

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

In re:

WASHINGTON MUTUAL, INC.,¹ *et al.*,

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,

-against-

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., MICHAEL MURPHY,

Defendants.

Chapter 11

Case No. 08-12229 (MFW)

Jointly Administered

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

**REPLY OF DEFENDANT WASHINGTON MUTUAL, INC.
TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL PRODUCTION OF
DOCUMENTS AND ANSWERS TO INTERROGATORIES**

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.



Defendant/Debtor Washington Mutual, Inc. (“WMI”)² hereby submits this Reply to Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion to Compel Production of Documents and Answers to Interrogatories, dated April 22, 2011 (the “Response”).

PRELIMINARY STATEMENT

A year into a litigation that they commenced, seeking a third of a *billion* dollars in damages from WMI’s bankruptcy estates and asserting claims of personal liability against members of WMI’s board of directors, Plaintiffs have not produced even a single document relating to the LTWs and have refused to respond to interrogatories that ask them to do nothing more than identify the facts that support their still-changing theories of liability. Although they are sophisticated investors represented by three experienced, national law firms, and plainly have ample resources to respond to basic discovery requests, Plaintiffs’ Response asserts, without basis, that the Discovery Request propounded by WMI is “designed solely to harass Plaintiffs and waste their limited litigation resources.” Response at 1. Plaintiffs’ position – that they should not be required to respond at all to discovery – is legally untenable under the well-established principles of broad discovery in Federal Rules of Civil Procedure 26, 33 and 34. And their rationale – that the Discovery Request was intended “to exploit the disparities of the resources of the parties” – is unfounded paranoia.

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in Defendant Washington Mutual, Inc.’s Motion to Compel Production of Documents and Answers to Interrogatories, dated March 28, 2011 (the “Motion”) and in WMI’s Memorandum of Law in Support of Its Motion for Summary Judgment, dated October 29, 2010.

The Discovery Request seeks information relevant to the claims and defenses in this action. Plaintiffs' assertions of undue burden are unsupported by *any* information about why it would be burdensome for Plaintiffs to respond. They submitted no affidavit attesting to the burden of responding, and do not bother to inform the Court or WMI of even an estimate of the time or the cost of responding. This is not surprising because the burden of responding is minimal. The Court should require them to promptly produce all non-privileged information they have in response to the Discovery Request.

ARGUMENT

A. The Discovery Request Seeks Relevant Information

Plaintiffs' core contention is that the only admissible evidence in this proceeding is evidence of the intent or understanding of the actual parties to the Original Warrant Agreement. Response at 5. Thus, they argue that they do not have to provide any discovery to WMI because nothing in their own files ever could be admissible. This is not the appropriate standard for discovery requests and the Court should decline Plaintiffs' invitation to rule on the potential scope of admissible extrinsic evidence at this stage of the proceedings. The lenient standard applicable to discovery under Federal Rule of Civil Procedure 26 requires only that the discovery requests be "reasonably calculated to lead to the discovery of admissible evidence" (Fed. R. Civ. Proc. 26(b)(1)), not that the propounding party establish the admissibility of the information sought. WMI's Discovery Request easily meets this requirement.

Plaintiffs argue that the language of the various versions of the Warrant Agreement is ambiguous and that judicial construction of the instrument therefore

requires resort to extrinsic evidence. As set forth in the Motion, admissible extrinsic evidence is not limited to contemporaneous expressions of the parties' intent. *See* Motion at 9; *Bourne v. Walt Disney Co.*, 68 F.3d 621, 628 (2d Cir. 1995) (applying New York law and considering the conduct of the successor in interpreting the contract's terms); *Pathmark Stores, Inc. v. Gator Monument Partners, LLP*, C.A. No. 08-3082, 2009 WL 5184483, at *7 (E.D. Pa. Dec. 21, 2009) (accord). Industry custom and practice, trade usage, and course of performance are all common sources of extrinsic evidence utilized in contract construction.

Plaintiffs attempt to isolate themselves from the instruments they purchased and ask the Court to rule, before anyone even sees what information they may have in their own files, that none of it could ever be admissible as an aid to interpretation of the Original Warrant Agreement or Amended Warrant Agreement. Even a cursory examination of the claims and defenses in this case demonstrates the fallacy of this position. For example, in their Amended Complaint, Plaintiffs have recast the lead claim and now assert as their primary theory of liability a breach of section 4.2(b) of the Original Warrant Agreement. Their theory is that this provision entitles LTW holders to receive the same consideration as Dime shareholders in the event of a business combination, and that, because Dime shareholders were able to elect cash consideration in connection with the WMI merger, any failure to allow LTW holders to elect cash as well constitutes a breach of contract. This interpretation of the Original Warrant Agreement, however, flies in the face of repeated statements by Dime (a party to the original agreement) and WMI (a non-party until it confirmed it would assume the warrant

obligations as part of the merger) to the effect that, after the merger, the LTWs would be satisfied with WMI common stock.³ In defense of Plaintiffs' claims of breach of section 4.2(b), WMI will argue, among other things, that Plaintiffs' proffered interpretation of section 4.2(b) is inconsistent with the contemporaneous public statements made by Dime and WMI demonstrating the intent of the Original Warrant Agreement and Amended Warrant Agreement. WMI's defenses, however, do not stop there and it will also argue that Plaintiffs' construction of section 4.2(b) is absurd because it is inconsistent with the expectations of market participants that the LTWs would be satisfied in common stock, for tax and other reasons.

