

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

-----		X
In re:	:	Chapter 11
WASHINGTON MUTUAL, INC., et al., ¹	:	Case No.: 08-12229 (MFW)
Debtors.	:	(Jointly Administered)
-----		X
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,	:	
	:	Adv. Proc. No. 10-50911 (MFW)
v.	:	
WASHINGTON MUTUAL, INC., CHARLES	:	
LILLIS, DAVID BONDERMAN, FRANCIS	:	
BAIER, JAMES STEVER, MARGARET	:	
OSMER MCQUADE, ORIN SMITH, PHILLIP	:	
MATTEWS, REGINA MONTOYA, STEPHEN	:	
FRANK, STEPHEN CHAZEN, THOMAS	:	
LEPPERT, WILLIAM REED, JR., and	:	
MICHAEL MURPHY,	:	
	:	
Defendants.	:	
-----		X

Re: Dkt. Nos. 163 & 164

**OBJECTION BY PLAINTIFFS TO MOTION OF AURELIUS
CAPITAL MANAGEMENT, LP TO INTERVENE AS A DEFENDANT**

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, as plaintiffs in the above-referenced adversary proceeding

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 Debtor's principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.



(“**Plaintiffs**”), by and through their undersigned counsel, hereby submits this objection (“**Objection**”) to the *Motion of Aurelius Capital Management, LP to Intervene as a Defendant* [Dkt. No. 163] (“**Intervention Motion**”) filed by Aurelius Capital Management, LP (“**Aurelius**”) on March 1, 2011. In support of this Objection, Plaintiffs respectfully represent as follows:

PRELIMINARY STATEMENT

1. Aurelius is an unsecured creditor in the Debtors’ bankruptcy cases. Its interests in this Adversary Proceeding² are already being represented by the Debtors and the Committee. Indeed, the Indenture Trustee that represents Aurelius is a member of the Committee. Now, approximately 11 months after this Adversary Proceeding was commenced, and after substantial work already has been performed by the parties to this Adversary Proceeding through motion practice, discovery and numerous status conferences, Aurelius belatedly seeks to intervene as a party-defendant. Aurelius has not contended that the Debtors and/or the Committee cannot adequately represent its interests in this Adversary Proceeding. Nor does Aurelius explain why it is necessary at this late date to intervene in this Adversary Proceeding. Aurelius merely asserts it is a creditor and, thus, can intervene in the Adversary Proceeding as of right. But, there are thousands of creditors in the Debtors’ bankruptcy cases. The law cannot be that every creditor in the Debtors’ bankruptcy cases can intervene in this Adversary Proceeding. The Intervention Motion should be denied because allowing Aurelius to intervene will merely be duplicative of the Debtors’ and the Committee’s efforts in the Adversary Proceeding, and will result in increased costs and delays that will unnecessarily be borne by the Debtors’ estates and the Plaintiffs.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the *Memorandum of Law in Support of the Motion of Aurelius Capital Management, LP to Intervene as a Defendant*, dated March 1, 2011 [Dkt. No. 164].

2. Even if Aurelius would generally have a right to intervene in the Adversary Proceeding pursuant to Section 1109(b) of the Bankruptcy Code solely because it is a creditor of the Debtors, Aurelius, itself, acknowledges that its Intervention Motion must be timely. *See* Intervention Motion, ¶ 20. As demonstrated below, the Intervention Motion is not timely. Significant events have already taken place in this Adversary Proceeding, including the exchange of important discovery, the briefing of a motion to dismiss, the adjudication of a motion for summary judgment, and numerous pretrial conferences during which a multitude of matters have been addressed. It is simply too late for Aurelius to intervene in this Adversary Proceeding. The Intervention Motion should, therefore, be denied as being untimely.

OBJECTION

A. Aurelius Should Not Be Permitted to Intervene in the Adversary Proceeding

3. Aurelius asserts in the Intervention Motion that it has an absolute right under Section 1109(b) of the Bankruptcy Code to intervene in this adversary proceeding because it is an unsecured creditor in the Debtors' bankruptcy cases and the outcome of this Adversary Proceeding could have an impact on its claims. Presumably, under Aurelius' theory, any entity that holds one of the thousands of claims in the underlying bankruptcy cases has a right to intervene in every adversary proceeding, regardless of whether a specific need is expressed or its interests are being adequately represented. But in each of the four cases cited by Aurelius in support of its broad interpretation of Section 1109(b) of the Bankruptcy Code, only a committee or other Estate fiduciary, charged with a duty to represent broad based interests, enjoyed the right to intervene. *See Official Unsecured Creditors' Committee v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445 (3d Cir. 1982) (creditors' committee had the right to intervene in an

