IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re WASHINGTON MUTUAL, INC., et al.,[1] Debtors.	Chapter 11 Case No. 08-12229 (MFW) (Jointly Administered)
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., 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, JAMES STEVER, MARGARET OSMER-MCQUADE, ORIN SMITH, PHILLIP MATTHEWS, REGINA MONTOYA, STEPHEN FRANK, STEPHEN CHAZEN, THOMAS LEPPERT, WILLIAM REED, JR., and MICHAEL MURPHY, Defendants.	Adv. Pro. No. 10-50911 (MFW)

JOINT PRE-TRIAL ORDER

NOW INTO COURT, through undersigned counsel, Plaintiffs Nantahala Capital Partners, LP ("Nantahala"), Blackwell Capital Partners, LLC ("Blackwell"), Axicon Partners, LLC ("Axicon"), Brennus Fund Limited ("Brennus"), Costa Brava Partnership III, LLP ("Costa Brava"), and Sonterra Capital Master Fund, Ltd. ("Sonterra"), individually and on behalf of all

[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).

0812229110908000000000002

holders of Litigation Tracking Warrants originally issued by Dime Bancorp, Inc. (collectively, "Plaintiffs"), and Defendants Washington Mutual, Inc. ("WMI"), Charles Lillis, David Bonderman, James Stever, Margaret Osmer-McQuade, Orin Smith, Phillip Matthews, Regina Montoya, Stephen Frank, Stephen Chazen, Thomas Leppert, William Reed, Jr., and Michael Murphy (collectively, "Defendants"), file this Joint Pre-Trial Order pursuant to this Court's June 8, 2011 Order (Docket No. 229).

I. PRE-TRIAL CONFERENCE

The pre-trial conference will be held at 2:00 p.m. on September 6, 2011.

II. APPEARANCE OF COUNSEL

Counsel representing the parties are as follows:

For Plaintiffs:

Arthur J. Steinberg of King & Spalding LLP, 1185 Avenue of the Americas, New York, New York 10036;

Jonathan L. Hochman and Daniel E. Shaw of Schindler Cohen & Hochman LLP, 100 Wall Street, 15th Floor, New York, New York 10005; and

Frederick B. Rosner and Scott J. Leonhardt of The Rosner Law Group, LLC, 824 N. Market Street, Suite 810, Wilmington, Delaware 19801; and

For Defendants:

David B. Hird and Adam P. Strochak of Weil, Gotshal & Manges LLP, 1300 Eye Street, NW, Suite 900, Washington, DC 20005; and

Brian S. Rosen of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153; and

Mark D. Collins, Michael J. Merchant, Travis A. McRoberts, and Julie Finocchiaro of Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, Delaware 19801.

For Defendant-Intervenor the Official Committee of Unsecured Creditors:

Robert A. Johnson and Robert J. Boller, Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, New York 10036

III. NATURE OF THE ACTION

Plaintiffs have brought this class action on behalf of the holders of Litigation Tracking Warrants ("LTWs"), which were issued by Dime Bancorp Inc. – the predecessor to WMI – in December 2000. Plaintiffs describe the LTWs as instruments through which the LTW holders would receive 85% of the value of any recovery in the underlying "goodwill" litigation entitled, *Anchor Savings Bank FSB v. United States*, No. 95-39C (the "Anchor Litigation"), net of fees and taxes. Defendants describe the LTWs as instruments that represent the right to purchase shares of common stock with the number of shares to be based on a formula derived, in part, from any future recovery from the Anchor Litigation. Plaintiffs have brought this action to determine the rights of the holders of LTWs in WMI's bankruptcy, and specifically whether the LTWs constitute claims or equity. Plaintiffs contend that the LTWs were intended to transfer 85% of the value, net of fees and taxes, of any recovery from the Anchor Litigation to the holders of the LTWs. Plaintiffs further contend that the documents governing the LTWs were designed to ensure that value was transferred to the LTW holders despite any changes (corporate or otherwise) that might affect the value of the issuer's stock, including bankruptcy. WMI contends the LTWs constitute common equity interests. WMI further contends that the LTWs were not intended to transfer outright any value, but rather to transfer an equity interest corresponding to a portion of any future recovery in the Anchor Litigation. In the alternative, WMI has counterclaimed seeking a declaration that, if the rights of the LTW holders are claims, they are subject to subordination to the level of common equity under section 510(b) of the Bankruptcy Code.

The issues are raised in Plaintiffs' Third Amended Class Complaint (Docket No. 230), the Third Amended Answer of Defendants to Plaintiffs' Third Amended Class Complaint and Counterclaim of Washington Mutual, Inc. (Docket No. 237), and the Answer to Counterclaim (Docket No. 186).

IV. SUBJECT MATTER JURISDICTION

Subject matter jurisdiction of this Court exists pursuant to 28 U.S.C. § 1334 in that this is a civil proceeding arising under title 11 of the United State Code, or arising in or related to a case under title 11. Specifically, this action is an adversary proceeding arising in the Chapter 11 bankruptcy of WMI.

V. FACTS THAT ARE ADMITTED AND REQUIRE NO PROOF

1. Anchor Savings Bank FSB ("Anchor") was a savings and loan institution.

2. In early 1995, Anchor filed suit against the United States government in the Court of Federal Claims, alleging, among other things, breach of contract and taking of property without compensation by the government, which was violative of the Fifth Amendment to the U.S. Constitution. Anchor's lawsuit was captioned *Anchor Savings Bank FSB v. United States*, No. 95-39C (the "Anchor Litigation").

3. After merging with Anchor, Dime Savings Bank of New York FSB ("Dime Bank") succeeded Anchor as the plaintiff in the Anchor Litigation.

4. The Court of Federal Claims has not rendered any final, non-appealable judgment fully resolving the Anchor Litigation. In a ruling dated March 14, 2008, the Court of Claims has found the United States liable and ruled that damages are $356,454,910.10. That ruling was appealed to the United States Court of Appeals for the Federal Circuit, which affirmed but remanded for consideration of additional damages due to the plaintiff. On remand, the plaintiff moved for an increase of $63,191,000 to correct the amount of mitigation damages. As was contemplated by the court's ruling, the plaintiff also has filed a Rule 60(b) motion seeking an amendment of the judgment to include a tax gross-up for the reduced stock proceeds and mitigation costs elements of the damages award. The United States disputes both aspects of the requested increases in damages. In addition, the United States also has asserted that J.P. Morgan Chase lacks standing as the real party in interest, and that the goodwill litigation claim is owned by the Federal Deposit Insurance Corporation, in its capacity as receiver for Washington Mutual Bank. These motions remain pending in the Court of Federal Claims.

5. During the mid-1990s, financial institutions with supervisory goodwill claims against the United States issued litigation participation securities, known as litigation or goodwill participation certificates, which entitled the holder to payment in cash of a portion of any judgment or settlement of the goodwill litigation.

6. In 1995, CalFed, Inc. issued a litigation participation certificate ("LPC") for 25.38% of the value of its goodwill litigation claim net of taxes and expenses, which traded as CALGZ.

7. In 1996, CalFed, Inc. issued a second LPC for 60% of the remainder of the value of its goodwill litigation claim (that is, the damages award less taxes, expenses, and the share paid to CALGZ holders), less a fixed payment of $125 million to First Nationwide, which traded as CALGL.

8. On January 13, 1998, Coast Federal issued contingent payment rights based on future recoveries from its goodwill litigation ("Coast Federal CPRs").

9. The structure of the LPCs issued by CalFed, Inc. and the Coast Federal CPRs provided holders the right to receive a portion of the proceeds from any damages award in their respective goodwill litigations in cash.

10. In January 1997, First Nationwide Bank acquired California Federal Bank, and the resulting combined bank was named California Federal Bank ("Cal Fed I").

11. On September 11, 1998, Cal Fed I merged with Glendale Federal Bank, and the resulting combined bank was also named California Federal Bank ("Cal Fed II").

12. In 1998, Golden State Bancorp was the parent company of Glendale Federal Bank.

13. On September 11, 1998, Golden State became Cal Fed II's publicly-traded holding company.

14. On April 23, 1998, Golden State issued litigation tracking warrants ("Golden State LTWs").

15. On December 12, 2000, Dime Bancorp, Inc. issued LTWs (the "Dime LTWs") to Dime shareholders based on their then-current ownership of Dime Common Stock or options to purchase Dime Common Stock.

16. The Dime LTWs were governed by a Warrant Agreement among Dime, EquiServe Trust Company, N.A., and EquiServe Limited Partnership, dated as of December 2000 ("2000 Warrant Agreement").

17. Plaintiffs describe the LTWs as instruments through which the LTW holders would receive 85% of the value of any recovery in the underlying "goodwill" litigation entitled, *Anchor Savings Bank FSB v. United States*, No. 95-39C (the "Anchor Litigation"), net of fees and taxes. Defendants describe the LTWs as instruments that represent the right to

purchase shares of common stock with the number of shares to be based on a formula derived, in part, from any future recovery from the Anchor Litigation.

