IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
WASHINGTON MUTUAL, INC., et al.,	Case No. 08-12229 (MFW)
Debtors.	Jointly Administered
	Hearing Date: August 12, 2011 at 10:30 a.m. (EST) **Related Dkt. Nos. 8065, 8077, 8335, 8337, 8372**

RESPONSE BY CLASS PLAINTIFFS REPRESENTING HOLDERS OF DIME LITIGATION TRACKING WARRANTS IN SUPPORT OF MOTION OF CERTAIN DIME LTW HOLDERS, PURSUANT TO BANKRUPTCY CODE § 1102, FOR AN ORDER APPOINTING AN OFFICIAL COMMITTEE OF DIME LTW HOLDERS

TO: THE HONORABLE MARY F. WALRATH,
UNITED STATES BANKRUPTCY JUDGE

Nantahala Capital Partners, LP, Blackwell Capital Partners LLC, Axicon Partners LLC, Brennus Fund Limited, Costa Brava Partnership III, LLP and Sonterra Capital Master Fund Ltd. (collectively, "**Class Plaintiffs**"), individually and as class representatives of holders of litigation tracking warrants ("**LTWs**") in the adversary proceeding entitled *Nantahala Capital Partners, LP, et al. v Washington Mutual, Inc., et al.*, Adv. Proc. No. 10-50911 (MFW) ("**Adversary Proceeding**"), by their undersigned counsel, hereby submit this response ("**Response**") in support of the motion ("**Motion**") made by certain LTW holders for the appointment of an Official Committee of LTW Holders, and represent as follows:

1. The objections to the Motion filed by the United States Trustee, the Debtor (as defined below) and the Creditors' Committee[1] (collectively, the "**Objectors**") omit the following salient facts which are relevant to the Motion.

IMPORTANT ADDITIONAL FACTS

2. In response to interrogatories filed by the Class Plaintiffs, Washington Mutual, Inc. ("**Debtor**" or "**WMI**") attached a list of approximately 15,000 names of individual LTW holders, and a list of approximately 100 bankers and brokers holding LTWs through the Depository Trust Company. Many of the LTW holders are individuals with relatively small holdings, and have either not appeared in these bankruptcy cases, or have appeared *pro se*. There are LTW holders who (a) are original Dime Bancorp. ("**Dime**") shareholders, (b) bought LTWs on the NASDAQ exchange before the Debtor's bankruptcy filing (both before and after the Dime-WMI merger), and (c) bought LTWs after the Debtor's bankruptcy filing.

3. There is no indenture trustee for the LTW holders. The Warrant Agent (Mellon Investor Services LLC ("**Mellon**")) under the 2003 Amended Warrant Agreement, dated March 11, 2003 ("**Amended Warrant Agreement**") is an agent of WMI (not the LTW holders). *See* Amended Warrant Agreement, § 5.1. Not surprisingly, therefore, Mellon has done ***absolutely nothing*** in the Debtor's bankruptcy case to protect the rights of LTW holders. In particular, Mellon did not file a class proof of claim on behalf of the LTW holders (although it did file a claim for its own fees and expenses). Indeed, Mellon failed even to send to the LTW holders notices expressly required by the Amended Warrant Agreement.

4. Section 4.4 of the Amended Warrant Agreement imposes the duty on the WMI Board of Directors to act in good faith to protect the intent of the Amended Warrant Agreement; that intent being, to provide the LTW holders with 85% of the net recovery in the so-called

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

Anchor Litigation. The Class Plaintiffs have sued the WMI Board for dereliction of its duty and contractual obligation to the LTW holders.

5. The members of the Creditors' Committee are comprised of four indenture trustees. Those indenture trustees have filed fee applications to be paid millions of dollars in these cases, which applications were unopposed by the Debtor and the Creditors' Committee.

6. The Debtor's proposed plan of reorganization (with the support of the Creditors' Committee) seeks to pay certain bondholders (already represented by said indenture trustees and the Creditors' Committee), subject to Court approval, millions of dollars for reimbursement of legal fees and expenses.

7. The Adversary Proceeding was commenced shortly after the Debtor filed a plan of reorganization which provided, among other things, for the improper cancellation of all LTWs with no consideration being paid to the LTW holders. It was only at the plan stage when LTW holders first learned that the Debtor intended to (a) disenfranchise them by transferring the Anchor Litigation to JP Morgan Chase free and clear of the LTW holders' rights and claims, (b) to pay all ***other*** creditors in full with post petition interest, (c) to reject its obligations under the Amended Warrant Agreement, and (d) to pay LTW holders nothing for their claims. Thus, the Adversary Proceeding, like the Motion, was commenced at a time when the Debtor was seeking confirmation of a plan. The Debtor failed in its first attempt at plan confirmation and has encountered strong opposition to its revised plan. No ruling has been made by the Court as to whether the Debtor's revised plan will be confirmed. The Class Plaintiffs believe the revised plan will not be confirmed.