adversary proceeding); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228 (3d Cir. 1228) (creditors' committee entitled to intervene in non-core adversary proceeding); *In re G-1 Holdings, Inc.*, 292 B.R. 804 (Bankr. D. N.J. 2003) (legal representative for future asbestos-related claims appointed by court had right to intervene in adversary proceeding); *Wakefern Food Corp. v. C&S Wholesale Grocers, Inc.*, No. 00-04372 (RTL), 01-758, CIV.A 01-233 (GMS), 2002 WL 1482392 (D. Del. July 11, 2002) (creditors' committee had right to intervene). Aurelius has not cited a case that would stretch Section 1109(b) of the Bankruptcy Code so far as to grant all creditors a right to intervene in every adversary proceeding commenced in a bankruptcy case, regardless of even a scintilla of need or some other expressed reason for the requested relief.

4. A case where an individual creditor was not granted the right to intervene in an adversary proceeding was *Stone & Webster, Inc. v. Saudi Arabian Oil Company (In re Stone & Webster, Inc.)*, 335 Fed. Appx. 202 (3d Cir. 2009)³. In *Stone & Webster*, a bank (SAMBA) lent money to a joint venture where the debtor was a 50% owner; the debtor was also a guarantor of the obligations owed to SAMBA. See *Saudi American Bank v. Saudi Arabian Oil Company (In re Stone & Webster, Inc.)*, Civ. No. 06-399-SLR, 2007 WL 2460590, *1 (D. Del. Aug. 29, 2007). The joint venture entered into a contract with another entity (Aramco) to upgrade an oil refinery and after a default, the debtor commenced an adversary proceeding against Aramco, asserting it had a right to step into the shoes of the joint venture and assert claims against Aramco. SAMBA sought to intervene in the adversary proceeding pursuant to, *inter alia*, Section 1109(b) of the Bankruptcy Code. The Third Circuit agreed with the bankruptcy court and district court, which found that merely "having a claim to proceeds of collateral does not entitle a party to intervene." *Stone & Webster*, 335 Fed. Appx. at 204. It reasoned that "a mere economic interest in the

³ This case was not selected for publication in the Federal Reporter.

outcome of litigation is insufficient to support a motion to intervene.” *Id.* (quoting *Mountain Top Condominium Assoc. v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995)). The Third Circuit then concluded by finding that “[h]olding otherwise would permit every secured creditor to intervene in its debtor’s litigation.” *Stone & Webster*, 335 Fed. Appx. at 204.

5. As did the Third Circuit in *Stone & Webster*, this Court should not find that Section 1109(b) of the Bankruptcy Code must be read to provide every creditor and party in interest an absolute right to intervene in every adversary proceeding commenced in a bankruptcy case. This is especially true where, as here, the defendants in the action are the Debtors and the Committee, both of whom clearly are already protecting the rights of all parties in interests in these cases.

6. Here, Aurelius has not contended that its interests in this Adversary Proceeding are not being adequately protected by the Debtors and/or the Committee. For that matter, Aurelius has not asserted any reason for its proposed intervention; instead relying exclusively on its alleged absolute right to intervene.

7. Having expressed no actual need for the requested relief, permitting Aurelius to intervene in this Adversary Proceeding will be duplicative of the Debtors’ and Committee’s efforts, will necessarily increase the costs associated with this matter, and would delay the resolution of issues raised herein. There simply is no need for Aurelius to intervene in this Adversary Proceeding and its Intervention Motion should, therefore, be denied.

B. The Intervention Motion is Untimely

8. Even if Section 1109(b) of the Bankruptcy Code could somehow be read to provide the broad and limitless relief Aurelius seeks, the Intervention Motion is not timely.

Whether mandatory or permissive, intervention requires a “timely application.” Fed. R. Civ. P. 24; *see also Stewart v. Rubin*, 948 F. Supp. 1077, 1103 (D. D.C. 1996) (“Whether intervention be claimed of right or as permissive, it is at once apparent from the initial words of both Rule 24(a) and Rule 24(b), that the application must be ‘timely.’”); *West Elecs., Inc. v. Nat’l Union Fire Ins. Co. (In re West Elecs., Inc.)*, Civ. No. 91-3781 (GEB), 1992 U.S. Dist. LEXIS 14503, at *40 (D. N.J. Sep. 14, 1992) (“Both permissive intervention and intervention as a matter of right require ‘timely application.’”); Intervention Motion, ¶ 20 (recognizing the need for a timely motion).