18. The Dime LTWs were distributed to Dime shareholders as a tax-free dividend.

19. The Dime LTWs were registered as securities under the Securities Act of 1933, as amended.

20. After the Dime LTWs were registered as securities, they became transferable on the NASDAQ. Dime stock continued to be traded on the New York Stock Exchange.

21. By the time Dime issued the Dime LTWs to Dime shareholders, the Golden State LTWs had already been issued.

22. On or about June 25, 2001, WMI and Dime entered into an agreement and plan of merger (the "Merger Agreement").

23. The aggregate consideration to Dime shareholders in the merger was a fixed amount of cash and a fixed number of shares of WMI common stock. Dime shareholders were permitted to elect between cash or stock for each share they held, subject to equalization procedures that adjusted the final consideration based on the aggregate election results.

24. A Dime shareholder who made no election was deemed to have elected to receive all stock.

25. Because the stock election was oversubscribed, all Dime shareholders who elected to receive cash consideration received all cash.

26. Due to the equalization procedures, a stockholder who elected to receive all stock, or one who made no election, received 11.6% of their consideration in cash and 88.4% in WMI stock.

27. The aggregate consideration paid to all Dime shareholders in the merger was allocated as 28.5% cash and 71.5% WMI stock. The Dime/WMI Merger closed on January 4, 2002.

28. On January 4, 2002, WMI, EquiServe Limited Partnership, EquiServe Trust Company, N.A., and Mellon Investor Services, LLC ("Mellon") entered into an agreement captioned Agreement Concerning Litigation Tracking Warrants™ and Replacement Warrant Agent (the "January 4, 2002 Agreement").

29. The January 4, 2002 Agreement was filed with the Securities and Exchange Commission as Exhibit 4.5 to WMI's Form 10-K for Year-End December 31, 2001.

30. On or about March 11, 2003, WMI and Mellon entered into an Amended and Restated Warrant Agreement (the "2003 Amended Warrant Agreement").

31. WMI filed the 2003 Amended Warrant Agreement with the Securities and Exchange Commission as an exhibit to a Form 8-K on or around March 12, 2003.

32. The 2003 Amended Warrant Agreement provides that "the '*Exercise Price*' is zero dollars and zero cents ($0.00) per each whole share of Common Stock, but shall be subject to adjustment as provided in this Agreement."

33. Washington Mutual Bank F.A. ("WMB") was a direct or indirect wholly-owned subsidiary of WMI.

34. On September 25, 2008, the Office of Thrift Supervision issued order number 2008-36, appointing the Federal Deposit Insurance Corporation as receiver for WMB. On the same day, the FDIC entered into a Purchase and Assumption Agreement with JPMorgan Chase N.A.

35. WMI filed for Chapter 11 bankruptcy on September 26, 2008.

36. The 2003 Warrant Agreement provides in section 5.1(a) that the "Warrant Agent hereby accepts the appointment as agent of the Company and agrees to perform that agency upon the express terms and conditions herein set forth (and no implied duties or obligations), by all of which the Company and the Warrant Holders, by their acceptance thereof, will be bound." Section 5.1(h) provides that, "The Warrant Agent will act hereunder solely as agent of the Company in a ministerial capacity, and its duties will be determined solely by the expressed provisions hereof."

37. On May 21, 2010, WMI, JPMorgan Chase, and the FDIC, among other parties, executed the Global Settlement Agreement.

38. None of the director defendants in this Adversary Proceeding signed any version of the warrant agreement.

VI. CONTESTED ISSUES OF FACT

A. Plaintiffs' Contested Issues of Facts

1. In or around early 2000, Dime Bancorp, Inc. ("Dime") retained Credit Suisse First Boston ("CSFB") as a financial advisor in connection with a possible merger with Hudson and then with defending the hostile takeover attempt by North Fork Bancorp ("North Fork").

2. Olivier Sarkozy ("Sarkozy") was the lead CSFB investment banker advising Dime.

3. As part of an overall effort to "front-end" value to the Dime shareholders in order to garner their support in defending against North Fork's attempted hostile takeover, Sarkozy and CSFB advised Dime to issue, as a dividend, litigation tracking securities relating to the Anchor Litigation to existing Dime shareholders.

4. In particular, CSFB recommended that Dime issue LTWs, a proprietary type of litigation participation security developed by Sarkozy and CSFB. CSFB trademarked (or attempted to trademark) the term "Litigation Tracking Warrant" and marketed LTWs to savings and loan institutions such as Golden State Bancorp. Inc. ("Golden State") and Dime.

5. As part of its takeover defense, CSFB also advised Dime to invite Warburg Pincus to acquire a substantial equity stake in Dime at a price similar to the price offered by North Fork so that Dime could utilize a portion of the equity proceeds to redeem the shares of those stockholders who wished to receive the price offered by North Fork.

6. Because Warburg Pincus, and other potential acquirers of Dime, put little or no value on the Anchor Litigation, spinning off the majority of the value of the Anchor Litigation to existing Dime shareholders in the form of LTWs also had the effect of "cleaning up" Dime's balance sheet, and making Dime's balance sheet easier to understand with fewer points of potential dispute and thus, a more attractive target for investors or merger candidates to evaluate.

7. Spinning off the majority value of the Anchor Litigation to the Dime shareholders also had the benefit of giving such value to Dime's existing shareholders instead of allowing new investors or merger partners to share in such value, without adequately paying for same.

8. Sarkozy advised Golden State on its design and issuance of the Golden State LTWs.

9. The Golden State LTWs were the first litigation participation securities that were exercisable (if no adjustment was required) for an initial currency of stock.

10. As with the LPCs and Coast Federal CPRs, the fundamental purpose of LTWs was to separate the value of the goodwill litigation from the value of the bank/bank holding company and to give that value, as a dividend, to the issuer's existing shareholders.

11. The earlier forms of litigation participation securities had a similar purpose of transferring the value of the goodwill litigation to the existing shareholders. For instance, the Coast Federal CPRs represented interests in the right to receive an amount equal to the net after-tax proceeds, if any, to be received by Coast Federal from its goodwill litigation.

12. As Stephen J. Trafton ("Trafton"), Chairman and Chief Executive Officer of Golden State, commented, upon announcement of the intent to issue Golden State's LTWs: "The distribution of the LTW(TM)s will provide a mechanism to allow the market to track the value of our pending goodwill lawsuit separately from the franchise value of the bank. The separation of the value of the underlying franchise from that of the goodwill lawsuit should allow both assets to be more accurately valued in the marketplace."

13. While the intent and purpose underlying the LTWs was the same as the LPCs and Coast Federal CPRs, the LTWs were developed to attempt to realize potential tax advantages for the recipient, as contrasted to recipients of the LPCs and Coast Federal CPRs. As of the time when the Dime LTWs were issued, there was a theoretical concern that the structure of the LPCs and the Coast Federal CPRs had potential, though unproven, tax implications for their holders.

14. The Dime LTWs were modeled after the Golden State LTWs. The Article IV adjustment section in the agreement governing the Golden State LTWs is substantially the same as the Article IV adjustment section in the 2000 Warrant Agreement.

15. The 2000 Warrant Agreement provided that stock was the initial currency for transferring their share of the value of the Anchor Litigation to the LTWs upon its resolution.

16. The 2000 Warrant Agreement further provided for adjustments, requiring that such value be transferred to the LTW holders by means of securities (other than Dime common stock), other property or cash, in various circumstances.

17. In cases of corporate "Combinations," such as mergers, section 4.2(b) of the 2000 Warrant Agreement provided for adjustments requiring that LTW holders receive the same proportion and type of consideration as was received by Dime common stock holders as a result of the "Combination."

18. Section 4.2(d) of the 2000 Warrant Agreement provided that Dime would ensure that any "Successor Company" would enter into an agreement with the warrant agent confirming the rights of the LTW holders under section 4.2 of the 2000 Warrant Agreement, and providing for adjustments equivalent to those required under Article IV of the 2000 Warrant Agreement.

19. Section 4.4 of the 2000 Warrant Agreement required the board of directors of Dime, in certain circumstances, to make whatever adjustments were necessary to protect the rights of the LTW holders, to effectuate the essential intent and principles of the 2000 Warrant Agreement – that being to transfer 85% of the net recovery from the Anchor Litigation to the LTW holders.

20. Further, section 6.3 of the 2000 Warrant Agreement required that the Dime Bank, or its successor, maintain sole and exclusive control of the Anchor Litigation, thereby prohibiting the sale of the Anchor Litigation to an entity other than the successor to Dime Bank.

21. The 2000 Warrant Agreement provided that Dime shareholders did not pay any consideration to Dime in exchange for their receipt of LTWs.