8. The Creditors' Committee intervened in the Adversary Proceeding on the side of the Debtor, opposing the claims made by the Class Plaintiffs on behalf of the LTW holders. It is

not clear why the Creditors' Committee decided to weigh in on this inter-creditor dispute -- especially when the Debtor has vigorously litigated the Adversary Proceeding.[2] In any event, notwithstanding the unsupported statements made by the Objectors, it is self-evident that the Creditors' Committee has not acted to protect the pecuniary interests of the LTW holders.

9. Since the Adversary Proceeding was commenced, the Debtor unsuccessfully tried to set a claims reserve for only Broadbill Investment Corp. ("**Broadbill**") as the original plaintiff in the Adversary Proceeding (and no other LTW holder). The Debtor's untenable rationale for this position was that Broadbill was the plaintiff in the Adversary Proceeding and, at that time, no other LTW holder was a party therein. The Debtor thereafter unsuccessfully tried to set a claims reserve for all LTW holders at $183 million (instead of the $337 million claims reserve ultimately established by the Court). In addition, the Debtor unsuccessfully tried to side step the Adversary Proceeding by seeking to proceed with claims objections (*i.e.*, the Debtor's 43rd and 44th omnibus claims objections) with the goal of overwhelming the *pro se* LTW holders, and those individual LTW holders who had small LTW holdings who did not know how to, or could not afford to participate in the bankruptcy proceedings. Moreover, the Debtor unsuccessfully proffered a plan of reorganization which improperly sought (a) to pay creditors post-petition interest ahead of late filed claims, (b) to give third-party releases to insiders and others for no consideration, and (c) to give stock elections in the reorganized debtor to a segment -- but not all -- of the unsecured creditors. During this entire time, the Creditors' Committee failed to protect the creditors impacted by these improper plan provisions such as the LTW holders. Indeed, the Creditors' Committee supported the Debtor's unsuccessful efforts to defeat the LTW holders' rights.

[2] The Debtor's objection to the Motion reinforces this point when it states that "advocating a particular litigation position is not the role of a committee." Debtor's Objection, at ¶ 10. The Class Claimants assume the Debtor was referring to inter-creditor disputes.

10. The LTW holders do not believe they are equity and, therefore, they have no basis to be on the Equity Committee. The Creditors' Committee is litigating against the LTW holders on the grounds that they are not creditors and, therefore, no meaningful purpose is served by putting an LTW holder as a minority member of the four person Creditors' Committee.

11. The Court recognized the need to determine the LTW claims efficiently and suggested that the Adversary Proceeding proceed as a class action.[3] When Broadbill resigned as a class representative, Nantahala and Blackwell (who hold approximately 4% of the LTWs) were left to continue to privately fund the expensive Adversary Proceeding for the benefit of all LTW holders. That left an inordinate burden on a small segment of the LTW holders. Broadbill's departure caused the parties who filed the Motion ("**Movants**") to be concerned that at some point down the road, the remaining class representatives may similarly seek to resign as class representatives, or may seek to compromise the LTW claims at a lower price because of the heavy burden of funding the Adversary Proceeding. That concern was not fully alleviated when the other Class Plaintiffs were added in the Adversary Proceeding. At this point, the Class Plaintiffs, who hold less than 20% of the LTWs, are ***privately funding the Adversary Proceeding for the benefit of all holders of LTWs***.

12. Whether or not the latest version of the Debtor's plan gets confirmed, the Adversary Proceeding needs to be tried and there may well be appellate work involved. The issues underlying the Adversary Proceeding, and those raised by the Class Plaintiffs as part of the plan confirmation process, could take years to resolve. This "lengthy remaining timeline" apparently

[3] The Creditors' Committee's reference to the Class Plaintiffs as the "putative class representatives" (Creditors' Committee Objection, at ¶ 21) is curious. At the hearing on the Motion, they should explain what is meant by the word "putative" and its implications in the Adversary Proceeding. If the Creditors' Committee is questioning the Class Plaintiffs' role as class plaintiffs, or whether the Adversary Proceeding is a class action, they should put that issue squarely on the table at the time the Court decides the Motion.

caused the Movants to file the Motion, which, under all of these circumstances, should be viewed as timely.

ARGUMENT

13. Section 1102 of the Bankruptcy Code provides that an additional committee of creditors may be appointed by the Court to assure "adequate representation of creditors." There is no statutory test for the "adequate representation" component; bankruptcy courts have exercised their discretion based on the facts of the case. *See In Beker Industries Corp*., 55 B.R. 945, 948 (Bankr. S.D.N.Y. 1985). In *Beker*, the Court appointed a separate debenture holders committee. Factors relied upon by the *Beker* court, which are present here, include (a) public debt which was widely held, (b) small holders of the public debt which warranted official committee representation, (c) the large size of the case which could afford the cost of an additional committee, (d) the debenture holders were not simply being asked to vote on a plan, and (e) the case needed their participation "to protect their interests."

