereof.

97. As a consequence of the foregoing, the LTW Holders are entitled to a claim for damages against WMI resulting from WMI's failure to provide the LTW Holders with the value of 85% of the net proceeds received for the alleged sale or transfer of the Anchor Litigation to JPMorgan.

Answer 97. WMI denies each and every allegation in paragraph 97 of the Complaint.

## **FIFTH CAUSE OF ACTION**

### **Declaratory Judgment (LTWs Represent the Right of Payment of Value and Constitute a Claim Against WMI) (WMI Only)**

98. Plaintiffs repeat and reallege all of the preceding allegations of this Amended Complaint as though set forth fully herein.

Answer 98. WMI incorporates by reference its responses to the allegations contained in paragraphs 1-97 of the Complaint.

99. The terms of the LTWs and the Agreements make clear that the Dime Board did not intend for the LTWs to be stock warrants, equity securities or equity interests in Dime, and indeed, the LTWs are not stock warrants, equity securities or equity interests in Dime. Among other things, the LTWs are not exercisable into a fixed number of shares, at a fixed time, and the LTWs do not have an exercise price - three fundamental and requisite elements of a stock warrant.

Answer 99. WMI denies each and every allegation in paragraph 99 of the Complaint.

100. The aggregate value of shares issuable pursuant to the LTWs does not change upon a change in value of WMI's common stock. Thus, the LTWs do not contain the hallmark characteristic of equity - - equity risk. The holder of an LTW receives the exact same value from an LTW regardless of the value of the underlying WMI shares.

Answer 100. WMI denies each and every allegation in paragraph 100 of the Complaint.

101. The LTWs are "claims" - they represent a "right to payment" of the net proceeds of the Anchor Litigation.

Answer 101. WMI denies each and every allegation in paragraph 101 of the Complaint.

102. Creditors of WMI did not rely on the value of 85% of the net recovery in the Anchor Litigation when they transacted business with WMI. That value had been spun-off to Dime shareholders years before WMI acquired Dime.

Answer 102. WMI is without knowledge or information sufficient to form a belief as to the allegations in the first sentence of paragraph 102 of the Complaint, and on that basis denies them. WMI denies each and every allegation contained in the second sentence of paragraph 102 of the Complaint.

103. Accordingly, the LTW Holders are entitled to an allowed claim against WMI in the amount equal to 85% the net proceeds of the Anchor Litigation.

Answer 103. WMI denies each and every allegation in paragraph 103 of the Complaint.

#### **ANSWER TO PRAYER FOR RELIEF**

WMI denies that the Plaintiffs are entitled to the relief requested or to any relief, and WMI denies all allegations of the Complaint except as specifically admitted herein.

#### **DEFENSES AND RESERVATION OF RIGHTS**

The statement of any defense hereinafter does not assume the burden of proof for any issue as to which applicable law places the burden upon the Plaintiffs.

WMI expressly reserves the right to assert, and hereby gives notice that it intends to rely upon, any other defense and/or affirmative defense that may become available or appear during discovery proceedings or otherwise in this case and hereby reserves the right to amend this Answer to assert any such defense and/or affirmative defense. WMI hereby incorporates into this Amended Answer and asserts any and all defenses asserted or pled

in this proceeding by any other party to the extent the defenses are applicable to WMI under the facts and law.

WMI has not knowingly or intentionally waived any applicable affirmative defenses. WMI presently lacks sufficient knowledge or information on which to form a belief as to whether it may have, as yet unstated, defenses or affirmative defenses, and expressly reserves all rights with respect to all defenses or affirmative defenses that may be revealed during the course of discovery.

WMI asserts the following defenses, without assuming the burden of proof when the burden of proof would otherwise be on the Plaintiffs:

**FIRST DEFENSE**

The Complaint fails to state a claim upon which relief can be granted.

**SECOND DEFENSE**

Plaintiffs lack standing, in whole or in part, to bring the claims asserted in the Complaint.

**THIRD DEFENSE**

The claims against WMI in this Complaint are barred by the doctrine of laches.

**FOURTH DEFENSE**

The claims against WMI in this Complaint are barred by the doctrine of estoppel.

**FIFTH DEFENSE**

The claims against WMI in this Complaint are barred by the doctrine of waiver.



**SIXTH DEFENSE**

The claims against WMI in this Complaint are barred by the parol evidence rule.

**SEVENTH DEFENSE**

The claims against WMI in this Complaint are barred by the Plaintiffs' failure to exhaust their contractual remedies.

**EIGHTH DEFENSE**

Plaintiffs' have set forth no basis for recovery of their attorneys' fees and costs.

**NINTH DEFENSE**

The claims against WMI in this Complaint are barred by the Plaintiffs' failure to timely file proofs of claim.

**TENTH DEFENSE**

The claims against WMI in this Complaint are barred by the failure of a condition precedent.

**ELEVENTH DEFENSE**

The claims against WMI in this Complaint are barred by the applicable statutes of limitations.

**TWELFTH DEFENSE**

The claims against WMI in this Complaint are barred by the seizure of the assets of WMB by the FDIC.

## RESERVATION OF RIGHTS

WMI reserves its right to raise affirmative defenses as they become known through discovery or otherwise, and hereby reserves the right to amend its answer and affirmative defenses to assert any such defense.

## COUNTERCLAIM

For its counterclaim against Plaintiffs, defendant WMI alleges as follows:

1. This Court has jurisdiction over this Counterclaim pursuant to 28 U.S.C. §§ 157 and 1334.
2. Venue is proper in this Court under 28 U.S.C. § 1409.
3. Plaintiffs allegedly 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.
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).
7. Plaintiffs assert "claims" against WMI in Counts I-V of the Complaint.
8. Plaintiffs' asserted claims are based upon 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.

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

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 WMI's common equity interests in accordance with section 510(b) of the Bankruptcy Code.

WHEREFORE, on its Counterclaim, WMI prays for judgment ordering that any claims asserted by Plaintiffs against WMI are subordinated to all claims or interests that are senior to WMI's common equity interests.

WHEREFORE, WMI further prays as follows:

1. That the Complaint and each cause of action therein be dismissed with prejudice;
2. That Plaintiffs take nothing by way of the Complaint;
3. That WMI be awarded costs of suit and attorney's fees herein; and
4. That the Court order such other and further relief for WMI as the Court may deem just and proper.

Respectfully submitted,

Dated: March 18, 2011  
Wilmington, Delaware

  
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**CERTIFICATE OF SERVICE**

I, Travis A. McRoberts, do hereby certify that on March 18, 2011, I caused copies of the foregoing **Second Amended Answer and Counterclaim of Defendant Washington Mutual, Inc. to Second Amended Class Complaint** to be served on counsel in the manner indicated on the attached service list.



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