22. The Dime LTWs were issued to the Dime shareholders as a way of separating a significant portion of the value of the Anchor Litigation from that of Dime common stock.

23. The Dime LTWs permitted investors to value any potential recovery from the pending Anchor Litigation separately from Dime itself (and subsequently from WMI).

24. Section 2.10 of the Merger Agreement provides that Dime LTW holders are, upon exercise of the LTWs, to receive "Merger Consideration."

25. Merger Consideration is defined in Section 2.15 of the Merger Agreement as "the amount or kind of consideration to be received by holders of Dime Common Stock under this Agreement...."

26. The Dime shareholders were given an election to receive either all cash or all stock as part of their Merger Consideration.

27. Upon the Dime/WMI Merger, approximately 24% of Dime shareholders elected to receive cash.

28. All Dime shareholders who elected to receive cash in connection with the Dime/WMI Merger received cash.

29. Approximately 28.5% of the overall consideration paid by WMI in relation to the Dime/WMI Merger was paid in cash.

30. In the January 4, 2002 Agreement, WMI expressly confirmed the rights of the LTW holders pursuant to section 4.2 of the 2000 Warrant Agreement and agreed to make the adjustments required by Article IV thereof.

31. The January 4, 2002 Agreement further provided that the 2000 Warrant Agreement remained in full force and effect.

32. The so-called 2002 Amended Warrant Agreement, dated as of January 7, 2002, was not located or maintained in WMI's files and was not produced by WMI in this litigation.

33. The 2002 Amended Warrant Agreement was never filed with the Securities and Exchange Commission.

34. WMI has no knowledge or understanding as to whether the 2002 Amended Warrant Agreement in Mellon's file and produced by Mellon is a true and accurate copy of any original 2002 Amended Warrant Agreement.

35. Fay L. Chapman, the former General Counsel of WMI, has no knowledge or understanding concerning the 2002 Amended Warrant Agreement, except that a copy of the document produced by Mellon appears to include a signature page with her signature. The signature page was mis-paginated and out of sequence.

36. WMI has no knowledge or understanding as to whether the purported signature page is actually a part of the 2002 Amended Warrant Agreement or was just mistakenly filed therewith.

37. WMI has no knowledge or understanding as to whether any fully-executed version of the 2002 Amended Warrant Agreement was ever delivered to WMI.

38. WMI has no knowledge or understanding as to why the 2002 Amended Warrant Agreement was never filed with the Securities and Exchange Commission.

39. The WMI Board never considered the 2002 Amended Warrant Agreement.

40. The WMI Board never voted upon or approved the 2002 Amended Warrant Agreement.

41. There are no documents and no evidence from fact witnesses indicating that the terms contained in the 2002 Amended Warrant Agreement were drafted to address tax considerations of WMI or the LTW holders.

42. The 2002 Amended Warrant Agreement does not reference the January 4, 2002 Agreement.

43. The WMI Board never considered the 2003 Amended Warrant Agreement.

44. The WMI Board never voted upon or approved the 2003 Amended Warrant Agreement.

45. There are no documents or deposition testimony indicating that the amendments to the 2000 Warrant Agreement that were made in the 2002 Amended Warrant Agreement or the 2003 Amended Warrant Agreement were done due to tax considerations of WMI or the LTW holders.

46. The 2003 Amended Warrant Agreement does not reference the January 4, 2002 Agreement.

47. Both Section 4.2(b) of the 2000 Warrant Agreement and Section 4.2(b) of the 2003 Amended Warrant Agreement provide that Dime LTW holders are to receive exactly what stockholders received in the event of a Combination.

48. The Dime/WMI Merger was a Combination within the meaning of the 2000 Warrant Agreement and the 2003 Amended Warrant Agreement.

49. Except for changing the referenced number of shares from 1 Dime share to 1.1232 WMI shares, the 2003 Amended Warrant Agreement was not intended to modify the rights given to the Dime LTW holders under Section 4.2(b) of the 2000 Warrant Agreement.

50. The purpose of the 2000 Warrant Agreement and the 2003 Amended Warrant Agreement is to convey 85% of the value of any recovery in the Anchor Litigation, net of expenses and taxes, to the Dime LTW holders.

51. The WMI Board was never presented with and never formally considered, or voted on, the issue of whether the Dime LTW holders' right to an election between stock and cash upon exercise of the LTWs, flowing from the Dime/WMI Merger, should be revoked or otherwise adjusted.

52. Under the 2003 Amended Warrant Agreement, upon the occurrence of a trigger event, the LTW holders do not have to pay anything to receive the value provided for them under the 2003 Amended Warrant Agreement, *i.e.*, the exercise price for the LTWs under the 2003 Amended Warrant Agreement is zero.

53. There is no specified time in the 2003 Amended Warrant Agreement as to when the LTWs are to be exchanged for value.

54. There is no fixed amount in the 2003 Amended Warrant Agreement for which the LTWs will be exchanged.

55. Neither the 2002 Amended Warrant Agreement nor the 2003 Amended Warrant Agreement was intended to remove the Dime LTW holders' right to an election between stock and cash upon exercise of the LTWs.

56. Under the 2000 Warrant Agreement and the 2003 Amended Warrant Agreement, Mellon is the agent for WMI and not the LTW holders.

57. WMI, through Mellon, knew the names of the LTW holders and never gave notice of the Claims Bar Date to the holders of Dime LTWs.

58. Under the Global Settlement Agreement, WMI is attempting to transfer its rights concerning the Anchor Litigation to JPMorgan Chase, free and clear of any rights and claims therein held by the LTW holders, pursuant to Section 363 of the Bankruptcy Code.

59. Under the Global Settlement Agreement between WMI and JPMorgan Chase, WMI is selling substantially all of its assets to JPMorgan Chase pursuant to Section 363 of the Bankruptcy Code.

60. JPMorgan Chase is a "Successor Company" to WMI within the meaning of the 2003 Amended Warrant Agreement.

61. The WMI Board was never presented with, and never formally considered, or voted on, the issue of whether WMI was required to cause JPMorgan Chase to assume its obligations under the 2003 Amended Warrant Agreement, pursuant to Section 4.2(d) thereof.

62. Under the Global Settlement, WMI caused JPMorgan Chase to assume certain of its liabilities relating to assets sold by WMI to JPMorgan Chase. The LTW obligation was specifically excluded from the list of liabilities assumed by JPMorgan Chase even though, under the Global Settlement, JPMorgan Chase was acquiring the Anchor Litigation.

63. Under section 6.3 of the 2003 Amended Warrant Agreement, control of the Anchor Litigation and ownership of any recovery resides with WMB and could not be transferred or sold. JPMorgan Chase is not a successor to WMB within the meaning of the 2003 Amended Warrant Agreement.

64. In connection with the adversary proceeding in the Bankruptcy Court between WMI and JPMorgan Chase, WMI took the litigation position that it, and not WAMU, owned the Anchor Litigation. WMI took that position in good faith and with the honest belief that it owned the Anchor Litigation.

65. On November 7, 2002, Citigroup bought Golden State.

66. In the Citigroup/Golden State merger, the Golden State shareholders received a combination of cash and Citigroup stock.

67. The Prospectus Supplement filed by Citigroup with the Securities and Exchange Commission on November 7, 2002, provides that Golden State LTW holders would, upon exercise of the LTWs, receive a combination of cash and Citigroup stock in the same proportion of cash and Citigroup stock received as merger consideration by Golden State shareholders.

68. The Prospectus Supplement filed by Citigroup with the Securities and Exchange Commission on April 5, 2005 provides that, a trigger event having occurred, holders of Golden State LTW could exercise their LTWs for a combination of cash and Citigroup stock in the same proportion of cash and Citigroup stock received as merger consideration by Golden State shareholders following the merger between Citigroup and Golden State.

B. Defendants' Contested Issues of Facts

Defendants provide this summary of contested issues of fact as to each count of Plaintiffs' Third Amended Class Complaint and Defendants' Counterclaim.

Count I – Section 4.2(b) of the 2000 Warrant Agreement

1. Under the original 2000 Warrant Agreement, the Dime LTWs were exercisable for Dime common stock upon the occurrence of a specified "Trigger", which required : (1) entry of a final judgment in Dime's favor in the Anchor goodwill litigation and actual receipt of a payment pursuant to that judgment, (2) calculation of the number of shares of Dime common stock to be distributed to Dime LTW holders, and (3) receipt of regulatory approvals necessary to issue the new Dime common stock.

2. In connection with pursuing goodwill litigations against the government, certain thrifts issued "goodwill litigation participation securities", which entitled the holders thereof to receive cash payments from a trust separately established by the issuer. By contrast, the Dime LTWs entitled the holders thereof to receive common stock of the issuer.