14. Additional committees have been appointed to protect the interests of a segment of the creditor body. There are many cases where an asbestos claimants committee has been appointed to litigate and protect their parochial interests as creditors. *See, e.g. In re ASARCO, LLC*, No. 05-21207, 2011 WL 2975882 (Bankr. S.D. Tex. July 20, 2011); *In re UNR Industries, Inc.*, 30 B.R. 613 (Bankr. N.D. Ill. 1983).

15. Bankruptcy courts have also appointed additional committees or a subset creditor group in other circumstances to protect the parochial interests of that creditor group. *See In re Wilnor Drilling, Inc*., 29 B.R. 727 (S.D. Ill. 1982) (committee of investors in oil wells); *In re Mansfield Ferrous Castings, Inc*., 96 B.R. 779 (Bankr. N. D. Ohio 1988) (employees committee); *see generally In re Farmland Industries, Inc.*, 397 F.3d 647, 649 (8th Cir. 2005)

(referencing official bondholders committee); *In re Franklin Park Development I*, 64 B.R. 253, 256-57 (Bankr. D. Mass. 1986) (authorizing an official tenants' committee); *In re Lion Capital Group*., 44 B.R. 684, 686 (Bankr. S.D.N.Y. 1984) (special committee of municipal entities and school districts). At least one bankruptcy court appointed a special committee of secured creditors post-confirmation. *See In re Diversified Capital Corp.*, 89 B.R. 826 (Bankr. C.D. Cal. 1988). And, often times. a creditors' committee, after plan confirmation, transforms into a supervisory board of a liquidating trust.

16. It should be noted that the Debtor's citation to the *Enron* case fails to mention that, in lieu of a separate creditors' committee, the court appointed an examiner to act as a fiduciary for the Enron North America ("**ENA**") bankruptcy estate with specific duties, among other things, to monitor certain ongoing obligations of the ENA debtor. *See generally In re Enron Corp., et al.*, Case No. 01-16034 (AJG) (Bankr. S.D.N.Y.).

17. The *Bennett Funding* case before Bankruptcy Judge Gerling of the Northern District of New York is on point with respect to the issue raised by the Motion. *See In re Bennett Funding Group, Inc.,* Case No. 96-61376 (SDG) (Bankr. N.D.N.Y.). There, the Chapter 11 trustee sued thousands of creditors on a preference/fraudulent transfer theory to reduce their claims on the grounds that such creditors received ponzi "profits." In appointing an "Early Investors Committee" for the creditor-defendants sued, the court recognized that the trustee's litigation affected thousands of creditors, there were common issues impacting the defendant creditors, and many of the defendant creditors could not afford individual representation. .

18. The Movants have stated that they are not seeking to delay the trial of the Adversary Proceeding or the bankruptcy case in general. Nor are they looking to replace Class Plaintiffs' counsel. They are looking to ensure that the LTW interests will be adequately

protected and funded throughout this case so their LTW interests can have a proper representation in this case.

19. In summary, the request for a separate committee is appropriate in a situation, as in the case at bar, where:

(a) there are thousands of publicly held LTWs;

(b) many of the LTW holders can not afford individual representation;

(c) there is no indenture trustee representing the LTW interests;

(d) the WMI Board has abdicated its duty and contractual obligation to the LTW holders;

(e) other public indentures with indenture trustees are getting paid by the Debtor millions of dollars for their attorneys fees;

(f) the Debtor intends to pay bondholders, represented by the indenture trustees, who themselves are members of the Creditors' Committee, millions of dollars for their attorneys fees;

(g) presently, a small segment of the LTW holders is incurring the significant expense of protecting all of the LTW interests;

(h) the Creditors' Committee is adverse to the LTW interests and the LTWs are not equity;

(i) there is a multi billion dollar bankruptcy estate, and the fees for an additional LTW committee, with a clearly defined mandate, will be comparatively small when contrasted to the monthly professional fee expenditure in these cases; and

(j) the Debtor has tried (albeit unsuccessfully) on numerous occasions to unfairly disenfranchise the claims of the LTW holders and, with the primary exception being the Class Plaintiffs, no one, including the Creditors' Committee has sought to oppose the Debtor's improper efforts.

CONCLUSION

20. For all of the foregoing reasons, the Class Plaintiffs believe the relief requested in the Motion is appropriate, and that the Motion should be granted.

Dated: August 5, 2011
Wilmington, Delaware

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