It is not at all hard to imagine how information from Plaintiffs' files might lead to admissible evidence on the proper interpretation of section 4.2(b) or other provisions of the Original Warrant Agreement and Amended Warrant Agreement. Plaintiffs are sophisticated investors in distressed securities. Emails, memoranda, reports, or other materials in their files may reveal their own views – as market participants – on the interpretation of the applicable instruments in light of the ample public disclosures that the LTWs would be satisfied in WMI common stock. Imagine, for example, that one of Plaintiffs' principals wrote an email to a colleague suggesting that the public disclosures are an indicator that the LTWs would be satisfied in WMI common stock. Surely that admission of a party opponent would be admissible evidence to contradict Plaintiffs'

³ *See, e.g.*, Dime Bancorp, Inc. Form 425 (Jun. 25, 2001) (noting that the LTWs “will become exercisable for Washington Mutual shares upon settlement or final judgment of the claim [in the Anchor Litigation] and will remain in accordance with their terms.”); Washington Mutual, Inc. Form 8-K (Dec. 21, 2001) (“Dime’s [LTWs] will remain outstanding but become exercisable for shares of [WMI] common stock instead of Dime shares.”).

assertions that the LTWs are not equity interests and that section 4.2(b) requires that holders be given an option to take cash instead of stock. Or, perhaps an analyst specializing in distressed securities wrote a report discussing the investment characteristics of the LTWs and Plaintiffs received a copy of that report. Surely this is potentially admissible evidence regarding construction of the applicable instruments, and, at a minimum, it might lead to other information – such as information the analyst relied upon in reaching her conclusions – that could shed light on the proper interpretation of the Original Warrant Agreement or Amended Warrant Agreement. WMI has no idea if these types of communications exist in Plaintiffs’ files or on their computers, but, based on prior experience in these chapter 11 cases and others, there is every reason to believe they might. There can be no doubt that the requests are reasonably calculated to lead to discovery of admissible evidence.

Plaintiffs cite *Honeywell, Inc. v. J.P. Maguire Co., Inc.*, No. 93-5253, 2000 WL 307398 (S.D.N.Y. Mar. 23, 2000), to support their contention that their own views of their rights under the LTWs are irrelevant. Response at 5. Their reliance on that case, however, is misplaced. The *Honeywell* court merely declined to “override the parties’ stipulated understanding at the behest of a nonparty to the contract claiming that the contract should be interpreted differently.” *Honeywell, Inc.*, 2000 WL 307398, at *9. Indeed, *Honeywell* suggests only that Plaintiffs’ newfound arguments of breach should be disregarded as inconsistent with the longstanding interpretation of WMI (which the Warrant Agent has never disputed) that the LTWs are payable in WMI common stock.

Perhaps most disingenuous is Plaintiffs' refusal to provide any information about their own holdings in LTWs. As purported representatives of a putative class, Plaintiffs should be required to demonstrate that they hold LTWs and continue to hold them through the conclusion of the litigation. This is an essential aspect of standing and a prerequisite to the jurisdiction of the Court. Paragraph 17 of the Amended Complaint specifically pleads that Plaintiffs are "beneficial holders and owners of LTWs." Discovery on this point seeks relevant information regarding Plaintiffs' own allegations; they should be required to respond.

B. The Discovery Request Is Not Unduly Burdensome

It is well established that a party seeking to avoid discovery requests as unduly burdensome must do more than simply allege undue burden. *See, e.g., Johnson v. Geico Cas. Co.*, 269 F.R.D. 406, 415 (D. Del. 2010) (ruling that a party seeking to protect itself from undue burden due to a discovery request must demonstrate "good cause" for the issuance of a protective order, and that "[g]ood cause is established on a showing that disclosure will work a clearly defined and serious injury," which must be shown with "specificity"). Plaintiffs have done nothing to substantiate their claims of undue burden. The entirety of their argument on burden is the completely false accusation that WMI seeks the discovery in order to harass Plaintiffs and deplete their "limited resources."

The Court should reject Plaintiffs' David versus Goliath argument as fantasy. Plaintiffs are sophisticated investors who presumably acquired LTWs at highly distressed prices and now seek windfall profits through litigation (we say "presumably" because they have refused to provide any information on their transactions). Plaintiffs

commenced this litigation and, as the Court is well aware, they have devoted considerable effort, at what must be considerable expense, to pursuing their theories and participating in the chapter 11 process. And, contrary to their claim of undue burden, Plaintiffs have had no difficulty in propounding their own extensive discovery requests upon WMI and in digesting the voluminous documents and complete answers to interrogatories that WMI provided in response. They cannot seriously contend that responding to a set of document requests and interrogatories – the most basic obligations of a litigant – is an undue burden and nothing in their Response justifies their complete failure to provide any document production and any meaningful responses to interrogatories..

As to the requests for information about Plaintiffs' holdings in LTWs, there is no undue burden to production of this information – it likely is contained within a limited set of trading records. The information requested is no more burdensome than that required by Bankruptcy Rule 2019 and the Court should require its production.

CONCLUSION

For the foregoing reasons, WMI respectfully requests that the Court grant the Motion.

Dated: April 27, 2011
Wilmington, Delaware



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CERTIFICATE OF SERVICE

I, Travis A. McRoberts, do hereby certify that on April 27, 2011, I caused copies of the foregoing *Reply of Defendant Washington Mutual, Inc. to Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Compel Production of Documents and Answers to Interrogatories* to be served on counsel in the manner indicated on the attached service list.



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