3. Because the Dime LTWs were warrants exercisable for stock, rather than certificates for cash, Dime LTWs had significant tax advantages for both the issuer, Dime, and its shareholders, who were the original Dime LTW holders. In particular, Dime attempted to avoid creating taxable events for the Dime LTW holders both at the time of issuance of the warrants and at the time the warrants were exchanged for stock.

4. The intent and purpose of the equity warrant structure for the Dime LTWs was to distribute to the holders an equity interest in a portion of any recovery in the Anchor Litigation, not a direct right to receive any of the recovery.

5. After announcing the proposed merger between Dime and WMI, Dime issued a notice to Dime LTW holders disclosing that, following the merger, their warrants would be exercisable for WMI common stock. After announcing the proposed merger, both Dime and WMI issued press releases and made numerous public filings with the SEC stating that, following the merger, the Dime LTWs would be exercisable for WMI common stock.

6. The merger between Dime and WMI closed on January 4, 2002. Three days after the Dime/WMI Merger, WMI entered into an Amended and Restated Warrant Agreement dated January 7, 2002, which expressly provided that the Dime LTWs would be exercisable for WMI common stock.

7. When Dime merged with WMI in January 2002, the Dime LTWs became exercisable for WMI common stock. The adjustment set forth in the 2002 Amended Agreement making the Dime LTWs exercisable for WMI common stock preserved the original expectations of the Dime LTW holders that their warrants would be exercisable for common stock. At the time of the merger, WMI had a far greater market capitalization than Dime. At the time of the merger, the outcome of the Anchor Litigation was uncertain and the case was still far from a final judgment.

8. After the Dime/WMI Merger, WMI's public financial statements and disclosures consistently reported that the Dime LTWs were payable in WMI common stock.

9. In March 2003, WMI entered into a second Amended and Restated Warrant Agreement, which contained the same provision providing that the LTWs were exercisable in WMI common stock and filed a copy of that agreement with the SEC under an 8-K.

10. The terms of the Merger Agreement and the numerous contemporaneous disclosures by both Dime and WMI demonstrate that the intention of the parties was to adjust the Dime LTWs so they would be satisfied solely in WMI common stock.

11. Nothing in the Merger Agreement nor any version of the warrant agreement requires that Dime LTW holders be provided any right of election with respect to the Dime/WMI Merger. The drafting history of the Merger Agreement confirms that there was no such intent.

12. Adjusting the Dime LTWs at the time of the merger to provide for cash payment, or the right to elect cash payment, would have had unfavorable tax consequences for holders of the Dime LTWs, potentially requiring them to pay tax notwithstanding that any recovery on the Anchor Litigation remained highly contingent.

Count II – Breach of Section 4.2(d) of 2003 Amended Warrant Agreement

13. The order of the Office of Thrift Supervision placing WMB in receivership on September 25, 2008, and the subsequent sale of WMB assets to JPMorgan Chase by the Federal Deposit Insurance Corporation, as receiver, was not a consolidation, merger or voluntary sale and therefore not a "Combination" under the 2003 Amended Warrant Agreement. It was an event controlled entirely by federal banking regulators and therefore did not create any obligation to adjust the Dime LTWs.

14. The corporate transactions that took place in connection with the Anchor Bancorp, Inc.-Dime merger and the Dime/WMI Merger demonstrate that WMB was the successor by merger to Anchor Savings Bank, FSB, the original claimant against the United States in the Anchor Litigation.

15. The Global Settlement Agreement is not a sale of all or substantially all of WMI's assets, and therefore does not constitute a "Combination" under the 2003 Amended Warrant Agreement. Rather, the Global Settlement Agreement is a comprehensive settlement of claims among various parties and pursuant to which WMI is retaining substantial assets valued at billions of dollars. Thus, JPMorgan Chase is not a successor to WMI within the meaning of the 2003 Amended Warrant Agreement.

16. Likewise, the plan of reorganization transaction that will distribute those assets to stakeholders in accordance with the priorities of the Bankruptcy Code is not a "Combination" under the 2003 Amended Warrant Agreement.

Count III – Breach of Sections 4.4 and 4.5 of the 2003 Amended Warrant Agreement

17. The cancellation of WMI's common stock pursuant to a plan of reorganization is not an event for which an adjustment is required to be made within the meaning of Section 4.4 of the 2003 Amended Warrant Agreement.

18. No extrinsic evidence demonstrates any intention that the use of the permissive term "may" in section 4.4 of the 2003 Amended Warrant Agreement was intended to set forth a mandatory requirement to modify the agreement in any manner whatsoever.

19. Section 4.5, which is a notice provision, does not apply to the cancellation of WMI's stock, because confirmation of the Plan will not constitute any of the "certain transactions" for which notice is required.

20. None of the Director Defendants took any action or made any statement that indicated any intent to be bound personally by any version of the warrant

agreement. Indeed, many of the Director Defendants were not even on the WMI board when the agreements were adopted.

21. The Director Defendants properly carried out their duties by maximizing the value of the estate and proposing a plan of reorganization that distributes that value in accordance with the priorities of the Bankruptcy Code. Nothing in the 2003 Amended Warrant Agreement required the Director Defendants to take action that would favor the Dime LTW holders over any other constituency.

Count IV – Breach of Section 6.3 of 2003 Amended Warrant Agreement

22. Prior to the merger between WMI and Dime, Dime's subsidiary, The Dime Savings Bank of New York, had the right to pursue and control the Anchor Litigation.

23. Following the merger between WMI and Dime, Dime's subsidiary, The Dime Savings Bank of New York, was merged into the entity which became WMB.

24. No extrinsic evidence demonstrates any intention that section 6.3 of the 2003 Amended Warrant Agreement imposes any requirement on WMI other than notification of certain events. Rather, section 6.3 states that LTW holders "will not have any right to control or manage the course or disposition of the [Anchor] Litigation or the proceeds or any recovery therefrom or any rights against the Company for any decision regarding the conduct of the Litigation or disposition of the Litigation...."

Count V – Declaratory Judgment that Dime LTWs Constitute a Claim

25. In addition to the plain language of the 2000 Warrant Agreement, which clearly provides that each Dime LTW "represents the right to purchase shares or a portion of a share of Dime's Common Stock," ample extrinsic evidence demonstrates that the Dime LTWs are equity interests.

26. The primary functions of the Dime LTWs were to distribute to Dime shareholders a proportionate benefit from an increase in equity that would occur upon Dime's receipt of any damage award in the Anchor Litigation and to permit equity market participants to value the potential recovery from pending goodwill litigation separately from Dime itself (and subsequently WMI).

27. The Dime LTWs and Dime Savings Bank of New York, FSB parent company stock (and subsequently WMI stock) shared certain equity risks, including risks identified in, or defined by the terms of, the registration statement under which the Dime LTWs were issued.

28. Equity market participants viewed litigation tracking warrants (including the Dime LTWs) as the functional and financial equivalent of an equity rights offering.

Damages

29. At this point, any recovery from the Anchor Litigation is contingent and that amount cannot be calculated with any certainty.

30. The government's motion to dismiss the case is pending in Court of Federal Claims and due to be argued on September 14, 2011.

31. As of January 5, 2011, $22,973,241 in expenses had been incurred in pursuing the Anchor Litigation and with respect to the creation, issuance and trading of the LTWs.

32. Based on 2010 federal and New York tax rates, calculation of the tax offsets required under the 2000 Warrant Agreement and the 2002, and 2003 Amended Warrant Agreements in determining the Adjusted Litigation Recovery would result in a reduction of $244,317,076.

WMI Counterclaim for Subordination

33. The Dime LTWs granted their holders the right to acquire common stock.

34. The Dime LTW holders were subject to equity risks, including the risk of adverse regulatory action, insolvency, and variation of stock price in the period between a judgment in the Anchor Litigation and the actual delivery of stock.

35. The Dime LTWs were listed on the NASDAQ as equity interests, and followed by equity investors.

36. The Warrant Agent was Mellon Investor Services LLC which handled communications with stockholders, not debt holders.

37. The presence of "adjustment" provisions in the 2000 Warrant Agreement and the 2002, and 2003 Amended Warrant Agreements did not change the fundamental character of the Dime LTWs as warrants for stock. Rather, similar adjustment provisions are common and found in many agreements for equity warrants.