9. In support of its timeliness argument, Aurelius asserts that this Adversary Proceeding is at a “relatively early stage” (Intervention Motion, ¶ 20). However, that argument clearly is wrong. This Adversary Proceeding is not at a “relative early stage.” Numerous substantive matters have already taken place in this Adversary Proceeding in the more than 11 months since the original complaint was filed on April 12, 2010.

10. Aurelius references the March 1, 2011 deadline to amend pleadings and join additional parties, asserting that this deadline should also apply to motions to intervene. *See* Intervention Motion, ¶ 20. That was never the case. This deadline was meant to provide the parties that were already involved in this action a time period to amend their pleadings or join other parties. It was not meant to give all parties in the Debtors’ bankruptcy case the ability to intervene in this Adversary Proceeding. Notably, the Defendants did not feel the need to join Aurelius to their defense team in this Adversary Proceeding.

11. In fact, Plaintiffs’ filing of their Second Amended Complaint (“SAC”) against the Defendants on March 1, 2011 [Dkt. No. 162] highlights the problem of having Aurelius intervene in this Adversary Proceeding. The Intervention Motion attaches Aurelius’ proposed answer to an earlier complaint -- filed on September 3, 2010 -- not the current complaint filed on

March 1, 2011. Thus, Aurelius' actions already demonstrate that its participation will lead to additional costs, delays and confusion. Moreover, Aurelius' proposed answer is also remarkably similar to the prior answers filed by the existing Defendants, highlighting that such parties are already adequately representing Aurelius' interests.

12. As noted, significant discovery already has taken place between the named parties since May, 2010. On May 26, 2010, the Plaintiffs filed discovery notices in this Adversary Proceeding; responses were served by the Defendants on or about June 24, 2010. Documents were produced over six months ago. Thereafter, Plaintiffs and Defendants each served interrogatory requests in September and October, 2010, with responses being served shortly thereafter -- approximately six months ago.

13. Other significant events that have taken place in this Adversary Proceeding include: (i) the parties briefed a motion to dismiss, which was ultimately withdrawn by the Debtors; (ii) the original complaint was amended on September 3, 2010 to serve as a class action on behalf of all LTW Holders; (iii) the parties briefed a motion for summary judgment filed by the Debtors on October 29, 2010, argued the motion on December 1, 2010, and the Court denied the motion for summary judgment on January 7, 2011; (iv) at an evidentiary hearing on January 6, 2011, the parties litigated the issue regarding an appropriate reserve to be established by the Debtors in the event the Plaintiffs are successful in this Adversary Proceeding; and (v) numerous pretrial conference have been held, wherein important issues have been resolved as to the timely adjudication of this matter. Given that significant events have occurred that have addressed important aspects of this Adversary Proceeding, it is clear that the Intervention Motion is untimely.

14. Aurelius now asserts that it is a significant creditor in the Debtors' bankruptcy cases and that this Adversary Proceeding may have a significant impact on its claims. Where was Aurelius before this time? Aurelius waited almost a year to seek to intervene in this Adversary Proceeding. It appears that the Intervention Motion is a "knee jerk" response to the Equity Committee's discovery as to Aurelius' trading activity during the Debtors' bankruptcy cases.

15. Accordingly, even if Aurelius had a legal basis to intervene in this Adversary Proceeding -- which it does not -- this Court should still exercise its discretion and deny the Intervention Motion due to Aurelius' willful inaction. Aurelius has had full knowledge of this Adversary Proceeding, and, despite such knowledge, it chose to sit on the sidelines while the named parties devoted considerable time to the prosecution and defense of this Adversary Proceeding. In short, the Intervention Motion is untimely.⁴

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that the Court (i) deny the Intervention Motion in its entirety; and (ii) grant Plaintiffs such other and further relief as is just and proper.

Dated: New York, New York
March 15, 2011

THE ROSNER LAW GROUP LLC

/s/ Scott J. Leonhardt
Frederick B. Rosner (DE # 3995)
Scott J. Leonhardt (DE # 4885)
824 Market Street - Suite 810
Wilmington, DE 19801
Telephone: 302-319-6301

⁴ Even if the Court believes that the Intervention Motion is timely and that Aurelius has the right to intervene, the Court should place limits on Aurelius' involvement in this Adversary Proceeding. Aurelius' role should be limited to areas where the Debtors and the Committee have not already participated in. Anything else will result in an additional layer of complexity and increased costs that will not benefit any of the parties in the Adversary Proceeding, or the timely adjudication of this matter.