VII. CONTESTED ISSUES OF LAW

[In addition to any issues pending before the Court]:

A. Plaintiffs' Issues of Law

1. Ambiguities In The Warrant Agreements Requiring Consideration Of Extrinsic Evidence Must Be Construed Against the Interest Of WMI

The Court has already held that it "agrees with the LTW Holders that an interpretation of the [2003] Amended Warrant Agreement (and the original Warrant Agreement executed by DBI) requires consideration of outside sources." (*See* Opinion denying WMI's Motion for Summary Judgment, dated January 7, 2011 ("Opinion Denying Summary Judgment") at 9.) In particular, the Court held that the 2000 Warrant Agreement and the 2003 Amended Warrant Agreement (collectively, the "Warrant Agreements") were ambiguous as to certain issues – "including whether the agreements were intended to convey only an equity interest or offered an option to receive property and whether the events triggering such an option occurred in this case." (Opinion Denying Summary Judgment at 11.) The Court noted the following provisions, for which extrinsic evidence may be required:

- Whether "WMI has breached Sections 4.2[b] and 4.3 of the Amended Warrant Agreement which provide that in certain circumstances the LTW Holders were entitled to receive property instead of simply stock," and whether "such circumstances occurred when WMI merged with DBI and the DBI shareholders were given the option of receiving cash or stock in WMI" (*id.* at 8);
- Whether WMI "breached Section 4.2(d) because it has not assured that JPMC as a Successor Company 'will enter into . . . an agreement with the Warrant Agent confirming the [LTW] Holders' rights pursuant to this Section 4.2 and providing for adjustments, which will be as nearly equivalent as may be practicable to the adjustments provided for in this Article" (*id.* at 8-9 (*quoting* Warrant Agreements at § 4.2(d)));
- Whether "under Section 4.4 of the Amended Warrant Agreement, WMI must assure that the LTW Holders receive the value of the Anchor Litigation" (*id.* at 7-8); and
- Whether "WMI breached section 6.3 of the Amended Warrant Agreement by permitting the transfer of control of (and any recovery from) the Anchor Litigation to JPMC" (*id.* at 7).

In resolving any ambiguity, these provisions of the Warrant Agreements should be construed against WMI, as WMI drafted the agreements and Plaintiffs had no say in the selection of the language therein. "It has long been the rule that ambiguities in a contractual instrument will be resolved *contra proferentem*, against the party who prepared or presented it." *151 West Assocs. v. Printsiples Fabric Corp.*, 61 N.Y.2d 732, 734, 472 N.Y.S.2d 909, 910 (1984); *see also Jacobson v. Sassower*, 66 N.Y.2d 991, 993, 499 N.Y.S.2d 381, 382 (1985).

2. Defendants Breached Section 4.2(b) of the Warrant Agreement

The LTW Holders have a claim against WMI because of WMI's breach of Sections 4.2(b) and 4.2(c) of the Original Warrant Agreement. These sections provide that, if there was a "Combination" (as defined in the Original Warrant Agreement), LTW Holders were required to receive the same type of consideration offered to Dime shareholders. WMI's purchase of Dime was a Combination within the meaning of the Original Warrant Agreement. When WMI purchased Dime, WMI offered Dime shareholders their choice of cash (up to $1.4 billion) or WMI common stock (92.3 million shares). Dime shareholders electing cash received their entire merger consideration in cash. Thus, LTW holders have since been (and currently are) entitled to receive what the Dime shareholders received in that Combination – *i.e.*, an option to take cash.

The *R.A. Mackie & Co., L.P. v. PetroCorp Inc.*, 329 F. Supp. 2d 477 (S.D.N.Y. 2004) case is instructive. There, the Court held that the Warrant holders should "have the opportunity, upon payment of the exercise price, to convert their Warrants – after the merger and at a time of their choosing – into all of the merger consideration offered to [the acquired company's] shareholders." *Id.* at 503; *see also Continental Airlines Corp. v. Am. Gen. Corp.*, 575 A.2d 1160, 1164, 1168 (Del. 1990) (finding that holder of warrants had the right to receive the same merger

consideration as other shareholders received in connection with merger based on the contractual rights set forth in the warrant).

A similar result is mandated here. LTW Holders are entitled to the same merger consideration (i.e., cash) as offered to Dime shareholders when there was a Combination of WMI and Dime.

3. The LTWs Are Debt

i. The LTWs Constitute A Declared Dividend

According to the LTW Registration Statement, Dime was "distributing the LTWs in an effort to pass along the potential value of our claim against the government to our existing stockholders in the form of tradable securities. The distribution is part of our effort to improve returns and provide enhanced value to our stockholders." (Registration Statement at 1.) By passing along the value of the claim against the government to its shareholders through the declaration of a dividend, a contractual debt was created that was enforceable by the LTW Holders against Dime. *See generally, First Fed. Sav. & Loan Assoc. of Rochester v. United States*, 58 Fed. Cl. 139, 157-58; 2003 U.S. Claims LEXIS 293, at *64-65 (Fed. Cl. Oct. 14, 2003).

Under Delaware law, a dividend lawfully declared creates a contract debt. Once declared, a dividend is a corporate obligation in much the same sense as an enforceable contract's obligation. A declared dividend is also treated as a debt in the sense that a creditor is owed money. The shareholders are treated as creditors. *Int'l Baks v. Centra, Inc.*, No. 94C-01-129, 1997 WL 819130, at *2 (Del. Dec. 15, 1997). Accordingly, by declaring the dividend and creating the LTWs, Dime created a contractual debt in favor of its shareholders which became an

obligation of the company to give the LTW Holder 85% of the net recovery in the Anchor Litigation.

Also, by creating a market for the LTWs that was not dependent on Dime's stock price, Dime made a dividend of a marketable security that was separate and distinct from Dime's stock. This is the equivalent of a "cash dividend," which creates a debt against the corporation. *See Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1175 (Del. 1988). A non "stock dividend" is the corporate distribution of property assets from the profits or surplus assets of the corporation and reduces the net assets of the corporation and transfers that amount of property to its stockholders. *Lynam v. Gallagher*, 526 A.2d 878, 882 (Del. 1987). In contrast, a "stock dividend takes nothing from the property of the corporation and adds nothing to the interests of the stockholders." *Id.*

Here, as reflected in Dime's press releases from December 18 and 20, 2000, Dime distributed to LTW Holders "a substantial portion of Dime's economic interest in its pending 'goodwill' lawsuit against the United States government . . . ." The obligation to provide such value (the dividend) to the LTW holders creates a liability for WMI.

ii. The Economic Realities of the Transaction Demonstrate that the LTWs Were Debt

The LTWs was structured with tax considerations in mind. There are many court decisions that say that the tax treatment for a transaction does not dictate how a court should view the economics of a transaction from a creditors' rights perspective. Courts look behind the form of the agreement to the economic substance:

> It is well established that a bankruptcy court, as a court of equity, may look through the form to substance when determining the true nature of a transaction as it relates to the rights of parties against a bankrupt's estate. . . . It is the economic substance of a transaction that should determine the rights and obligations of interested parties.

Liona Corp. v. PCH Assocs. (In re PCH Assocs.), 949 F.2d 585, 597 (2d Cir. 1991); *see also Duke Energy Royal, LLC v. Pillowtex Corp. (In re Pillowtex, Inc.)*, 349 F.3d 711, 719 (3d Cir. 2003) (applying the "economic reality of the transaction in order to determine, based on the particular facts of the case, whether the transaction is more fairly characterized as a lease or a secured financing arrangement").

The economic substance of the LTWs was to transfer 85% of the value of the Anchor Litigation to the LTW Holders. Looking through the form to the substance of the transaction, the LTWs should, therefore, be considered a distribution to the LTW Holders that created a debt, and not an equity interest.

4. **Section 510(b) Does Not Apply To Require Subordination Of Plaintiffs' Claims**

Plaintiffs have previously briefed this issue, with citations, as part of successfully responding to Defendant's summary judgment motion.

5. **Other Contested Issues Of Law**

Plaintiffs reserve the right to argue any other issues of law that may arise during trial.

B. Defendants' Issues of Law

Defendants provide this summary of issues of law remaining to be litigated as to each count of Plaintiffs' Third Amended Complaint and Defendants' Counterclaim.

Count I – Section 4.2(b) of the 2000 Warrant Agreement

1. Plaintiffs contend that section 4.2(b) of the 2000 Warrant Agreement required WMI to provide holders of the Dime LTWs with an election – at some indefinite point in the future – to choose either cash or WMI stock as a result of the Dime/WMI Merger in January 2002. As a matter of law, the 2000 Warrant Agreement did not require this. In connection with

the Dime/WMI Merger, the 2000 Warrant Agreement was amended and restated to provide that the Dime LTWs would be assumed by WMI and satisfied in WMI common stock upon the occurrence of a trigger event. This adjustment to the Dime LTWs was expressly permitted by Section 7.2 of the 2000 Warrant Agreement, which provides that "This Agreement may be amended by the parties hereto without the consent of any Holder for the purpose of . . . making any other provisions with respect to matters or questions arising under this Agreement as the Company and the Warrant Agent may deem necessary or desirable; provided, however, that such action will not affect adversely the rights of the Holders." Further, amendment of the 2000 Warrant Agreement to provide for satisfaction in WMI common stock was consistent with the underlying purpose of the Dime LTW instruments – passing 85% of the net value of a favorable judgment, if any, in the Anchor Litigation to Dime LTW holders through the non-taxable distribution of common stock – and preserved the original expectation of the Dime LTW holders that their warrants would be exercisable for stock. It was thus permitted under sections 4.2(d), 4.4, and 7.2 of the 2000 Warrant Agreement. At the time of the adjustment, there was no adverse effect on the rights of Dime LTW holders.

2. Plaintiffs assert that the Merger Agreement between WMI and Dime stated that the Dime LTW holders would receive the same "Merger Consideration" that shareholders received, and that section 4.2(b) of the 2000 Warrant Agreement required Dime LTWs to receive "the same proportion and type as one share of Common Stock was exchanged for or converted into" as did Dime shareholders. This argument fails as a matter of contract interpretation. Because of the election procedures and adjustment mechanisms, the merger consideration paid to Dime shareholders was variable. Further, nothing in the Merger Agreement requires that Dime LTW holders be provided any election rights. The election rights Plaintiffs now claim – the

indefinite right to elect cash – is a right far more valuable than any election rights the Dime shareholders had.

3. In fact, the many contemporaneous statements of the parties to the merger demonstrate that there was no intent in the Merger Agreement to provide Dime LTW holders any right of election. The facts at trial will demonstrate that WMI and Dime consistently, repeatedly and publicly stated that the Dime LTWs would be exercisable for WMI common stock after the merger.

4. The express terms of the Merger Agreement preclude the Dime LTW holders from asserting any rights thereunder. *See generally Straughn v. Delta Air Lines, Inc.*, 170 F. Supp. 2d 133, 150 (D.N.H. 2000) (only an intended beneficiary of a contract provision may claim its breach); *Everest Props. II, L.L.C. v. Am. Tax Credit Props. II, L.P.*, No. 99C-08-122-WTQ, 2000 WL 145757, at *5 (Del. Super. Ct. 2000) (dismissing breach of contract claims based on plain language of partnership agreement, and holding it was "clear that no privity of contract exists" and "[w]ithout such privity," a plaintiff has no "standing to assert breach of contract unless an agency relationship, legally recognizable in this context, exists.").

5. Any claim for breach of section 4.2(b) of the 2000 Warrant Agreement is barred by New York's six-year statute of limitations, because if such a claim existed, it would have accrued in 2001 when the merger was publicly announced and Dime LTW holders were notified that they would receive WMI stock rather than Dime stock, or at the very latest in January 2002 when the merger occurred and the 2002 Amended Warrant Agreement was amended to provide specifically that the Dime LTWs would be satisfied in WMI common stock. N.Y. C.P.L.R. § 213. The statute of limitations on any cause of action for breach of the 2000 Warrant Agreement

thus expired not later than January 4, 2008, before the WMI bankruptcy and long before Plaintiffs commenced this action.

Count II – Breach of Section 4.2(d) of 2003 Amended Warrant Agreement

6. Plaintiffs assert in Count II that WMI and each of the director defendants breached section 4.2(d) of the 2003 Amended Warrant Agreement by failing to cause JPMorgan Chase to assume obligations to the Dime LTW holders, or by failing to request that JPMorgan Chase do so. Neither the sale of the assets of WMB to JPMorgan Chase by the FDIC nor the Global Settlement Agreement constitute a "Combination" under the 2003 Amended Warrant Agreement. JPMorgan Chase is not a "Successor" to WMI within the meaning of the 2003 Amended Warrant Agreement. 12 U.S.C. § 1821(d)(2)(A)(i) (the FDIC as receiver shall "by operation of law, succeed to—(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution."). Thus, by operation of law the FDIC, as receiver, succeeded to all rights of WMB. Finally, even if JPMorgan Chase were considered a "Successor" company under the 2003 Amended Warrant Agreement, the Dime LTW holders would only be entitled to whatever WMI common shareholders received in that transaction. *See* 2003 Amended Warrant Agreement § 4.2(d). Because WMI common shareholders will receive nothing in exchange for their common stock as a result of the seizure of WMB, FDIC's sale of its assets to JPMorgan Chase, and consummation of the Global Settlement Agreement and the Plan, the Dime LTWs have no value, and there are no damages for such a breach.

7. Even if the sale of WMB's assets by FDIC or the Global Settlement Agreement were a "Combination" under the 2003 Amended Warrant Agreement, as a matter of law neither

WMI nor the director defendants were under any obligation under the 2003 Amended Warrant Agreement as a result of the pendency of the bankruptcy case. As discussed in ¶¶ 18-19, below, the Dime LTWs are equity interests. No principle of law requires a debtor corporation or its board to favor the interests of one class of equity holders over all creditors and holders and all other equity interests.

8. The Director Defendants are not liable for any breach under the 2003 Amended Warrant Agreement, because nothing in the 2003 Amended Warrant Agreement creates obligations for the Director Defendants. They are not parties or signatories to any of the relevant agreements, no privity exists between the Dime LTW holders and the Director Defendants, the majority of the Director Defendants did not become directors of WMI until after the 2003 Amended Warrant Agreement became effective, and none of the Director Defendants has indicated an intention to be bound personally by any of the agreements. *See Pac. Carlton Dev. Corp. v. 752 Pac., LLC*, 878 N.Y.S.2d 421, 422 (N.Y. App. Div. 2d Dep't 2009) (holding that because defendant was "not a party to the contract alleged to have been breached[, . . .] he cannot be bound by the contract;"); *Nat'l Survival Game of N.Y. v. NSG of LI Corp.*, 169 A.D.2d 760, 761 (N.Y. App. Div. 2d Dep't 1991) (explaining that because defendant and his corporation "were not parties to this [non-compete] agreement, they cannot be bound by it"); *Carcasole-Lacal v. Am. Airlines, Inc.*, No. CV-02-4359 (OGT), 2003 WL 21525484, at *4 (E.D.N.Y. July 8, 2003) (finding that "Plaintiff's breach of contract claim is fatally deficient because there is not and was never a contractual relationship between plaintiff and either American Airlines or TWA Airlines LLC" and explaining that "a party cannot be held liable for a breach of contract to which it was not a party."); *Randolph Equities, LLC v. Carbon Capital, Inc.*, No. Civ. 10889 (PAC), 2007 WL 914234, at *4 (S.D.N.Y. 2007) (finding that "contract claim against

[defendant] . . . fails because Plaintiffs have not alleged facts sufficient to show that [defendant] entered into an agreement with Plaintiffs."); *Samide v. Roman Catholic Diocese of Brooklyn*, 754 N.Y.S. 2d 164, 176 (N.Y. Sup. 2003) (dismissing breach of contract claims against executives for lack of contractual obligation between plaintiff and defendants, and stating that "[w]here there is no contractual obligation between two parties, there can be no breach of contract claim"); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1177 (2d Cir. 1993) (holding that "[a] director is not personally liable for his corporation's contractual breaches unless he assumed personal liability, acted in bad faith or committed a tort in connection with the performance of the contract[,]" and dismissing breach of contract claim against directors); *Liang v. Sollecito*, No. 097990 CVN 2010, 2010 WL 4668334, at *1-2 (N.Y. Civ. Ct. Nov. 18, 2010) (dismissing breach of contract claim where "[t]here [wa]s insufficient proof of privity of contract between the parties to this action" and explaining that "[t]he officers of a corporation . . . cannot be held personally liable on contracts provided that they did not bind themselves individually"); *Westminster Constr. Co. v. Sherman*, 160 A.D.2d 867, 868 (App. Div. 2d Dep't 1990) (holding that a corporate officer "individually, cannot . . . be held liable for a breach of contract between his corporation and another"); *Lerner v. Amalgamated Clothing & Textile Workers Union*, 938 F.2d 2, 3 (2d Cir. 1991) (describing the "presumption against individual liability . . . under New York Law" when an individual signs a contract in his or her corporate capacity as an officer or director of a corporation, as opposed to a personal capacity and noting the absence of evidence of "the signatory's explicit intent to assume personal liability").

9. The Director Defendants did not breach any fiduciary duty to plaintiffs because they had no such duty. As a matter of law, holders of warrants like the Dime LTWs, are not owed any fiduciary duty by a corporation's directors. *Helvering v. SW. Consol. Corp.*, 315 U.S.