KING & SPALDING LLP
Arthur Steinberg
1185 Avenue of the Americas
New York, NY 10036
Telephone: 212-556-2100

-and-

SCHINDLER COHEN & HOCHMAN LLP
Jonathan L. Hochman
Daniel E. Shaw
100 Wall Street, 15th Floor
New York, NY 10005
Telephone: 212-277-6300

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

COZEN O'CONNOR

/s/ Mark E. Felger
Mark E. Felger (DE # 3919)
Simon E. Fraser (DE # 5335)
1201 N. Market Street, Suite 1400
Wilmington, DE 19801
Telephone: 302-295-2000

-and-

ANDREWS KURTH LLP
Paul N. Silverstein
Jeremy B. Reckmeyer
450 Lexington Avenue
New York, NY 10017
Telephone: 212-850-2600

Counsel to Broadbill Investment Corp.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

----- X
In re: : Chapter 11
WASHINGTON MUTUAL, INC., et al., : Case No.: 08-12229 (MFW)
Debtors. : (Jointly Administered)
----- X
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. : Adv. Proc. No. 10-50911 (MFW)
WASHINGTON MUTUAL, INC., CHARLES :
LILLIS, DAVID BONDERMAN, FRANCIS :
BAIER, JAMES STEVER, MARGARET :
OSMER MCQUADE, ORIN SMITH, PHILLIP :
MATTEWS, REGINA MONTOYA, STEPHEN :
FRANK, STEPHEN CHAZEN, THOMAS :
LEPPERT, WILLIAM REED, JR., and :
MICHAEL MURPHY, :
Defendants. :
----- X

CERTIFICATE OF SERVICE

I, Scott J. Leonhardt, hereby certify that on the 15th day of March 2011, I served a copy of the **Objection by Plaintiffs to Motion of Aurelius Capital Management, LP to Intervene as a Defendant** filed upon the following parties listed below via First Class Mail:

Mark D. Collins, Esq.
Chun I. Jang, Esq.
Travis McRoberts, Esq.
Andrew C. Irgens, Esq.
Richards Layton & Finger
One Rodney Square
PO Box 551
Wilmington, DE 19899

David B. Stratton, Esq.
John H. Schanne, Esq.
Pepper Hamilton LLP
1313 N. Market Street, Suite 5100
Wilmington, DE 19801

Marcia L. Goldstein, Esq.
Brian S. Rosen, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Fred S. Hodara, Esq.
Robert A. Johnson, Esq.
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10022

Charles Lillis
1301 Second Avenue
Seattle, Washington 98101

David Bonderman
1301 Second Avenue
Seattle, Washington 98101

Francis Baier
1301 Second Avenue
Seattle, Washington 98101

James Stever
1301 Second Avenue
Seattle, Washington 98101

Margaret Osmer McQuade
1301 Second Avenue
Seattle, Washington 98101

Orin Smith
1301 Second Avenue
Seattle, Washington 98101

Phillip Mattews
1301 Second Avenue
Seattle, Washington 98101

Regina Montoya
1301 Second Avenue
Seattle, Washington 98101

Stephen Frank
1301 Second Avenue
Seattle, Washington 98101

Stephen Chazen
1301 Second Avenue
Seattle, Washington 98101

Thomas Leppert
1301 Second Avenue
Seattle, Washington 98101

William Reed, Jr.
1301 Second Avenue
Seattle, Washington 98101

Michael Murphy
1301 Second Avenue
Seattle, Washington 98101

Mitchell Eitel
Sullivan & Cromwell
125 Broad Street
New York, NY 10004-2498

Michael D. DeBaecke, Esq.
Victoria A. Guilfoyle, Esq.
Blank Rome LLP
1201 North Market Street, Suite 800
Wilmington, Delaware 19801

Thomas Moers Mayer, Esq.
Philip Bentley, Esq.
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036

THE ROSNER LAW GROUP LLC

By: /s/ Scott J. Leonhardt
Scott J. Leonhardt
824 Market Street, Suite 810
Wilmington, DE 19801
Telephone: 302-295-5093
leonhardt@teamrosner.com

*Local Counsel to Blackwell Capital
Partners, LLC and Nantahala Capital
Partners, LP*