194, 200-01 (1942) ("Whatever rights a warrant holder may have to require the obligor corporation to maintain the integrity of the shares covered by the warrants ... he is not a shareholder . . . His rights are wholly contractual . . . And he cannot assert the rights of a shareholder"); *MCG Capital Corp. v. Maginn*, No. 4521-CC, 2010 Del. Ch. LEXIS 87, at *54 (Del. Ch. May 5, 2010) ("Under Delaware law, directors do not owe fiduciary duties to warrant holders under any circumstances. The rights of warrant holders are governed exclusively by the terms of their warrants."); *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (explaining that actions of a corporation's directors and officers are governed by the laws of the state of incorporation); *Schwartzman v. McGavick*, No. C06-1080P, 2007 U.S. Dist. LEXIS 28962, at *10-11 (W.D. Wash. Apr. 19, 2007) (demonstrating reliance on Delaware corporate law in construing Washington corporate conduct); *In re F5 Networks Deriv. Litig.*, No. C06-794RSL, 2007 U.S. Dist. LEXIS 57464, at *16-18 (W.D. Wash. Aug. 6, 2007) (same). Moreover, where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim, and cannot be converted to a breach of fiduciary duty claim simply because one party to the contract was to act through its fiduciaries. *Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010) ("any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous."); *Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 833 (Del. Ch. 2006) (explaining that "if the dispute relates to rights and obligations expressly provided by contract, the fiduciary duty claims [against board members] would be 'superfluous.'"). No actions by the Director Defendants violated Washington law, WMB had already been seized by the FDIC when Plaintiffs allege the Director Defendants allegedly failed to make adjustments with respect to the Dime LTWs, and the Director Defendants' conduct is protected by the business judgment rule. Wash. Rev. Code §

23B.08.300(1) (2011) (providing the duties of a director of a corporation); *Miller v. Robertson*, No. 22157-8-II, No. 23087-9-II, 1999 Wash. App. LEXIS 244, at *36 (Wash. Ct. App. Feb. 12, 1999) (setting forth the parameters of the business judgment rule).

Count III – Breach of Sections 4.4 and 4.5 of the 2003 Amended Warrant Agreement

10. Plaintiffs contend that cancellation of WMI common stock under the Modified Sixth Amended Plan of Reorganization is an event requiring adjustment of the Dime LTWs under sections 4.4 and 4.5 of the 2003 Amended Warrant Agreement and contend that both WMI and the Director Defendants breached a duty under section 4.4 to make adjustments that would allow the Dime LTW holders to recover the value of the Anchor Litigation.

11. This claims fails as a matter of law because Defendants have not breached, and will not breach, sections 4.4 and 4.5 of the 2003 Amended Warrant Agreement by effectuation of the Plan. Cancellation of WMI's common stock pursuant to a plan of reorganization does not constitute a breach, because a bankruptcy reorganization is not an event for which an adjustment is required to be made under Article IV of the 2003 Amended Warrant Agreement.

12. Even if its provisions were applicable to a chapter 11 plan of reorganization, section 4.4 of the 2003 Amended Warrant Agreement – which provides that the board "may" make adjustments to Article IV of the agreement – expressly is permissive and does not require modification of the Dime LTWs, much less modification in a way that would be contrary to the priority scheme of the Bankruptcy Code. *See, e.g., ASM Commc'ns Inc. v. Allen*, 656 F. Supp. 838, 839 (S.D.N.Y. 1987) ("In common usage and understanding, the word 'shall' signifies a command[,]" whereas "[t]he word 'may' is permissive."); *Proyecfin de Venezuela, S.A. v. Banco*

Indus. De Venezuela, S.A., 760 F.2d 390, 396 (2d Cir. 1985) (holding that use of "may" in forum selection clause is permissive).

13. Section 4.5 is merely a notice requirement and does not impose any requirement on WMI or its directors to make any adjustment to the Dime LTWs, and in any event does not cover a chapter 11 bankruptcy by its own terms.

14. Count III fails to assert any valid claim against the Director Defendants for the same reasons applicable to Count II. *See* ¶¶ 7-9, above.

Count IV – Breach of Section 6.3 of 2003 Amended Warrant Agreement

15. Plaintiffs assert that section 6.3 of the 2003 Amended Warrant Agreement requires WMB to retain control over the recovery from the Anchor Litigation for the benefit of the Dime LTW holders. This claims fails as a matter of law under the terms of the 2003 Amended Warrant Agreement.

16. Section 6.3 provides expressly that WMB will retain 100% of any recovery from the Anchor Litigation, defeating any contention by Plaintiffs that they are entitled to direct payment of any portion of the recovery. The express terms of section 6.3 state that the Dime LTW holders "will not have" any "right to control or manage the course or disposition" of the Anchor Litigation "or the proceeds of any recovery therefrom." Further, dealing a fatal blow to Plaintiffs' claims, section 6.3 states that Dime LTW holder have "no rights against the Company for any decision regarding the conduct of the Litigation or disposition of the Litigation . . . regardless of the effect on the value of the Warrants." The plain meaning of this language forecloses any claim for breach.

17. Even if the plain meaning does not dispose of this claim, admissible extrinsic evidence will demonstrate that the intent of section 6.3 was to restrict the Dime LTW holders

from claiming any right to control the Anchor Litigation or assert any direct interest in the proceeds of the Anchor Litigation. Because the Dime LTW holders were not intended beneficiaries of any protections under section 6.3, they cannot enforce it. *Straughn v. Delta Air Lines, Inc.*, 170 F. Supp. 2d 133, 150 (D.N.H. 2000) (only an intended beneficiary of a contract provision may claim its breach).

Count V – Declaratory Judgment that Dime LTWs Constitute a Claim

18. Count V seeks a declaration that the Dime LTWs constitute a right of payment, and thus a claim, against WMI. As a matter of law, the Dime LTWs constitute equity interests in WMI, not claims.

19. The Dime LTWs are equity instruments because they are warrants that can be exercised for common stock of the issuer (in this case, WMI) upon the occurrence of a specified trigger event – a final judgment in the Anchor Litigation. The Dime LTWs were designed as warrants for stock in order to avoid creating a taxable event for Dime LTW holders upon the issuance of the warrants or their exercise for stock, and thus were different in kind from goodwill litigation participation certificates (LPCs) issued by other thrifts that were redeemable for cash. Holders of Dime LTWs also were subject to equity risks, including the risk of adverse regulatory action, insolvency, and variation of stock price in the period between a judgment in the goodwill litigation and the actual delivery of stock, which were disclosed in the applicable documents. See 11 U.S.C. § 101(16)(C) (defining "equity security" as a "share in a corporation" or a "*warrant or right*, other than a right to convert, *to purchase, sell, or subscribe to a share*") (emphasis added); *Allen v. Levey (In re: Allen)*, 226 B.R. 857, 865 (Bankr. N.D. Ill. 1998) (discussing 11 U.S.C. § 101(16)(c)); *In re Insilco Techs.*, 480 F.3d 212, 218 (3d Cir. 2007) (explaining that an instrument is an "[e]quity investment," and an interest rather than a claim, if

it represents "a share of ownership in the debtor's assets—a share that is subject to all of the debtor's payment obligations.").

Damages

20. As a matter of law, even if the Plaintiffs could establish liability on any of their claims for relief, they will not be able to prove any right to damages. There is no final judgment from the Court of Federal Claims and a motion to dismiss the underlying Anchor Litigation is pending before that court. Under the terms of the 2000, 2002 and 2003 Amended Warrant Agreements, the right of the Dime LTW holders to acquire shares expressly is contingent on final determination of the amount of damages in the Anchor Litigation, and on actual recovery in the underlying Anchor Litigation, which may never occur. Because the outcome of the Anchor Litigation remains uncertain, in the event the Court find that holders of the Dime LTWs have claims against the WMI bankruptcy estate (or against the Director Defendants), it should defer determination of the amount of those claims until a final, non-appealable judgment is entered in the underlying Anchor Litigation.

21. Moreover, the 2000, 2002 and 2003 Amended Warrant Agreements in all versions provide that, once Amount Recovered is determined, the "Adjusted Litigation Recovery," as defined in the warrant agreement, will be calculated as 85% of the Amount Recovered minus deductions for litigation expenses and expenses of issuing, creating, and trading the warrants (calculated as $22,973,241 as of January 5, 2011), and a deduction for taxes (calculated as $244,317,076 based on 2010 tax rates).

22. If the Court finds liability on Count I and concludes that Plaintiffs are entitled to receive the same proportion of stock and cash that Dime shareholders received at the time of the Dime/WMI merger in 2002, then it must determine what that proportion is because Dime

stockholders did not receive a uniform proportion of cash and stock. Dime shareholders who made no election obtained 88.4% of their compensation for Dime shares in WMI stock and only 11.6% in cash. Nothing in the 2000 Warrant Agreement required that Dime LTW holders be provided with any election rights. Accordingly, the maximum amount to which the Dime LTWs holders could be entitled as a claim is 11.6% of the Adjusted Litigation Recovery.

Counterclaim for Subordination

23. Even if the Court concludes that the Dime LTW holders have claims against the estate, those claims are subject to mandatory subordination under § 510(b) of the Bankruptcy Code because they arise with respect to the purchase of a security. The Third Circuit has repeatedly held that section 510(b) must be broadly construed to effectuate its purpose. *In re Telegroup, Inc.*, 281 F.3d 133, 142 (3d Cir. 2002); see also *In re International Wireless Comm. Holdings, Inc.*, 2003 WL 21466898, 68 Fed. App'x. 275, 278 (3d Cir. 2003). Pursuant to section 510(b), subordination is required regardless whether the Dime LTWs are debt or equity securities. See 11 U.S.C. § 101(49) (defining "security[ies]," like the Dime LTWs here, to include notes, stocks, debentures, and any other claim or interest commonly referred to as a security.)

24. Because the security in question is a warrant to acquire common stock, any claim Plaintiffs assert must be subordinated to the level of common equity. 11 U.S.C. §§ 510(b); *Telegroup,* 281 F.3d at 138, 142-43 (holding shareholder claims for breach of a provision in a stock purchase agreement properly subordinated); *Int'l Wireless*, 2003 WL 21466898, 68 Fed. App'x 275 (holding that claims for breach of contract based on an agreement to pay a set dollar amount in the form of common stock were subordinated under 510(b)); *In re Touch Am. Holdings Inc.*, 381 B.R. 95, 103-106 (Bankr. D. Del. 2008) (even indemnification claims brought

by debtor's officers and directors are subject to subordination when they are based on their potential liability in an ERISA "stock-drop" lawsuit, since those indemnification claims would not exist but for the underlying ERISA lawsuit based on the debtor's stock. Even if the Dime LTWs were considered debt securities, section 510(b) still requires subordination to all claims senior to or equal in priority to the claim represented by the Dime LTWs.

Other Contested Issues Of Law

Defendants reserve the right to argue any other issues of law that may arise during trial.

VIII. EXHIBITS

A. Exhibits

The list of exhibits submitted by Plaintiffs and Defendants is attached to this Order as Exhibit A.

B. Designations of Defendants' Responses to Plaintiffs' Interrogatories

Plaintiffs designate Responses 1, 6, 7, 15, 18, 21, and 24 of Defendants' Responses to Plaintiffs' Interrogatories.

C. Designations of Plaintiffs' Responses to Defendants' Interrogatories

None.

D. Plaintiffs' Requests for Admissions and Defendants' Responses Thereto

Plaintiffs' Requests for Admissions and Defendants' Responses thereto are attached to this Order as Exhibit B.

E. Defendants' Requests for Admissions and Plaintiffs' Responses Thereto

Defendants' Requests for Admissions and Plaintiffs' Responses thereto are attached to this Order as Exhibit C.

IX. Witnesses[2]

A. For Plaintiffs:

1. Olivier Sarkozy (by deposition)

2. Mitchell Eitel (by deposition)

3. Margaret Osmer McQuade (by deposition)

4. Julie Roh (by deposition)

5. Dennis Treibel (by deposition)

6. Richard Sohn (by deposition)

7. William Kosturos (by deposition)

8. Barry Levine. Mr. Levine is an independent financial consultant who regularly serves as an expert concerning finance and complex financial instruments. Mr. Levine will testify about the Dime Litigation Tracking Warrants generally, that they constitute liabilities of WMI rather than equity or equity securities, and that they should be treated as claims rather than equity for the purposes of the WMI bankruptcy and this adversary proceeding. Mr. Levine will further opine on the proper interpretation of the agreements governing the Dime Litigation Tracking Warrants from a financial perspective.

9. Plaintiffs reserve the right to use deposition testimony of any witness who has been deposed and may use deposition testimony to impeach any witness.

B. For Defendants:

1. Olivier Sarkozy (by deposition)

2. Mitchell Eitel (by deposition

---

[2] Deposition designations, counter-designations, and objections for both Plaintiffs and Defendants are attached hereto as Exhibit D. Please note that Plaintiffs' designations are yellow, Defendants' designations are orange, and testimony designated by both party are grey. Objections are located in the footnotes of the transcripts and indicate whether they are Plaintiffs' Objection ("Pl. Obj.") or Defendants' Objection ("Def. Obj.").

3. Margaret Osmer McQuade (by deposition)

4. Richard Sohn (by deposition)

5. Julie Roh (by deposition)

6. Dennis Treibel (by deposition)

7. Daniel Mack (by deposition)

8. William Kosturos (by deposition)

9. Jonathan Goulding

10. James Carreon

11. Charlotte Chamberlain, Ph.D. Dr. Chamberlain is an economist and an expert in economics, equity analysis, and analysis of market-making and trading in equity securities. She is a Chartered Financial Analyst and formerly was a managing director and equity analyst at Jefferies & Company Inc, a broker-dealer and investment banking firm. As an analyst, she followed litigation participation securities. She also formerly served as Chief Economist and Director of Policy and Economic Research at the Federal Home Loan Bank Board. Dr. Chamberlain will provide an overview of the historical events and financial conditions that led to the issuance of the litigation tracking warrants at issue in this litigation, provide an overview of the features and benefits of these instruments, discuss how these instruments have been viewed by market participants, and offer her opinion that the litigation tracking warrants issued by Dime Bancorp, Inc., as subsequently assumed by WMI, constitute equity securities.

12. Richard D. Pomp. Mr. Pomp is the Alva P. Loiselle Professor of Law at the University of Connecticut Law School, and an adjunct Professor of Law at NYU Law School in the LL.M. program. He is an expert in state and federal taxation. Mr. Pomp will testify about

the federal tax consequences of the distribution of the LTWs by Dime to its common shareholders, and the federal tax consequences of the change in the rights of the LTW holders after the WMI merger.

13. Defendants reserve the right to use deposition testimony of any witness who has been deposed and may use deposition testimony to impeach any witness.

X. DEMONSTRATIVE AIDS

The parties anticipate using in their opening statements, examination of witnesses and closing statements charts, graphs, models, schematic diagrams, and similar objects that are not entered into evidence. The parties have agreed to exchange the demonstrative exhibits prior to trial at a date to be agreed upon. Both Plaintiffs and Defendants reserve the right to submit a timely objection to the use of any such demonstrative aids.

XII. PLAINTIFFS' STATEMENT OF PROOFS

Plaintiffs refer to their contested issues of fact and law in sections VI(a) and VII(a) above.

XIII. DEFENDANTS' STATEMENT OF PROOFS

Defendants refer to their contested issues of fact and law in sections VI(b) and VII(b) above.

XIV. SETTLEMENT CERTIFICATION

The parties hereby certify that they have engaged in a good faith effort to explore the resolution of this controversy by settlement.

XV. OTHER ISSUES

The parties have agreed that the issues of liability and damages should be tried in a bifurcated trial, such that the court will consider the issue of damages only if Plaintiffs prevail at the liability phase.

THIS ORDER SHALL CONTROL THE SUBSEQUENT COURSE OF THE ACTION UNLESS MODIFIED BY THE COURT TO PREVENT MANIFEST INJUSTICE.

Dated: September 2, 2011
Wilmington, Delaware

/s/Arthur J. Steinberg
Arthur J. Steinberg
KING & SPALDING LLP
1185 Avenue of the Americas
New York, NY 10036
Telephone: 212-556-2100
Facsimile: 212-56-2222

Jonathan L. Hochman
Daniel E. Shaw
SCHINDLER COHEN & HOCHMAN LLP
100 Wall Street, 15th Floor
New York, NY 10005
Telephone: 212-277-6300
Facsimile: 212-277-6333

Frederick B. Rosner (No. 3995)
Scott J. Leonhardt (No. 4885)
THE ROSNER LAW GROUP LLC
824 N. Market Street, Suite 810
Wilmington, DE 19801
Telephone: 302-777-1111

Counsel for Plaintiffs 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.

/s/Brian Rosen
Brian S. Rosen
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: 212-310-8602
Facsimile: 212-310-8007

Mark D. Collins
Michael J. Merchant
Travis A. McRoberts
Julie Finocchiaro
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: 302-651-7531
Facsimile: 302-498-7531

Counsel for Defendants Washington Mutual, Inc., Charles Lillis, David Bonderman, James Stever, Margaret Osmer-McQuade, Orin Smith, Phillip Matthews, Regina Montoya, Stephen Frank, Stephen Chazen, Thomas Leppert, William Reed, Jr., and Michael Murphy

/s/ David Stratton
David B. Stratton (DE No. 960)
PEPPER HAMILTON LLP
Hercules Plaza, Suite 5100
1313 Market Street
P.O. Box 1709
Wilmington, DE 19801
Tel. (302) 777-6500
Fax (302) 421-8390

Fred S. Hodara
Robert A. Johnson
AKIN GUMP STRAUSS HAUER & FELD LLP
One Bryant Park
New York, NY 10036
Tel. (212) 872-1000
Fax (212) 872-1002

Counsel for the Official Committee of Unsecured Creditors of Washington Mutual, Inc., et al.

SO ORDERED:

9/6/11

THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE