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)

POST-TRIAL MEMORANDUM OF LAW OF CLASS-PLAINTIFFS

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[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).

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PRELIMINARY STATEMENT

The evidence adduced at trial provides at least four independent reasons why this Court should reject the Debtors' bid to disenfranchise the Litigation Tracking Warrant ("LTW") holders: *First*, the LTWs are liabilities of Washington Mutual, Inc. ("WMI"), not equity interests and, therefore, should be treated as claims against WMI's estate. *Second*, beneficial ownership of 85% of the net proceeds of *Anchor Savings Bank FSB v. United States*, No. 95-39C (the "Anchor Litigation") was distributed to the LTW holders at the time of issuance of the LTWs; thus, that value is simply not property of WMI's estate. *Third*, the law governing contract interpretation clearly provides that any ambiguities in the Warrant Agreement, dated as of December 21, 2001 ("2000 Warrant Agreement") and the Amended and Restated Warrant Agreement, dated as of March 11, 2003 ("2003 Warrant Agreement") (collectively, the "Warrant Agreements") should be construed against WMI. *Fourth*, Article IV of the Warrant Agreements requires adjustments that will result in the LTW holders receiving value equal to 85% of the net Anchor Litigation proceeds in currency other than WMI stock.

Extrinsic evidence concerning both the purpose and the structure of LTWs proves that LTWs are liabilities, not equity interests. Both sides agree that litigation participation securities – litigation participation certificates ("LPCs") as well as LTWs – arose out of a desire by thrifts to separate large contingent assets (goodwill litigations) from their banking franchises. The evidence overwhelmingly demonstrates that LTWs were intended by Dime Bancorp ("Dime") to transfer the value of 85% of the thrift's net goodwill litigation recovery to the LTW holders. This evidence comes from a host of sources, including: the Dime's LTW Registration Statement ((LTWX 7 at 1 ("We are distributing the LTWs in an effort to pass along the potential value of our claim . . .")); contemporaneous Dime press releases (LTWX 10 at 2 (indicating "a substantial portion of Dime's economic interest" in the recovery in the Anchor Litigation was being

distributed to the LTW holders); correspondence to the SEC from Dime's counsel (LTWX 37 at SC_LTW_000000054.00030 (stating that LTWs "represent[] an interest in our pending 'goodwill' lawsuit")); SEC documents (LTWX 54 at 10 (stating the LTWs' "issuance has the same economic effect as a spin-off of the contingent asset")); the testimony of Olivier Sarkozy, the Credit Suisse First Boston ("CSFB") banker who developed LTWs (LTWX 195 at 77:3-24 (indicating the purpose of LTWs was to transfer 85% of the net value of the litigation recovery to the LTW holders)); and the testimony of Dime's Board member Margaret Osmer McQuade (LTWX 194 at 91:12-25, 93:6-15 (stating that the proceeds of the goodwill litigation were transferred to the LTW holders)).

Most strikingly, Dr. Charlotte Chamberlain, WMI's own expert witness, conceded precisely Plaintiffs' point concerning the purpose of LTWs: "**a principle [sic] aim** of the firms issuing litigation tracking warrants **was to separate ownership interests in the pending litigation proceeds from ownership interests in the thrift franchise."** (LTWX 233 ¶ 81 (emphasis added); *see also* LTWX 243 at ¶ 59; TR3[2] at 91:15-92:13, 94:6-19, 95:12-17.) Dr. Chamberlain further testified that the ownership interests in the litigation proceeds ***were transferred to the LTW holders at the time the LTWs were issued***. (TR3 at 95:18-24.)

This purpose – transferring a beneficial ownership of 85% of the net litigation proceeds to the LTW holders – was woven into their structure and makes them liabilities. Specifically, even though LTWs were initially payable in the currency of common stock, they are not equity warrants and differ from them, *inter alia*, in a critical regard: LTWs are exercisable for a

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[2] Transcripts from the hearing in this proceeding shall be referred to herein as "TR1" for the September 12, 2011 transcript, "TR2" for the September 13, 2011 transcript, "TR3" for the September 14, 2011 transcript, and "TR4" for the September 20, 2011 transcript. "LTWX" refers to the joint exhibits submitted by the parties in connection with the hearing in this proceeding.

variable number of shares.[3] In other words, the number of shares LTW holders would receive varied based upon the delivery of a fixed amount of value, *i.e.*, 85% of the net litigation proceeds. By contrast, equity warrants deliver a fixed number of shares for a variable value. Thus, equity warrants are linked to variations in the price of the issuer's common stock, while LTWs are not.

As Plaintiffs' expert Barry Levine testified, this delivery of value, initially through a variable number of shares, is the economic essence of LTWs and makes them liabilities. This crucial economic difference is exactly why the Financial Accounting Standards Board ("FASB"), the International Accounting Standards Board ("IASB"), and the Securities and Exchange Commission ("SEC") all reached the same conclusion as Mr. Levine that financial instruments with the characteristics of LTWs are liabilities.

The LTW holders are also entitled to declaratory judgment because 85% of the net proceeds of the Anchor Litigation were transferred to the LTW holders and therefore simply do not belong to WMI. The evidence has shown that a primary purpose of litigation participation securities, including LTWs, was to separate the value of the goodwill litigation recovery from the value of the thrift because potential acquirers were (in the eyes of the thrifts) undervaluing the goodwill litigation. As a result, litigation participation securities were designed to prevent potential acquirers from receiving the litigation proceeds since they would not fairly value the contingent asset. Instead, this value was "spun off" prior to a Combination (as defined in the Warrant Agreements) to litigation securities holders. WMI has taken the indefensible position that, even though WMI was an acquirer of Dime, and therefore was never supposed to receive

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[3] As set forth herein, there are numerous other differences between LTWs and equity warrants, such as the lack of a fixed time of exercise.

85% of the net value of the Anchor Litigation proceeds, somehow WMI's creditors in bankruptcy should receive that value. This position makes no sense. The right to 85% of the value of the net Anchor Litigation recovery was distributed to the LTW holders over ten years ago. Thus, the asset – *i.e.*, the right to 85% of the net litigation recovery – and the proceeds therefrom are beneficially owned by the LTW holders and were never part of WMI's estate.

The LTW holders also should be granted declaratory judgment relief that WMI breached the Warrant Agreements. As an initial matter, the LTW holders are entitled to a cash election under Sections 4.2(b) and 4.2(c) of the 2000 Warrant Agreement. The express terms of Section 4.2(b) require that the LTW holders get what Dime shareholders received in the Dime/WMI merger. Dime shareholders received a cash election, and the LTW holders are entitled to no less.[4]

In addition, the Global Settlement is a Combination (a sale of substantially all of WMI's assets). WMI's failure to cause JPMorgan (the "Successor Company," as defined in the Warrant Agreements) to assume the LTW obligations is a breach of Section 4.2(d) of the 2003 Warrant Agreement.

Moreover, evidence establishing the purpose of the LTWs provides ample proof of the parties' intent, making it clear how to interpret the Adjustments section (Article IV) of the Warrant Agreements. For example, WMI argues that Section 4.4 of the Warrant Agreements is permissive because the drafters used the word "may" as opposed to "shall."[5] In denying WMI's

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[4] There actually is no other way to read Section 4.2(b) and, having no sensible interpretation, WMI instead falls back upon made-up facts about a purported decision to revoke the LTW holders' right to an election. But, as the evidence demonstrates, this imagined revocation never occurred, and was never permissible under Section 7.2 of the 2000 Warrant Agreement.

[5] The word "may" does not stand by itself as part of Section 4.4. It is used as part of the phrase "may make, without the consent of the Holders. . . ." (LTWX 1 at § 4.4.)

summary judgment motion, this Court ruled that the language of the Warrant Agreements on this point was ambiguous. (LTWX 219 at 10-12.) However, in light of the extrinsic evidence as to the purpose of LTWs, the ambiguity is easily resolved. WMI's reading simply does not effectuate the purpose of transferring 85% of the net litigation proceeds to the LTW holders, whereas the Plaintiffs' interpretation does.[6]

Even if (contrary to fact) the clarity of the evidence relating to intent was somehow not dispositive, the canons of contract construction require that ambiguities be construed against WMI as the drafter of the 2003 Warrant Agreement, and the successor to the drafter of the 2000 Warrant Agreement. Thus, any lingering ambiguity as to the Warrant Agreements should be resolved in favor of the Plaintiffs.

For all of these reasons, and as further demonstrated herein, declaratory judgment should be entered in favor of the LTW holders, vindicating their rights to the value of the litigation recovery distributed to them in 2000.

FACTUAL BACKGROUND[7]

A. The Purpose Of Litigation Participation Securities

The parties agree on the genesis of litigation tracking securities. Dr. Chamberlain testified that the presence of a large contingent asset *(i.e.,* goodwill litigation) on the balance sheet of a thrift holding company created issues for the thrift and, as a result: "[t]hrift directors

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[6] Sarkozy (the investment banker), Mitchell S. Eitel (Dime's outside lawyer) and McQuade (the Board member) all testified that no one involved in drafting or approving the 2000 Warrant Agreement contemplated that Dime or an acquirer would ultimately file for bankruptcy. (LTWX 193 at 150:17-151:7; LTWX 194 at 88:11-13; LTWX 195 at 69:13-17.) WMI offered no document or testimony to support its position that LTW holders were not supposed to receive the value of the Anchor litigation transferred to them in the case of a WMI bankruptcy.

[7] Plaintiffs incorporate by reference the undisputed facts and Plaintiffs' statement of contested facts set forth in the Joint Pre-Trial Order, dated September 2, 2011 [Adversary Proceeding Docket No. 270], as well as the facts set forth in the Expert Report of Barry M. Levine, dated July 13, 2011 ("Levine Report" or "Levine Rep.") [LTWX 232].

sought to separate the market value of the potential litigation recoveries from the market value of [t]hrift franchises." (TR3 at 88:7-11.) The desire to separate the value of potential litigation recoveries from the value of thrift franchises first led to the issuance by thrifts of LPCs. (*Id.* at 88:12-21; TR1 at 45:7-11.) Issuing LPCs allowed thrift holding companies to move all or part of their goodwill litigation assets off their balance sheets, which, among other things, permitted potential acquirers to value the thrift's core banking business without the uncertainty created by a potentially large, but contingent, asset. (TR1 at 43:8-21; *see also* TR3 at 87:21-88:11.) Indeed, potential acquirers generally did not want to pay much for goodwill litigations claims, while thrift holding companies placed a higher value on them. (TR1 at 43:22-44:6.) By spinning off the recovery value of the goodwill litigation to their shareholders prior to a merger, the thrifts avoided disputes with future acquirers over how to value the goodwill litigation and preserved the value of the goodwill litigation recovery for their existing shareholders – instead of diluting the contingent asset in favor of an acquirer, who was not willing to pay the perceived fair price for the asset. (LTWX 195 at 34:21-36:6, 38:22-39:21; TR1 at 44:7-25.)

LPCs, the first type of goodwill litigation participation securities, were issued by, among others, CalFed, Inc. ("CalFed") and Coast Savings Financial, Inc. ("Coast"). CalFed issued LPCs pursuant to which portions of the goodwill litigation recovery were transferred to its shareholders. Coast used a business trust structure and issued interests in the trust to its shareholders in order to transfer 100% of the value relating to its goodwill litigation claim to its shareholders. (LTWX 232 at 10-11; TR1 at 45:23-46:1.)

B. The Purpose Of LTWs

LTWs were a refinement of LPCs, developed by CSFB in response to a perception that LPCs may have adverse tax consequences.[8] CSFB trademarked the terms "Litigation Tracking Warrant" and "LTW"[9] as a marketing device but only convinced two entities to issue LTWs – Golden State Bancorp. Inc. ("Golden State") and Dime.[10]

The perceived tax advantages of LTWs did not change the essential economic purpose of the transaction. *See Duke Energy Royal, LLC, v. Pillowtex Corp. (In re Pillowtex, Inc.)*, 349 F.3d 711, 722 (3d Cir. 2003) (distinguishing economic substance from form used for tax purposes). Nor did it change the purpose of issuing them. (TR1 at 62:2-23.) Like LPCs, LTWs were issued to separate the value of the goodwill litigation recovery from the value of the thrift. As acknowledged by Stephen J. Trafton, then chairman of Golden State, in a publicly filed press release: "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." (LTWX 50 at 3.)[11]

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[8] There is no indication that an adverse tax consequence actually occurred in connection with the issuance of the CalFed LPCs. Nor is it clear that the LTW structure successfully avoided any such negative tax treatment. The tax opinion given by Sullivan & Cromwell, Dime's outside counsel, relating to LTWs, said that the issue was uncertain and that there is no clear law on the subject. (LTWX 7 at 20-21.) Moreover, the fact that Warburg Pincus ("Warburg"), a major equity investor in Dime, did not receive LTWs, may have negated the alleged tax safe harbor for LTWs. (*Id*. at 21.)

[9] As Mr. Levine testified, and as the SEC and the accounting literature recognize, the term "warrant" by itself does not denote an equity interest. Warrants can be liabilities or even assets. (TR1 at 73:25-74:21; LTWX 142; LTWX 154; LTWX 155; LTWX 168.)

[10] The Golden State LTWs and Dime LTWs are the same in all material respects. (TR1 at 51:7-52:8.) WMI has asserted that the Dime LTWs were modeled after the Golden State LTWs. (LTWX 214 at 28.)

[11] Significantly, Trafton's statement was quoted, with approval, in Dr. Chamberlain's report. (LTWX 233 at 11, n.25.)

1. Dr. Chamberlain Concedes The Principal Purpose Of LTWs

Significantly, Defendants' own expert, Dr. Charlotte Chamberlain, in a stunning admission, agrees with Plaintiffs that the purpose of issuing LTWs was to separate the ***ownership interests*** in the goodwill litigation recoveries from the ownership interests in the thrifts: "**a principle [sic] aim** of the firms issuing litigation tracking warrants **was to separate ownership interests in the pending litigation proceeds from ownership interests in the thrift franchise."** (LTWX 233 at ¶ 81 (emphasis added); *see also* LTWX 243 at ¶ 59; TR3 at 91:15-92:13, 94:6-19, 95:12-17.) Dr. Chamberlain further concedes that this separation of "ownership interests" occurred "when the S-3 was issued and the litigation tracking warrants started to trade." (TR3 at 95:12-24.)

2. Dime's Issuance Of LTWs

The background to Dime's issuance of LTWs confirms that LTWs were designed to distribute goodwill litigation recoveries to the thrifts' shareholders. (LTWX 232 at 15-16.) In early 2000, Hudson United Bank and Dime entered into a merger agreement. (LTWX 195 at 20:12-22; TR1 at 63:3-11.) This put Dime "in play," and North Fork Bank made a hostile takeover bid for Dime. (LTWX 195 at 21:2-5; TR1 at 63:3-11.) Dime's Board believed that the North Fork offer was inadequate and, as a defensive maneuver to remaining independent, sought a "white knight" to make an equity investment in Dime. (TR1 at 63:12-17.) Warburg emerged as that "white knight." (*Id.* at 63:18-21.) It purchased 19.9% of Dime's equity, and Dime used the cash from Warburg's investment, in part, to buy back shares from disgruntled stockholders at the price previously offered by North Fork. (LTWX 195 at 21:21-22:12.)

The Warburg equity investment in Dime was only one piece of a multi-prong strategy to gain favor with the Dime shareholders so as to remain independent. (LTWX 84 at 2, 12; TR1 at 64:1-65:6.) Another part of Dime's "independence" strategy was the distribution of LTWs to

Dime shareholders. (TR1 at 65:7-66:11.) Sarkozy tried unsuccessfully for 18 months to market LTWs to Dime. It was not until the Warburg investment that Dime became receptive to the concept of issuing LTWs. (LTWX 195 at 64:24-65:20.) According to Dime, the valuation underlying Warburg's equity investment did not put a fair value on the Anchor Litigation. Spinning off the value of the Anchor Litigation recovery to the Dime shareholders, in the form of LTWs, and not sharing that value with Warburg, gave Dime's other shareholders a "front end" distribution of that value. (*Id.* at 62:3-19; LTWX 84 at 12; TR1 at 66:12-67:5.)

Sarkozy testified that transferring the value of the Anchor Litigation to the shareholders made the Dime balance sheet less complex, easier to value, and to that extent, a more attractive merger target candidate. (LTWX 195 at 34:21-36:6, 47:24-48:11, 62:3-19; *see also* LTWX 232 at 10.) This was important because, once a financial player like Warburg became Dime's largest shareholder, it was just a matter of time before Dime would be acquired.[12] Because it was considered unlikely that an acquirer would fairly value the Anchor Litigation, it made sense to Dime to spin out that value to its shareholders before any merger. Further, issuing the LTWs allowed Dime to accrue legal expenses as part of a spin-off structure as compared to expensing legal costs; thus, improving Dime's current profitability. (LTWX 195 at 62:20-64:7.)

3. A Plethora Of Other Evidence Confirms The Purpose Of LTWs

Numerous other sources confirm that the LTWs' primary purpose was to separate the value of the goodwill litigation recovery and transfer it to LTW holders. (LTWX 232 at 12-13.) For example, the Dime LTW Registration Statement states as follows: "**We are 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 tradeable securities." (LTWX 7 at 1 (emphasis added).)

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[12] WMI acquired Dime within 13 months of the issuance of Dime's LTWs.

This distribution of value via the LTWs was also announced in a contemporaneous Dime press release: "Dime Bancorp, Inc. (NYSE: DME) today announced that its Board of Directors **has declared a distribution** to common stockholders **of a substantial portion of *Dime's economic interest* in its pending 'goodwill' lawsuit** against the United States government through the issuance of Litigation Tracking Warrants™ (LTW™s)." (LTWX 10 at 2 (emphasis added).)

Further, in the December 20, 2000 Form 8-K Press Release, Dime makes clear that its common stock will trade without the value distributed to the LTW holders. (LTWX 11 at 2.) In effect, value equal to 85% of the net recovery in the Anchor Litigation was distributed from the thrift holding company to the Dime shareholders through the construct of LTWs. (TR1 at 55:12-24.)

Dime's outside counsel (Sullivan & Cromwell) confirmed to the SEC that, by issuing LTWs, Dime was distributing "an interest" in the Anchor Litigation: "The anticipated distribution of securities, known as litigation tracking warrants, to all of our stockholders (excluding Warburg) ***represent[s] an interest in our pending 'goodwill' lawsuit*** against the United States government." (LTWX 37 at SC_LTW_000000054.00030 (emphasis added); TR1 at 56:14-23.)

An influential committee of high-level SEC staff also recognized that the issuance of LTWs represents a separation of value from the thrift and a distribution of that value to the thrift's shareholders. Specifically, in a report of an SEC staff meeting addressing the accounting treatment of Golden State's LTWs, the SEC staff recognized that "pooling of interests" accounting could not be used for LTWs in connection with a Golden State merger specifically because LTWs separated and spun-off the value of the goodwill litigation from the value of the rest of the company:

> **The staff believed that the instrument effectively separated the combined entity into two components: the contingent asset [i.e., the LTW] and the remainder of the company.** Upon issuance of the [litigation tracking] warrant, the shareholders would be able to trade the value of the contingent asset separately from the rest of the company's value. . . the staff believed that **the [litigation tracking] warrant issuance has the same economic effect as a spin-off of the contingent asset**, which would be precluded by paragraph 48c.[13]

(LTWX 54 at 10 (emphasis added).)

Sarkozy also confirmed that LTWs were designed to separate out the litigation asset from the thrift holding company. (LTWX 195 at 37:3-11.) He testified that the economic purpose of LTWs was to separate the value of the litigation from the value of the bank, and that the value of the litigation was transferred to the LTW holders. (*Id.* at 54:7-16, 56:4-19.) Margaret Osmer McQuade, Dime's Board member, testified to similar effect. (LTWX 194 at 91:12-25, 93:6-15.)

Finally, Golden State had LTWs as well as LPCs and accounted for them in exactly the same way. With respect to their LTWs, Golden State showed only 15% of the goodwill litigation as an asset on its balance sheet –the other 85% of the value of the goodwill litigation asset was not shown as it had been already spun off to shareholders. The same value shift occurred from Dime to its shareholders when it issued its LTWs. This value shift is similarly demonstrated by the reduction in price of Golden State stock at the time that the Golden State LTWs began to trade "ex-dividend" for an amount that corresponded to the perceived value of the Golden State goodwill litigation spun off. (TR1 at 61:6-62:1; LTWX 232 at 21.)

PROCEDURAL BACKGROUND

On April 12, 2010, a holder of the Dime LTWs commenced the above-captioned adversary proceeding (the "Adversary Proceeding") against WMI. Ultimately, the complaint

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[13] After the SEC staff meeting, in recognition of the view announced, Golden State decided to utilize purchase accounting for the merger – not pooling accounting.

was amended, the Adversary Proceeding was certified as a class action, and Plaintiffs were designated as class representatives. Prior to the September 2011 trial, WMI lost its motion for summary judgment arguing that LTWs are equity and that LTW claims should be subordinated pursuant to Section 510(b) of the Bankruptcy Code. The Court found that extrinsic evidence was required to interpret the Warrant Agreements. WMI also lost its subsequent motion to dismiss the director Defendants. The Court conducted a reserve trial and set the claims reserve for the LTW claims at the $337 million Plaintiffs requested.

ARGUMENT

I. The Economic Essence Of LTWs Is That They Are Liabilities

Mr. Levine's testimony and expert report demonstrate that the economic essence of LTWs is that they are liabilities because they deliver a fixed amount of value. (TR1 at 77:20-78:15; LTWX 232 at 17.) Notably, the SEC, FASB, and IASB all confirm Mr. Levine's view that LTWs, and financial instruments like them, are liabilities, not equities. (TR1 at 68:14-77:19; LTWX 142; LTWX 154; LTWX 168.) The accounting literature is structured to classify securities based on their essential economic characteristics, and not on how they are labeled.[14] This is the same analysis that the Court ultimately must do. And, as demonstrated below, the economic essence of LTWs is that they deliver a fixed value (85% of the net litigation recovery) and are therefore liabilities.

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[14] *See, e.g.*, FASB News Release, "FASB FSP Will Require Recalculation of Leveraged Leases If Timing of Tax Benefits Affect Cash Flows" (July 13, 2006) ("'Today's FSP reflects our belief that accounting should fully reflect the economics of a transaction,' said Edward W. Trott, FASB Member."); FASB Summary of Statement No. 146 (June 2002) ("This statement affirms the Board's view that a fair value measurement is the most relevant and faithful representation of the underlying economics of a transaction.").

A. LTWs Provide For A Variable Number Of Shares And Transfer A Specific Value

One of the primary reasons why LTWs are not equity is that they are designed so that holders will receive a variable number of shares of common stock (assuming no adjustment to the payout currency must be made) for a specific value. As Mr. Levine testified, an obligation to issue a variable number of shares for a specific value is not an equity interest. (TR1 at 73:10-74:21, 77:20-78:15, 86:23-87:22; LTWX 142; LTWX 154; LTWX 155; LTWX 168.)

In general, equity warrants are issued for a fixed number of shares – *e.g.*, 100 shares of IBM stock. In contrast, LTWs constitute an obligation to issue a variable number of shares for a specific amount of value. Section 3.1 of the 2000 Warrant Agreement sets forth the formula that gives LTW holders value equal to 85% of the net Anchor Litigation recovery. (TR1 at 70:1-9; LTWX 1 at § 3.1.) This is necessarily a variable number, because it is not possible to determine the amount of shares of Dime (or WMI) stock to be distributed until the amount of the Anchor Litigation recovery is known. In the Statement of Financial Accounting Standards No. 150, the FASB states, in a section entitled, "Certain Obligations to Issue a Variable Number of Shares," as follows:

> A financial instrument that embodies an unconditional obligation, or a financial instrument other than an outstanding share that embodies a conditional obligation, that the issuer must or may settle by issuing a variable number of its equity shares shall be classified as a liability (or an asset in some circumstances) if, at inception, the monetary value of the obligation is based solely or predominantly on any one of the following:
>
> (b) Variations in something other than the fair value of the issuer's equity shares (for example, a financial instrument indexed to the S&P 500 and settleable with a variable number of the issuer's equity shares)

(LTWX 142 at 7, ¶ 12.) Based on this pronouncement, LTWs are liabilities, not equity interests. Specifically, LTWs are not outstanding common shares; they are, as stated in the first sentence

of this provision, financial instruments embodying either an unconditional or conditional obligation. (TR1 at 70:18-71:2.) Further, the requirement that the instrument be one that "the issuer must or may settle by issuing a variable number of equity shares," is applicable to LTWs. Finally, under this provision, an instrument is classified as a liability "if, at inception, the monetary value of the obligation is based solely or predominantly on … [v]ariations in something other than the fair value of the issuer's equity shares…." Again this describes the LTWs, the monetary value of which is based on variations in the value of an asset other than the thrift's common stock – *i.e.*, the underlying goodwill litigation. (*Id.* at 71:3-17.)

Similarly, under the IASB's rules, LTWs would also be classified as liabilities. IAS 32 defines a "Financial liability" as, amongst other things, "a contract that will or may be settled in the entity's own equity instruments and is a non-derivative for which the entity is or may be obliged to deliver a variable number of the entity's own equity instruments . . . ." (LTWX 154 at 4.) Thus, the IASB provides that if you have a warrant-like LTW that settles in a variable number of shares and not a fixed number of shares, it is a liability. (TR1 at 73:10-24.)

Finally, high level SEC staff concerned with the classification of warrants as liabilities or equity also concluded that securities like the LTWs are liabilities. In particular, the SEC found that "[i]nstruments within the scope of SFAS 150 [LTWX 142] . . . will not qualify for treatment as equity." (LTWX 168 at 32.)

Like Mr. Levine, the accounting boards and the SEC focused on the economics rather than the form of warrants with characteristics of both liabilities and equities and determined that the economic essence of instruments like LTWs is that they are liabilities. (TR1 at 77:6-19.)

B. LTWs Are Not Equity Warrants

The LTWs also lack the traditional characteristics of equity warrants. Most importantly, as discussed above, the LTWs are exercisable for a variable number of shares of common stock (barring any adjustment to the form of value distribution). In contrast, equity warrants are typically issued for a fixed number of shares of common stock with variable value. (*Id*. at 77:20-78:15.) Further, equity warrants normally have an exercise price and a finite time period in which they must be exercised. (*Id*. at 77:25-79:11.) But there is no exercise price for the LTWs (*Id.* at 78:16-23), nor any specific date by which they must be exercised.

Another clear indication that the economic essence of LTWs is completely different from that of equity warrants is there is an inextricable economic link between an equity warrant and the issuer's stock, but no such link exists between the LTWs and the issuer's stock. This difference is clearly reflected in the completely different way that market participants valued LTWs and equity warrants. As Mr. Levine indicated, equity warrants are valued by market participants, including Dime, based on financial models, such as the well known Black-Scholes model, that use the price movements of the issuer's common stock as a primary input. (*Id.* at 80:9-23; LTWX 232 at 19.) For LTWs, market participants never used valuation models that relied on the issuer's common stock. (TR1 at 80:24-86:22; LTWX 80 at 20; LTWX 37 at 7; LTWX 107 at 3-4.) Rather, they valued LTWs (and LPCs for that matter) based exclusively on the likelihood, amount and timing of the potential litigation recovery. (TR1 at 85:13-86:18.) This indisputable difference in valuation method for LTWs and equity warrants demonstrates the stark difference in the economics of these two types of instruments and disposes of WMI's argument that the label "warrant" has anything to with the economic essence of LTWs.

C. LTWs Are Not Equity Securities

Furthermore, LTWs are not equity securities, as they were designed to be independent of the stock price of the issuer's common stock. Because the value of LTWs was tied to the value of the Anchor Litigation, LTW holders could not expect to receive any upside if the price of Dime (or WMI) stock went up, nor were the LTW holders subject to the risk of the price of the stock falling. In other words, as the price of the stock rose or fell, the LTW holders would simply get more or less shares. (*Id.* at 88:4-24.)

Accordingly, Dime's Registration Statement for the LTWs expressly recognized that LTWs did not share the same economic risks of Dime's common stock: "[a]n investment in the LTWs involves different risks and considerations from an investment in the common stock of a savings and loan holding company such as Dime Bancorp." (LTWX 7 at 6.) This LTW disclosure is completely different than the disclosure made for an equity warrant, wherein the risks involved for the equity warrant holder are virtually identical to that of the holder in common stock of the issuer.[15] By contrast, the risks of the LTWs are those associated with the Anchor Litigation, not of Dime's operations. (*Id.* at 4; TR1 at 89:24-90:12; LTWX 195 (Sarkozy Dep. Tr.) at 70:4-15 ("Q. What, in your view, was – were the risks of the LTWs? A. That the lawsuits, ultimately, would prove to be valueless. [Q.] Did you believe that operational risks of the bank were risks connected to the LTWs? . . . A. No, they wouldn't have really entered my thinking.").)[16]

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[15] Again, it is for this reason that equity warrants are valued using models tied to the underlying stock price.

[16] The Risk Factor section of the LTW Registration Statement as contrasted to the risk factors in a typical equity security registration statement starkly illustrates this point (absence of risk in LTWs concerning general economic conditions or operation of issuer). (*Compare* LTWX 7 at 4-6 *with* LTWX 9 at 3-4; *see also* TR1 at 90:13-93:1.)

Finally, issuers of LTWs did not account for them as equity warrants. For example, Golden State did not account for LTWs in the same fashion that it accounted for its equity warrants. Golden State (which issued LTWs and acquired an issuer of LPCs) did, however, account for its LTWs the same as its LPCs.[17] (LTWX 177 at F-60; LTWX 232 at 22; TR1 at 93:2-95:8.) Indeed, as noted, after Golden State's LTWs were issued, only 15% of the goodwill litigation (the amount not spun off to Golden State shareholders) remained on Golden State's balance sheet. (*See* LTWX 50 at 6.) Similarly, neither Dime nor WMI accounted for the LTWs as equity. (LTWX 27 at 3-5; TR1 at 95:9-98:14.) But WMI did account for Dime's stock options (which are nearly identical to equity warrants) as equity in connection with the Dime/WMI merger. (TR1 at 98:4-11.)

Thus, the evidence unequivocally establishes that the economic essence of LTWs – in sharp contrast to equity warrants or equity securities – is that they are liabilities.

D. Dr. Chamberlain's Testimony Fails To Establish That LTWs Are Equity

Dr. Chamberlain's arguments that Dime LTWs represent equity interests do not withstand scrutiny and should be given no weight by the Court.

1. That The LTWs Were Listed On NASDAQ, Not Rated, And Followed By Dr. Chamberlain In Her Capacity As Equity Analyst, Proves Nothing Because The Same Factors Apply Equally To LPCs, Which Are Clearly Liabilities

Dr. Chamberlain compared LTWs to equity securities because they were listed on NASDAQ, were not rated, and were followed by the equity department at Jefferies. (TR2 at 211:10-214:3.) But these factors apply equally to LPCs, which are clearly liabilities. (TR3 at 149:1-150:10; TR1 at 46:10-50:10; LTWX 52; LTWX 48.)

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[17] As shown in Section I.D.1. hereof, LPCs are unquestionably liabilities.

Dr. Chamberlain destroyed her own credibility when she testified repeatedly that LPCs are equity securities. (TR3 at 142:1-4 "Q. … Now, in your view, Dr. Chamberlain, litigation participation certificates, LPCs, like LTWs, are also equity securities, correct? A. That's right.") That testimony was utter nonsense and quickly dissolved under cross examination. As Dr. Chamberlain admitted, LPCs are payable in cash and are not warrants in any sense. (*Id*. at 142:5-20.) When confronted with documents indicating that Coast LPCs would "rank *pari passu* with other ***senior indebtedness*** of [the bank holding company]," Dr. Chamberlain admitted that she did not know if Coast LPCs were liabilities. (*Id*. at 147:10-148:25 (emphasis added).) Similarly, when confronted with documents indicating that CalFed LPCs represented a direct ownership interest in the litigation proceeds, Dr. Chamberlain once again admitted that she simply had not done the analysis ***and did not know one way or the other whether LPCs were or were not liabilities***:

> Q. Okay. So bottom line is that **it's possible that the LPCs of both Coast and CalFed, in your opinion, were actually liabilities and not equity securities?**
>
> A. You mischaracterizing my testimony. **My testimony is I didn't do an analysis. I don't know.**
>
> Q. Well, **doesn't that make it possible**, then, that the –
>
> A. I --
>
> Q. -- result -- excuse me, I'm not done with my question -- **that the result of your analysis, had you done it, would have shown that one or both of these securities were actually liabilities and not equity securities?**
>
> A. **I simply don't know.** It could have been indeterminate.

(TR3 at 156:3-14 (emphasis added).)

Thus, Dr. Chamberlain was ultimately forced to plead ignorance as to how to classify LPCs. Because she had previously concluded that LTWs should be classified and valued the same way as LPCs, for her to admit the obvious – that LPCs were liabilities – would have been an outright concession of Plaintiffs' position that LTWs are also liabilities. Dr. Chamberlain's retreat to ignorance was tantamount to making that concession anyway. At any rate, her claim that LTWs are equity because they were listed on NASDAQ, not rated, and followed by her in the equity department at Jefferies, utterly collapses because those same factors apply equally to LPCs, which are obviously liabilities. (*See* TR1 at 112:5-113:12; *see generally* LTWX 75; LTWX 78.)

2. Dr. Chamberlain's Observations About Tax And Regulatory Issues Do Not Support The Conclusion That LTWs Are Equity

In her report, Dr. Chamberlain takes the position that tax and regulatory features of LTWs are common to equity. (LTWX 233 at ¶¶ 44-52.) With respect to taxation, however, she later admitted that the fact that litigation proceeds are taxable to the thrift does not make LTWs equity. (TR3 at 175:2-16.) With respect to regulatory matters, Dr. Chamberlain quotes a risk factor in the Dime LTW Registration Statement to support her conclusion that the possibility of "regulatory intervention establishes that federal regulators and thrifts regarded the distribution of prospective litigation award to holders of the Dime LTWs as an equity distribution." (LTWX 233 at ¶¶ 47-48.) This risk factor warned that the value of the LTWs and Dime's common stock ***"may"*** be affected "***in the unlikely event"*** that Dime Bank was unable to dividend up litigation proceeds to Dime Bancorp. (*Id*. at ¶ 47; LTWX 7 at 5 (emphasis added).)

The conclusion that this risk factor somehow indicates that LTWs are like equity also crumbled on cross examination. First, Dr. Chamberlain admitted that she did not even understand the entire quotation that she reproduced in her report. (TR3 178:24-25 ("I really wish

I could say that I think there's a definitive meaning of that.").) Second, Dr. Chamberlain had to admit that the risk of not being able to dividend up funds from the thrift to the holding company ***was also a risk of debt securities***. In particular, the 9% Notes issued by Dime within a week of the LTWs contained a substantially identical risk factor. (*Id.* at 183:14-184:22; LTWX 9 at 3-4.) Accordingly, the presence of this risk factor simply does not indicate that the LTWs are similar to equity, because the exact same risk factor applied equally to Dime's ***debt*** securities.[18]

Finally, the testimony of Dime Board member, Margaret McQuade, casts significant doubt on Dr. Chamberlain's alleged regulatory issue. Ms. McQuade testified that the Board never discussed whether there was a risk that shares would not be available at the Trigger event. (LTWX 194 at 57:15-21.) Nor did the Board, according to McQuade, ever discuss whether the Anchor Litigation recovery needed to be upstreamed to Dime in order for the LTW holders to receive the value given to them. (*Id.* at 63:2-8.) McQuade's unequivocal testimony raises the obvious issue as to why the market or LTW holders should have perceived a so-called regulatory risk that the Dime Board never even discussed, let alone recognized.

3. LTWs Do Not Share Equity Risk With Issuer's Common Stock

Dr. Chamberlain's opinion on whether LTWs share market risk with the issuer's common stock is limited to the very narrow claim that the LTW risk cannot be "entirely separated" from the risks of equity – due to a potential 40-72 day window between the stock determination date and the actual transfer of stock. (LTWX 233 at ¶¶ 53-61.) This point is irrelevant because Plaintiffs are not claiming a right to payment in stock. Rather, as set forth herein, the LTW

[18] Indeed, if anything, this risk factor cuts in favor of the LTWs being considered liabilities. Specifically, the only reason that it would be necessary to upstream cash in order to satisfy LTW holders would be if cash (not stock) was required to satisfy the LTW obligation.

holders are entitled to a cash election as a result of Sections 4.2(b) and (c) of the 2003 Warrant Agreement, or an adjustment for payment in cash pursuant to Section 4.4.

It is also significant that this newly minted, theoretical window of price fluctuation in the event that LTW holders were to be paid in stock, was never mentioned by Dr. Chamberlain as an equity risk of LTWs in any of her research reports while she was at Jefferies. (TR3 at 197:12-198:4; TR1 at 84:20-86:22; LTWX 107 at 3-4.) On the contrary, she used the exact same method for valuing LPCs, which were liabilities and which were payable in cash, as she did for valuing LTWs.[19]

In addition, the fact that Dr. Chamberlain focused only on a theoretical 40-72 day period[20] of what is already an almost 11-year existence of LTWs illustrates the immateriality of this point to the issue of whether LTWs are liabilities.

Dr. Chamberlain's testimony concerning a putative correlation between price movements of WMI equity and the LTWs also misses the mark. Relying on a comparison with banking market indices, she testified that a drop in WMI common stock caused a drop in the price of LTWs during the period from March 2008 to September 2008, in which there was purportedly no news that would affect the LTWs. (TR3 at 21:7-22:3.) This opinion is flawed for many reasons. *First*, her premise is completely wrong. There was very important news concerning the LTWs during that time period: on July 16, 2008, the Court of Claims modified its judgment and reduced it by $26 million (TR4 at 94:12-23); and in early September 2008, the U.S. government appealed

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[19] As indicated above, no one else seeking to value LTWs treated them any differently from LPCs payable in cash. At trial, Mr. Levine referred to valuations done by at least four banks which applied the identical valuation method to both LPCs and LTWs, and that method had absolutely nothing to do with equity risk of the issuers. (TR1 at 80:24-86:22; LTWX 107 at 3-4; LTWX 37 at 7; LTWX 80 at 20; LTWX 81 at 3, 9.)

[20] As Mr. Levine testified, some of the equity risk during this theoretical period can be hedged. (LTWX 202 at 227:16-23.)

the Court of Claims judgment, thus stretching a 13-year old case to an indeterminate additional period, with litigation risk of an adverse outcome still present due to the appeal. (*Id.* at 94:24-25; 95:4-8). *Second*, as Mr. Levine testified, the movement of WMI stock and the LTWs did not appear to be particularly correlated. (TR2 at 35:13-20.) *Third*, Dr. Chamberlain's comparison with market indices is meaningless. She compared the movement of WMI stock to the movement of various indexes to show that WMI moved more than the banking indexes. While that may be, it proves nothing about ***why the LTWs' price*** moved. *Fourth,* Dr. Chamberlain admitted that the time frame she looked at was the "crescendo of the financial crisis," during which "the value of all sorts of securities plummeted." (TR3 at 169:7-19.) *Fifth*, her starting point date was just after the LTWs moved up by over 300%. (TR2 at 41:21-42:22.) If she had chosen the day before as her starting point, LTWs would have gone up during the same period that WMI stock plummeted, thus negating her entire thesis. *Sixth*, Dr. Chamberlain's correlation theory did not withstand scrutiny, since, on her starting point date, WMI's stock went down while LTWs went up 300% based on the good news received in the Anchor Litigation. *Seventh*, Dr. Chamberlain admitted that she conducted no statistical analysis to establish any correlation between WMI equity and LTWs. (TR3 at 162:3-10.) *Finally*, Dr. Chamberlain admitted that after November 2008, there has been no correlation at all between WMI common stock and the LTWs. (*Id.* at 171:24-172:5.)[21]

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[21] Dr. Chamberlain tried to dismiss the obvious lack of correlation by suggesting that trading securities after they have been delisted is like buying securities on "ebay." The PIERS are also delisted, and WMI has referred to their trading price on numerous occasions in this bankruptcy case to support particular relief requested. (*See, e.g.*, Motion of Washington Mutual, Inc. and WMI Investment Corp. for an Order (a) Disbanding the Official Committee of Equity Holders Appointed by the United States Trustee or (b) Limiting the Fees and Expenses Which May Be Incurred by Such Committee [Bankruptcy Docket No. 2132] at ¶ 2 (stating that the PIERS were trading, as of January 8, 2010, at approximately 50 cents to the dollar).

4. There Is No Basis For Dr. Chamberlain's Opinion That The Market Viewed LTWs As Equity Securities

Dr. Chamberlain's opinion that the market viewed LTWs as equity securities (*see* LTWX 233 at ¶¶ 62-68) is baseless. Dr. Chamberlain refers to supposed – though completely undocumented (TR3 at 200:1-4) – communications with market participants while she worked at Jefferies, most of whom she would not identify. (*Id*. at 200:5-16.) However, as Dr. Chamberlain ultimately admitted on cross-examination, her discussions with clients actually concerned how much she "thought the lawsuit was going to pay and when." (*Id*. at 202:19-203:2.) Her answers made clear that none of her communications with clients or market makers had anything to do with whether or not the LTWs were equity securities. (*Id*. at 201:1-206:8.) Indeed, Dr. Chamberlain conceded that whether or not the LTWs were payable in stock would not have been relevant during the time she was communicating with her clients. (*Id*. at 203:10-204:2.) Thus, she was essentially forced to admit that communications with her clients were not a basis for her opinion that LTWs are equity. Her attempt to salvage her unsupported opinion by falling back on a canned speech about an amorphous "totality of consideration" was vacuous and unavailing. (*Id*. at 204:3-13.)

Dr. Chamberlain's reliance on the equity analyst reports of Kevin Starke is equally specious. On two occasions, she referred to his graduate degree in ethics as being important to her. (*Id*. at 35:4-12, 223:12-17.) What apparently was not important to her was the fact that Mr. Starke had recommended to his clients that they buy PIERS, that his company makes a market in trading PIERS, and that a determination that the LTWs are liabilities would have a direct negative impact on the value of the PIERS. Nor does it appear that Dr. Chamberlain believed it was relevant that Mr. Starke's pronouncements were made during the pendency of, and as

commentary upon, this adversary proceeding – they were not the product of objective, pre-dispute analysis. (*Id.* at 224:24-227:2; LTWX 133.)

5. The Terms Of The Relevant Agreements Do Not Support Dr. Chamberlain's Opinion

At paragraphs 69 through 73 of her Report, Dr. Chamberlain opines that the terms of the various agreements support her view that the LTWs are conditional interests in common stock. However, her reading of the documents is incomplete and inaccurate and should be disregarded. Dr. Chamberlain states that the relevant documents, "define the Dime LTWs as conditional interests in the common shares of Dime or WMI as [Dime's] successor." (LTWX 233 at ¶ 69.) On cross examination, Dr. Chamberlain was forced to admit that there was no actual definition in the Warrant Agreements which refers to the LTWs as conditional interests in the common shares of Dime. (TR3 at 98:20-24.) Rather, that was a conclusion she drew (*id.* at 99:24-100:1) based on selectively misquoting the Warrant Agreements. (*Id.* at 100:22-101:17.) Tellingly, she took a clause of the Warrant Agreements concerning payment in stock out of context by omitting the crucial following phrases, "subject to adjustment as provided herein, upon terms and subject to the conditions herein set forth." (*Id.*) Indeed, she admits that the entire Adjustments section of the Warrant Agreement is nowhere addressed in her expert report, even though that is the heart of this case. (*Id.* at 107:5-7.) Nonetheless, she ultimately conceded that, under various circumstances, the Warrant Agreement requires adjustments that would make the LTWs payable in a currency other than common stock, including cash, other assets or other property. (*Id.* at 109:5-110:4.) And, significantly, she also ultimately conceded that the *purpose* of the Article IV Adjustments section was to ensure that LTW holders receive their net 85% value of the Anchor Litigation *in some form or another*. (*Id.* at 108:14-18.)

6. Dr. Chamberlain's Opinion That LTWs Are Equity Warrants And Do Not Share The Characteristics Of Liabilities Is Wrong

Dr. Chamberlain starkly contradicts her own rationale as to why LTWs purportedly are equity warrants. On her direct testimony, she stated that: "Certainly there was an exercise price. Certainly, there was an exercise period. And, in my view, they were derivative equity securities, contingent equity securities, due to the shared equity risk and due to the fact that there was an exercise period and a strike price." (*Id*. at 34:1-10.) This is exactly the opposite of what Dr. Chamberlain maintained in her expert report, in which she took pains to explain why LTWs were equity warrants ***despite not having*** a predetermined exercise price, number of shares or expiration date. (LTWX 233 at ¶ 78.) This flip-flop notwithstanding, the fact is that the LTWs have no exercise price and no expiration date. (TR1 at 78:16-79:21.) Thus, as Mr. Levine explained, they do not bear the typical indicia of an equity warrant. (*Id*. at 77:20-79:21.)

Dr. Chamberlain's further opinion that the LTWs are not liabilities was based primarily on her reliance on accounting literature that a liability is for a "transaction or other event obligating the entity" that has already happened. (LTWX 233 at ¶ 83, n.88.) However, Dr. Chamberlain is not an accounting expert (TR3 at 82:23-25) and she clearly was wrong about when the relevant "transaction or other event" obligating the entity actually occurred. That relevant event is when the LTWs were issued, almost 11 years ago; it is not when the future Trigger event occurs. (TR1 at 111:6-13.) If Dr. Chamberlain were right (which she is not) she would single-handedly have eliminated the term "contingent liabilities" from the financial lexicon. (TR3 at 209:15-23.) In the end, Dr. Chamberlain's testimony on this point disintegrated and, as described below, she struggled to distance herself from the accounting literature on which she had previously relied. (*Id.*)

7. Authoritative Accounting Literature Completely Undercuts Dr. Chamberlain's Opinion

During her deposition, and after discussing her reliance on accounting literature in her report, Dr. Chamberlain made the honest, straightforward concession that if the accounting literature indicated that LTWs should be treated as liabilities, it "certainly would" have an impact on her opinion. (LTWX 201 at 258:14-19.) And she reaffirmed this testimony at trial:

> Q. … What I am asking is was it important to you that you felt the accounting literature supported your conclusion that LTWs are not liabilities?
>
> A. It was one of the factors.
>
> Q. … If there was accounting literature that specifically indicated that LTWs should be treated as a liability that would have to impact your opinion, wouldn't it?
>
> A. It certainly would. Yes.
>
> Q. Do you remember being asked those questions and giving those answers?
>
> A. And I stand by it. It does.

(TR3 at 211:16-212:2.)

However, because it is now perfectly clear that the accounting literature indeed specifically indicates that LTWs should be classified as liabilities (*see* § I.A. above), Dr. Chamberlain was actually willing to do anything *but* stand by her prior sworn testimony. Rather, she testified repeatedly that her view now is that the accounting rules essentially do not matter at all because they are changeable. (*Id.* at 207:17-209:2, 210:21-211:7, 212:4-11.) And her testimony as to how her newly-contrived opinion (that accounting treatment does not matter)

reconciles with her previous statement (that definitive accounting literature "certainly would" impact her opinion) is convoluted to the point of absurdity. (*See, e.g.*, *id.* at 211:20-212:11.)[22]

But more importantly, Dr. Chamberlain's argument that accounting rules can change or might technically not apply to instruments issued before 2003 entirely misses the point. Technically correct accounting treatment is not the issue. The import of SFAS 150 is that the FASB specifically looked at how to properly classify warrants that have characteristics of both liabilities and equity. (TR1 at 75:25-77:19.) In trying to determine what is the economic essence of such instruments, the FASB, like Mr. Levine, concluded that the crucial factor was whether the instrument was payable in a variable number of shares (and thus delivered a fixed value), like the LTWs (and, therefore, was a liability), or a fixed number of shares and a variable value tied to the issuer's economic performance, like an equity warrant.[23] This critical distinction is exactly what Plaintiffs argue and what the evidence proves: that LTWs were intended to transfer value, not a particular number of shares. Accordingly, Dr. Chamberlain has no answer to the dispositive point that the FASB's analysis precisely matches Plaintiffs' position: that LTWs are liabilities because their economic essence is to deliver value to the holders.[24]

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[22] This gibberish testimony is reminiscent of Dr. Chamberlain's characterization of the importance of legal documents. She referred to various securities filings in her direct testimony and then on cross-examination concluded that equity analysts do not care what the legal documents say, and instead rely on public pronouncements such as press releases and analyst calls for their understanding of the financial instruments and products they cover. (TR3 at 117:11-25.)

[23] Notably, SFAS 150 did not constitute a change in the accounting treatment of securities with the characteristics of both liabilities and equity, but rather reflected a clarification to unify formerly disparate treatment of such securities. (TR2 at 49:21-23, 58:3-6.) Dr. Chamberlain's (erroneous) testimony concerning her belief (as an admitted non-expert on accounting issues) as to how the LTWs would be classified for accounting purposes under EITF-0019 was stricken from the record by the Court (TR3 at 79:5-13).

[24] Indeed, other than her quibbles about the effective date, Dr. Chamberlain did not even argue that LTWs should not be classified as liabilities under SFAS 150 or FASB 480.

II. Having Been Given To The LTW Holders, The Value Of The Anchor Litigation Cannot Be Taken Away From Them

WMI's bankruptcy did not change what already occurred eight years earlier: the LTW holders had received – as Dr. Chamberlain put it – an "ownership interest" in 85% of the net recovery of the Anchor Litigation. (LTWX 233 at ¶ 81.) This ownership interest was transferred to Dime's shareholders at the time the LTWs were issued and therefore belonged to them.

The LTW holders' beneficial interest in 85% of the net Anchor Litigation proceeds consequently is not the property of WMI's estate. "A bankruptcy estate includes all property of the debtor, ***but only to the extent of the debtor's equitable interest in such property***." *Official Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys. Inc.)*, 997 F.2d 1039, 1054 (3d Cir. 1993) (emphasis added). This principle is clearly spelled out in Section 541(d) of the Bankruptcy Code:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d). Because, according to WMI's own expert, the "ownership interest" in 85% of the net Anchor Litigation recovery was transferred to the LTW holders at the time of issuance, WMI's estate simply does not own that beneficial interest and should not be permitted to distribute it to other constituencies under its plan of reorganization.

The constructive trust remedy is related to the Section 541(d) construct. *See EBS Pension LLC v. Edison Bros. Stores, Inc. (In re Edison Bros, Inc.)*, 243 B.R. 231, 235 (Bankr. D. Del. 2000); *Fluor Enters., Inc. v. Orion Refining Corp. (In re Orion Refining Corp.)*, 341 B.R.

476, 483 (Bankr. D. Del. 2006). And the principles and intent of the constructive trust remedy are applicable here as an independent basis for the relief that Plaintiffs' seek.[25]

"A constructive trust is the formula through which the conscience of equity finds expression." *See Koreag, Controle Et. Revision S.A. v. Refco F/X Assoc., Inc. (In re Koreag, Controle Et. Revision S.A.)*, 961 F.2d 341, 354 (2d Cir. 1992). The key element for the imposition of a constructive trust is unjust enrichment. *Id*. Unjust enrichment "does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched. What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it.'" *Simonds v Simonds*, 45 N.Y.2d 233, 242, 408 N.Y.S.2d 359, 364 (N.Y. 1978) (*quoting Miller v. Schloss*, 218 N.Y. 400, 407, 113 N.E. 337, 339 (N.Y. 1916) (other citations omitted)).

Dime clearly intended to give up 85% of the value of the net Anchor Litigation recovery and to pass this value to the LTW holders. WMI inherited that obligation to pass along that value to LTW holders. WMI should not be permitted, "in equity and good conscience" to rewrite the past and erase the eight years that preceded its bankruptcy filing. The LTW holders had a beneficial, economic and expectancy interest in 85% of the net Anchor Litigation recovery. To strip them of that longstanding right would be completely unfair and should not be permitted by this Court.

III. WMI Has Breached The Warrant Agreements

Article IV of the Warrant Agreements requires "adjustments" if Dime or WMI underwent a major corporate merger, recapitalization or other event, before a "Trigger" (as defined in the

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[25] Even though Plaintiffs are entitled to the constructive trust remedy, they do not require it to prevail. Plaintiffs are entitled to the declaratory judgment they seek because, *inter alia*, WMI simply does not own the beneficial interest in 85% of the net Anchor Litigation proceeds that it seeks to give to other constituencies.

Warrant Agreements) occurred. (LTWX 1 at Art. IV; LTWX 4 at Art. IV.) Article IV provides that adjustments will be made to effectuate the intent and principles underlying the LTWs – *i.e.*, to ensure that the LTW holders actually receive the value that had already been transferred to them; not that they get paid in any particular kind of currency. The Warrant Agreements expressly provide for this transfer of value in a number of forms of currency under various circumstances, including: (a) securities other than Dime common stock; (b) other property; and/or (c) cash. (*See* LTWX 1 at §§ 4.2, 4.3 & 4.4.) In particular, Section 4.4 recognizes that the Warrant Agreements could not anticipate every type of corporate event that might occur before a Trigger and obligates the WMI Board to adjust the LTWs in order to preserve the essential intent and principles of the Warrant Agreements. Under the circumstances here, Article IV requires that LTW holders receive currency other than common stock.

A. The Warrant Agreements Should Be Construed Against WMI

The Court has already ruled that the Warrant Agreements are ambiguous. (LTWX 219 at 9-12.) In resolving these ambiguities, the terms of the Warrant Agreements should be construed against WMI, because WMI and its predecessor, Dime, drafted the agreements. "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 (N.Y. 1984); *see also Jacobson v. Sassower*, 66 N.Y.2d 991, 993, 499 N.Y.S.2d 381, 382 (N.Y. 1985) ("In cases of doubt or ambiguity, ***a contract must be construed most strongly against the party who prepared it,*** and favorably to a party who had no voice in the selection of its language." (emphasis added)); *Coliseum Towers Assocs. v. County of Nassau*, 2 A.D.3d 562, 565, 769 N.Y.S.2d 293, 296-97 (N.Y. App. Div. 2003) (same). Accordingly, even if the extrinsic evidence were inconclusive as to the parties' intent (which, as

demonstrated herein, it is not) the doctrine of *contra proferentem* requires that the ambiguities in the Warrant Agreements be construed against WMI.

B. The Warrant Agreements Should Be Construed In Accordance With Extrinsic Evidence That The Fundamental Purpose Of The LTWs Was To Transfer Ownership Of 85% Of The Net Anchor Litigation Proceeds

The Court has already held that it "agrees with the LTW holders that an interpretation of the [2003] Warrant Agreement (and the original Warrant Agreement executed by [Dime]) requires consideration of outside sources." (*See* LTWX 219 at 9.) Where, as here, a contract is ambiguous, the court "must rely on extrinsic evidence to discern the intent of the parties." *A.J. Temple Marble & Tile, Inc. v. Long Is. R.R.*, 256 A.D.2d 527, 528, 682 N.Y.S.2d 873, 874 (N.Y. App. Div. 1998); *see also 67 Wall St. Co. v. Franklin Nat'l Bank*, 37 N.Y.2d 245, 249, 371 N.Y.S.2d 915, 918 (N.Y. 1975).

As demonstrated above, the extrinsic evidence here clearly demonstrates that the fundamental purpose of the LTWs was to transfer to the holders 85% of the net Anchor Litigation recovery. (*See*, *supra*, Factual Background § B.3.) This extrinsic evidence of the overall intent to transfer value affects the interpretation of Article IV and mandates adjustments so that the LTW holders receive such value.

C. WMI Breached Sections 4.2(b) And 4.2(c) Of The 2000 Warrant Agreement

1. Section 4.2(b) Of The Warrant Agreement Requires That LTW Holders Receive The Same Consideration As Dime Shareholders

Under the terms of the 2000 Warrant Agreement, LTW holders were to receive the same merger consideration as that given to Dime shareholders. Specifically, section 4.2(b) of the Warrant Agreements provides:

> The proportion and type of capital stock, other securities or property that the holders will have the right to receive in the circumstance set forth in Section 4.2(a) will be the same proportion

> and type as one share of Common Stock was exchanged for or converted into as a result of such Combination. . . .

(LTWX 1 at § 4.2(b).) Thus, Section 4.2(b) requires that the LTW holders be given precisely what the Dime common stockholders received in any Combination. In the Dime/WMI merger, Dime shareholders received a cash election. That is what LTW holders are entitled to.

There is no question that the Dime/WMI merger constituted a Combination. In the Agreement Concerning Litigation Tracking Warrants™ And Replacement Warrant Agent, dated January 4, 2002 ("January 4, 2002 Agreement"), WMI states that the Dime/WMI merger "will constitute a Combination," and that "Section 4.2 of the Warrant Agreement sets forth the rights of the holders of Dime's Litigation Tracking Warrants™ in the event of a Combination." (LTWX 2 at 1.) Importantly, in this same agreement, WMI also expressly obligated itself to satisfy Section 4.2 of the Warrant Agreement and to make such adjustments as necessary to ensure that the LTW holders received that value of the Anchor Litigation. (*Id.*)

The Merger Agreement (LTWX 12) is also entirely consistent with WMI's obligation to provide LTW holders with precisely the same consideration upon a trigger event that Dime shareholders received upon the merger. The Merger Agreement expressly provided that LTW holders would receive "Merger Consideration,"[26] the defined term that described the cash election that the Dime common stockholders would receive in the merger.[27] As set forth in Section 2.10 of the Merger Agreement: "At and following the Effective Time, **each outstanding [LTW]** issued by Dime pursuant to the Warrant Agreement . . . **shall entitle the holder thereof to receive upon exercise of such LTW** in accordance with the terms of the Warrant Agreement

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[26] Approximately 33% of the Merger Consideration received by Dime Shareholders was in the form of cash. (*See* LTWX 233 at ¶ 42.)

[27] (*See also* LTWX 195 at 96:10-97:17.)

Merger Consideration consistent with the terms thereof." (LTWX 12 at § 2.10 (emphasis added).) 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…." (*Id*. at § 2.15.)

That the provisions of the Merger Agreement fulfilled Dime's obligations under Section 4.2(b) was not a coincidence; rather, a June 24, 2001 draft of the Merger Agreement proves that Section 2.10 was drafted ***precisely to account for Dime's obligations under Section 4.2 of the Warrant Agreement***. The draft, which was marked up by Dime's counsel, notes that the prior iteration of Section 2.10 did not reflect what is required by Section 4.2 of the 2000 Warrant Agreement and suggests that it would be easiest to reference that section. (LTWX 89 at STB 06574.) The final version of Section 2.10 effectuated this comment and satisfied the requirements of Section 4.2 of the 2000 Warrant Agreement by providing that LTW holders would receive "Merger Consideration" upon exercise.

Several witnesses confirmed this purpose of 4.2(b) of the 2000 Warrant Agreement. Sarkozy testified that the adjustments section, in the context of the Dime/WMI merger, was intended to provide that "whatever currency was received by the shareholder of Dime, would be the currency utilized substantively to settle the [LTW]." (LTWX 195 at 96-97.) Sarkozy also testified that if the merger "was stock, or cash, or all cash, then the way the warrant would be settled would be adjusted, according to the way the acquisition had been structured." (*Id*. at 97. *See also* LTWX 193 (Eitel Dep. Tr.) at 142:12-19 ("I think [4.2(b)] speaks for itself. The proportion and type of capital stock, other securities ***or property*** that would be received in exchange for the warrant, when exercised for its trigger . . . ***Could be something other than common stock***.") (emphasis added); TR1 at 98:15-99:5; TR3 at 109:5-110:4.)

The treatment of the Golden State LTW holders following a merger further supports LTW holders' rights to receive an adjustment providing them with value in a currency other than common stock of WMI following a cash/stock merger. After Golden State's merger for a combination of cash and stock, and upon the occurrence of a trigger event, the Golden State LTW holders also received a combination of cash and stock designed to reflect the proportional consideration that Golden State shareholders had received in the merger – not just common stock of the merged entity. (LTWX 61 at 1.)

In *R.A. Mackie & Co., L.P. v. PetroCorp Inc.*, 329 F. Supp. 2d 477 (S.D.N.Y. 2004), the Court had to determine the rights of a warrant holder (with a similar clause to Section 4.2(b)) as a result of a merger. 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 the merger based on the contractual rights set forth in the warrant). As in *Mackie*, the LTW holders' entitlement to a cash election did not end when the Dime/WMI merger closed.[28] Like the situation in Golden State, *Continental Airlines*, and *Mackie*, Dime LTW holders' right to the same merger consideration (*i.e.*, cash) offered to Dime shareholders as part of the WMI/Dime Combination became vested when the merger closed, and LTW holders still have that right since the Trigger event has not yet

[28] Dr. Chamberlain was wrong on this issue and had no evidentiary basis for her view.

occurred. WMI's current attempt to strip LTW holders of the cash election is a breach of the Warrant Agreement.[29]

2. The LTW Holders' Right To An Election Was Never Revoked

Despite clear evidence of the intent to give the LTW holders an election, WMI claims that the LTW holders' contractual right to an election was taken away. Defendants, however, did not introduce any evidence indicating that anyone ever decided to revoke the holders' right to an election. Rather, the evidence actually indicates that no one at WMI even considered this issue.

Richard Sohn was an in-house lawyer at WMI, who had been on the job for approximately one month when he was given the assignment to review the 2000 Warrant Agreement (LTWX 1) and draft any amendments necessary as a result of the Dime/WMI merger. (LTWX 198 at 20:11-23, 22:20-23:8.) Sohn was designated as WMI's Rule 30(b)(6) deposition witness as the person most knowledgeable to testify as to all matters relating to the 2003 Warrant Agreement. (*Id.* at 6:24-7:6.) ***He testified that, as the drafter of the 2003 Warrant Agreement, it was never his intention, nor, so far as he knew, the intention of anyone at WMI, to eliminate a cash election that the LTW holders otherwise had.*** (*Id.* at 78:9-13.) Sohn was not aware of any discussion regarding the tax implications to the LTW holders based on giving them a cash election (*id.* at 42:8-15), and was not aware of any WMI Board review of the tax implications to the LTW holders based on giving them a cash election (*id.* at 66:4-15). In short, there is no document or testimony to suggest that there was ever a decision to eliminate the LTW holders' cash election.

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[29] Should the Court determine, even in the face of all this evidence, that section 4.2(b) remains ambiguous as to its intent, for the reasons stated in Section III.A. hereof, this ambiguity should be construed against WMI as the drafter of the Warrant Agreements.

The various public filings Defendants rely on for their election revocation argument prove nothing to the contrary. In general, these documents simply state the obvious: that *to the extent* holders were entitled to Dime stock, they would now receive WMI stock, since Dime stock would no longer exist. These documents do not suggest an intentional decision by WMI to breach the clear terms of the 2000 Warrant Agreement. Indeed, most of these documents cross-reference the Warrant Agreements, and thus do not support any intentional revocation or breach theory.

For example, WMI wrongly claims that a notice purportedly sent to LTW holders before the Dime/WMI merger clearly revokes LTW holders' right to a cash election. This notice states, in relevant part, that:

> Following the closing of the Merger, each outstanding LTW will entitle its holder to receive, upon exercise of such LTW in accordance with the terms of the Warrant Agreement, shares of Washington Mutual common stock. Under the terms of the Merger Agreement, each share of Dime common stock will be converted into either shares of Washington Mutual common stock or cash, in each case subject to cash/stock election and equalization procedures.

(*See* LTWX 41 at 1.) As an initial matter, there was no witness involved in the drafting of this notice that testified at trial. The notice is clear that what the LTW holders will get will be "in accordance with the terms of the Warrant Agreement." It then sets forth what the Dime shareholder received, which would only be relevant to the LTW holders to whom the notice was addressed if they were entitled to receive the same thing. There is no language in the notice that says that LTW holders are being deprived of their cash election right. Further, as explained in Section III.C.3. hereof, Dime and WMI were not entitled to amend the 2000 Warrant Agreement to remove the LTW holders' right to a cash election without the LTW holders' consent, which

was never sought nor obtained. The fact that deprivation of an election would have been a breach of contract makes it further unlikely that Dime or WMI intended to do so.

WMI also claims that a series of SEC filings from the time of the merger announcement communicate the intent to remove the LTW holders' right for a cash election. (*See generally* LTWX 15-17, 19-22.) These documents, however, have several things in common that negate WMI's argument. First, as with the purported notice to LTW holders, none of these documents even discuss the LTW holders' right to a cash election at all, never mind WMI's purported intent to remove an election. Second, almost all of these documents provide that the treatment of LTWs will remain in accordance with the terms of the 2000 Warrant Agreement. (*See, e.g.,* LTWX 17 at 3 ("Dime's Litigation Tracking Warrants (TM) will become exercisable for Washington Mutual shares upon settlement or final judgment of the claim ***and will remain in accordance with their terms***.") (emphasis added).) Third, these documents make clear that the receipt of WMI stock upon completion of the merger was simply as a substitute to the receipt of Dime stock. They do not state that stock is the only currency and will be used in lieu of a cash election which otherwise is provided for in the 2000 Warrant Agreement. (*See, e.g.,* LTWX 19 at 41 ("Holders of Dime's litigation tracking warrants will be entitled to receive, upon exercise of the litigation tracking warrants after completion of the merger, ***in accordance with the terms of the warrant agreement governing the issuance of the litigation tracking warrants***, for each litigation tracking warrant they hold, shares of Washington Mutual common stock ***instead of shares of Dime common stock***.") (emphasis added).)

In any event, WMI's claim that it revoked the LTW holders' right to an election at some point in 2001 during the merger announcement process ignores the obvious point that these documents were distributed and/or filed with the SEC ***before*** the execution of the January 4,

2002 Agreement, which explicitly provided that LTW holders have their rights under section 4.2(b), which, in turn, would give LTW holders a cash election.[30] Moreover, the January 4, 2002 Agreement provides that the terms of the 2000 Warrant Agreement were to remain unchanged and in full force and effect. (LTWX 2 ¶ 5). Therefore, whatever rights the LTW holders had under the 2000 Warrant Agreement as a result of the Dime/WMI merger were expressly confirmed – not revoked.

Furthermore, as with the various filings, nothing in the amended Warrant Agreements themselves expressly refer to the cash election right being revoked. And the 2003 Warrant Agreement is virtually the same as the 2000 Warrant Agreement so that any intent to remove such right is far from obvious. Moreover, neither the alleged 2002 Warrant Agreement nor the 2003 Warrant Agreement refers to or purports to repeal the January 4, 2002 Agreement which explicitly confirms the LTW holders' Section 4.2(b) rights, which provide for LTW holders to get what Dime shareholders got – a cash election.[31]

Given WMI's failure to present any testimony about WMI's purported decision to remove LTW holders' right to an election, and given Mr. Sohn's testimony that the 2003 Warrant Agreement (and the purported 2002 Warrant Agreement) were not intended to remove an election, Plaintiffs' interpretation of what occurred is the only sensible one – *i.e.,* that taking

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[30] It is noteworthy in this regard that WMI's argument is based on the factual predicate that the decision to modify LTW holders' rights occurred ***prior*** to the Dime/WMI merger. (*See* TR4 at 127:8-20; LTWX 234 at no. 36.) Therefore, public filings made after the merger closed are irrelevant.

[31] Paragraph 2 of the January 4, 2002 Agreement states as follows:

> In satisfaction of Section 4.2(d) of the Warrant Agreement, and subject to the completion of the Merger, Washington Mutual hereby (i) confirms the rights of the Holders pursuant to Section 4.2 of the Warrant Agreement, including without limitation Section 4.2(b) thereof, and (ii) agrees to make adjustments as nearly equivalent as may be practicable to the adjustments provided for in Article IV of the Warrant Agreement. (LTWX 2 at ¶ 2.)

away the LTW holders' right to an election was never even considered.[32] Thus, WMI never revoked the LTW holders' right to an election prior to bankruptcy. Rather, WMI has now breached the Warrant Agreements by making clear their intent to do so as part of its plan of reorganization.

3. Section 7.2 Does Not Permit WMI To Eliminate The Cash Election Without LTW Holders' Consent, And No Such Consent Was Ever Sought Or Given

If WMI had tried to amend the Warrant Agreement pursuant to Section 7.2, it would have been a clear breach of the 2000 Warrant Agreement. Section 7.2 of the 2000 Warrant Agreement allows for only ministerial changes to the 2000 Warrant Agreement and expressly requires the LTW holders' consent for any modification which would have an "adverse effect" on their interests. (LTWX 1 at § 7.2.) The Registration Statement for the Dime LTWs expressly provides that LTW holder consent will be needed for any decrease in "other securities or property" issuable upon the exercise of the LTWs. (LTWX 7 at 19-20). An elimination of a cash election, otherwise required by Section 4.2(b) of the 2000 Warrant Agreement, is clearly adverse to the LTW holders' interests and is a decrease in property (cash) otherwise due to the LTW holders.

Even if there was no express provision in the Registration Statement which prevented WMI from decreasing the cash due to the LTW holders, any decision to revoke their cash election would have certainly had an "adverse effect" on them for several reasons, and therefore, would not have been permissible without the consent of the LTW holders. *First,* in the

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[32] If revocation of the LTW holders' right to an election had actually been intended, several witnesses under WMI's control could have testified. It speaks volumes that WMI did not present the testimony of Fay Chapman, who allegedly signed both agreements and who would have understood the intent behind such documents. WMI also did not present the testimony of anyone at Heller Ehrman, WMI's outside counsel who was responsible for, *inter alia*, working with WMI in amending the 2000 Warrant Agreement. (LTWX 198 at 25:22-26:2.)

Dime/WMI merger, holders of approximately 24% of the shares made the cash election. (LTWX 233 at ¶ 41.) That magnitude of electing shareholders demonstrates that having a cash election was a valuable right, so revocation of that right would therefore have had an "adverse effect." *Second*, Dr. Chamberlain discussed a potential WMI stock movement for an approximate 40-72 day interval from the Determination Date (as defined in the 2000 Warrant Agreement) and the receipt by the LTW Holders of shares of tradable stock. (TR3 at 194:24-195:24.) A cash election would totally eliminate any concern relating to stock movement during this short time interval. *Third*, Sarkozy explained the benefit of a cash election given to shareholders in the context of the Dime/WMI merger. He told the Dime Board that the impact to the Dime shareholders of having a cash election is to "reduce the impact to Dime stockholders of fluctuations in Washington Mutual's stock price between the time of announcement and the closing of the Potential Transaction." (LTWX 91 at 7.) That is the same salutary benefit that the LTW Holders are entitled to receive from a cash election. *Fourth*, Professor Pomp testified that the "right to an election" had a value which needed to be calculated. (TR2 at 131:4-10).[33] By definition, taking away that "value" would have had an "adverse effect" on the LTW holders. Accordingly, removal of the LTW holders' right to an election would have obviously been an "adverse effect" to them, and it thus would have been a breach to revoke their election without consent.

4. Professor Pomp's Testimony Was Neither Relevant Nor Reliable

In response to Plaintiffs' Section 4.2(b) argument, WMI offered the testimony of Professor Pomp, in an attempt to demonstrate that there might have been a tax rationale for the purported removal of the LTW holders' cash election. But Professor Pomp's testimony as to the

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[33] Professor Pomp also had to admit that you cannot override a contractual provision (Section 4.2(b)) because of a tax concern that was inherent to the provision from inception. (TR2 at 146:2-10.)

tax impact of the cash election which LTW holders were entitled to, based on the Merger Consideration offered by WMI to the Dime shareholders, was premised on the following false, intertwined assumptions: (a) there was an intention to deprive the LTW holders of the cash election required by Section 4.2(b) of the 2000 Warrant Agreement, and WMI eliminated the cash election due to the LTW holders based on tax concerns for the LTW holders; and (b) WMI was authorized to eliminate the LTW holders' cash election without their consent based on the amendment provision (Section 7.2) of the 2000 Warrant Agreement. (LTWX 4 at §§ 4.2(b) and 7.2)

a. There Was No Intention To Eliminate The Cash Election For Tax Reasons

As set forth in Section III.C.2. above, there is no evidence of any decision to eliminate the LTW holders' cash election. Sohn's testimony, which came after Pomp's report, eviscerated any factual predicate for Pomp's thesis. Strikingly, even WMI's attorney had to concede that the record is devoid of any basis to support his contention that the cash election was purposefully eliminated by WMI for tax reasons. (TR2 at 124:9-15). WMI nonetheless still called Pomp as a witness to testify under the assumption that WMI's concocted theory was possible. Admittedly, the LTWs were issued by Dime in calendar year 2000 with tax considerations in mind. From that starting point, however, WMI concedes that it is making up the rest of the story. (*Id.*) WMI takes the quantum leap (without any factual support) that somehow in 2002, an unknown person at a different organization (WMI), at an unknown place and time, cogitated on tax issues relating to the LTW holders and decided that the LTW holders should be deprived of their contractually-given cash election, for their own alleged tax benefit. WMI tries to tie together its concocted story with a bogus legal theory (as shown in the prior section); thus, making the entire Pomp testimony a farce.

b. Pomp's Irrelevant Testimony Was Not Even Reliable

Professor Pomp gave two opinions. The first opinion was the perceived tax benefit for transferring the value of 85% of the net recovery in the Anchor Litigation to the LTW holders in the form of a warrant. The LTW holders agree that CSFB marketed the LTW product to Dime as an "improvement" to the LPCs because of CSFB's contention that LTWs (as compared to LPCs) were less likely to cause immediate tax consequences, upon receipt of LTWs, for the holders thereof. Whether CSFB was correct or not in its tax assumption (which Pomp superficially opined upon), is irrelevant to this case.[34] Pomp's second opinion was equally unreliable. He states that if the LTW holders received an election it would have to be valued and that would have a tax consequence. Pomp's analysis abruptly stops at this point. Pomp has no clue as to how to value the election, and said it would be subject to "substantial uncertainty." (TR2 at 156:14-20.) He said no one would have him on the team to do that type of valuation. (*Id.* at 156:10-13). When asked whether the value of the election would be *de minimis*, he had no clue. (*Id.* at 177:14-19.) Pomp was only aware of two entities that issued LTWs (Dime and Golden State). (*Id.* at 161:1-3.) However, in writing his report, Pomp did not look to see what occurred at Golden State. (*Id.* at 160:4-6.)[35] Pomp ultimately agreed that business decisions get

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[34] Pomp's analysis on this point was superficial. He claims to have reviewed the Sullivan & Cromwell tax opinion which is included in the LTW Registration Statement (LTWX 7.) The law firm's opinion states at the outset that the issue "is uncertain because of the absence of any direct authority." (*Id*. at 20.) Pomp agrees that there are no cases or direct authority on the subject but downplays Sullivan & Cromwell's warnings as to the reliability of its tax opinion based on "lawyer conservatism." (TR2 at 179:25-180:3.) Where Pomp demonstrates his shoddy analysis on this issue is his failure to notice that Warburg Pincus, the largest shareholder of Dime, received no LTWs. (TR2 at 180:4-10.) The fact that not all Dime shareholders got LTWs could very well have impacted whether the LTWs were actually distributed on a "tax-free" basis. Pomp says he never considered the issue. (TR2 at 180:11-15.) The Sullivan & Cromwell opinion, which Pomp claims to have reviewed, actually discusses this issue in the Alternative Characterization section of its opinion (LTWX 7 at 21.) Sullivan and Cromwell highlights that some of the Dime stockholders would not receive LTWs, and concludes "there is no authority directly on point," and urges LTW holders to consult their own tax advisers on the issue. (*Id*.)

[35] Dr. Chamberlain held Golden State LTWs, and conveniently forgot everything about the cash she received at the trigger event (TR3 at 135:10-136:12, 137:4-9, 138:4-9), and whether amending the LTWs in 2002 to provide

made for reasons other than tax concerns, and he had no idea whether WMI actually attempted to eliminate the cash election for tax reasons or otherwise. (*Id.* at 185:11-14.)

In sum, WMI's concocted story is based on an underlying false premise attached to a bogus legal theory. The role of expert witnesses is not to make up reasons where the record is devoid of any evidence. Rather, the absence of evidence itself speaks volumes. Here, the record is clear that what WMI theorized happened, never occurred. WMI's attempt to go down a road that leads nowhere is illustrative of the efforts it has made to deprive the LTW holders of the rights and claims given to them by Dime.

5. WMI Breached Section 4.2(c)

Section 4.2(c) of the Warrant Agreements provides that:

> **In the event of a Combination where consideration is payable to holders of Common Stock in exchange for their shares solely in cash, the holders will have the right to receive upon exercise of each Warrant cash** in an amount equal to the Adjusted Litigation Recovery divided by the Maximum Number of Warrants, less the Exercise Price (if any).

(LTWX 1 at § 4.2(c) (emphasis added).) Importantly, this section refers simply to "holders" of Common Stock, not a specific number of holders or all holders. Here, since some holders of Dime common stock received consideration for their shares "solely in cash," this section expressly provides that "the holders," defined as the LTW holders, also have "the right to receive upon exercise of each Warrant cash."[36] In seeking to deprive the LTW holders of their rights, WMI has breached its obligations under section 4.2(c) of the Warrant Agreements.

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cash consideration to LTW holders on a future trigger event had a tax consequence. She did say that Professor Pomp was "eloquent" but, of greater significance, she did not understand what he said. (*Id.* at 137:24-138:3.)

[36] (*See, e.g.*, LTWX 233 at ¶ 41, saying that holders who elected cash got cash.)

D. WMI Breached Sections 4.2(d) And 6.3 Of The 2003 Warrant Agreement In Approving The Global Settlement

1. The Sale Of WMI's Assets To JPMorgan Constituted A Combination

Under the 2003 Warrant Agreement, in case of a Combination, WMI is required to cause its Successor Company to assume the obligations to the LTW holders. "Combination" is defined to include a sale of "substantially all" of the assets of WMI. (LTWX 4 at § 1.1.) The Global Settlement constitutes a sale of substantially all the assets of WMI within the meaning and intent of the 2003 Warrant Agreement. Thus, WMI was required to cause JPMorgan to assume the LTW obligations. By structuring the Global Settlement to be a sale of the Anchor Litigation to JPMorgan without the LTW obligations, WMI breached Section 4.2(d) of the 2003 Warrant Agreement. (*See id.* at § 4.2(d).) WMI also breached Section 6.3 of the Warrant Agreement which required Washington Mutual Bank or its successor to retain control over the Anchor Litigation. (*See id.* at § 6.3.)[37]

WMI simplistically refers to the sale of assets by WMI to JPMorgan as being part of the Global Settlement without recognizing that the sale is inextricably tied to the Global Settlement itself, and the Global Settlement is inextricably tied to the Plan. As a result, when the sale to JPMorgan is consummated, substantially all of WMI's assets will be distributed to its creditors and equity security holders (in excess of $7 billion). (TR4 at 45:17-20.) The net result of all of these intertwined transactions is: (a) WMI will no longer be a bank holding company, which was its primary business prior to WMI's bankruptcy filing; (b) WMI will have effectively liquidated or will be liquidating all of its assets other than what it transfers to the Reorganized Debtor; (c)

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[37] The Anchor Litigation is not supposed to be split off from the entity that obligated itself to the LTW holders under the 2003 Warrant Agreement. That is why Section 6.3 of the Warrant Agreement requires that Washington Mutual Bank or its successor retain control over the Anchor Litigation. Even Mr. Goulding testified

the source of the cash proceeds being paid under the Plan primarily emanate from the Global Settlement which are the sale proceeds paid by JPMorgan to WMI; and (d) the Reorganized Debtor will only retain (other than a net operating loss carry forward) WMMRC, an insurance subsidiary in wind-down mode, worth less than $200 million (*id*. at 51:16-17).

2. Case Law Supports Plaintiffs' Position That A Sale Of Substantially All Assets Occurred

The issue of whether a sale constitutes a sale of "substantially all assets" comes up, *inter alia,* in the non-bankruptcy context, in deciding whether a particular transaction requires a shareholder vote. (*See* DEL. CODE ANN. tit. 8, § 271.) The general test is whether the assets to be sold are (a) quantitatively vital to the operation of the corporation, and (b) substantially affect the existence and purpose of the corporation. *Gimbel v Signal Cos., Inc*., 316 A.2d 599, 606 (Del. Ch. 1974), *aff'd*, 316 A.2d 619 (Del. 1974). The two *Gimbel* factors have been interpreted to mean that the qualitative factor asks the court to consider whether the sale substantially affected the existence and purpose of the corporation, and that the quantitative factor involves a determination of whether the sale involved assets quantitatively vital to the operation of the corporation. *See In re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig.*, 810 A.2d 351, 371 (Del. Ch. 2002).

The inquiry of whether a sale is one of "substantially all assets" is fact intensive and generally case specific. The following cases are illustrative: *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996) (sale of 68% of assets is a sale of substantially all assets); *Winston v Mandor*, 710 A.2d 835, 843 (Del. Ch. 1997) (sale of 60% of company's net assets was a sale of substantially all assets); *Katz v. Bregman*, 431 A.2d 1274,1275-76 (Del. Ch. 1981) (sale of 51%

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that it was logical to have the entity that controls the Anchor Litigation also be the entity to have the obligation to the LTW holders. (TR4 at 65:16-24.)

of assets, 45% of sales revenues, and 52% of net operating income is a sale of substantially all assets).

Generally, in deciding whether a sale is of "substantially all assets," the factors include: (i) whether the corporation is retaining other significant assets; (ii) whether the retained assets are profitable with expectations of growth; (iii) whether the corporation will be economically viable after the sale; and (iv) whether the equity holders will be left with a qualitatively different investment after the sale.

Applying those factors to the sale of assets contained in the Global Settlement, there is no doubt that the sale to JPMorgan constitutes a sale of substantially all of the assets of WMI. As noted, after the sale is consummated, all that is left is the Reorganized Debtor, which will hold the stock of a self-liquidating insurance subsidiary worth approximately $200 million. WMI will have distributed over $7 billion of cash to its creditors, most of which is derived from the value received as part of the Global Settlement. JPMorgan did not simply give this money to WMI under the Global Settlement for no consideration. This value of approximately $6.5 billion was transferred to WMI in exchange for more than $7 billion of assets received by JPMorgan from WMI pursuant to the sale contained in the Global Settlement.

WMI's argument that the sale is not really a sale is fiction. WMI asked the Court for "free and clear of liens, claims and interests" findings that are part of a sale structure, and it asked the Court for a Section 1146(a) transfer tax exemption which is part of a Section 363(f) sale structure. WMI simply cannot ask for those benefits which are derived from a sale structure, but then also ask the Court to ignore that it is a sale which is being approved.

3. Goulding's Testimony Supports Plaintiffs' Position That Sections 4.2(d) And 6.3 Were Breached

At trial, Jonathan Goulding testified and offered a demonstrative relating to the Global Settlement (the "Global Settlement Demonstrative"). Goulding's testimony and the Global Settlement Demonstrative actually support the LTW holders' position regarding WMI's breach of Section 4.2(d) of the 2003 Warrant Agreement.

Goulding admitted that the Global Settlement included a sale of WMI's assets. He contended, however, that the Global Settlement is not a sale of "substantially all [of WMI's] assets." (TR4 at 78:12-20.) The Global Settlement Demonstrative introduced by WMI at trial (*see* LTW-DX) did not directly address this issue for it failed to describe *any* of the assets being *sold* by WMI to JPMorgan. Rather, the Global Settlement Demonstrative focused solely on the value of the assets *received* by WMI as a result of the Global Settlement. And, from that perspective, the Global Settlement Demonstrative supports the LTW holders' position that the Global Settlement is a sale of substantially all of WMI's assets. The Global Settlement Demonstrative shows that before the Global Settlement, WMI has undisputed assets of approximately $1 billion. By virtue of the Global Settlement and the sale contained therein, WMI will then have undisputed assets of approximately $7.5 billion. In other words, by virtue of the transactions included in the Global Settlement, WMI's undisputed assets, substantially cash representing the sale proceeds, will have increased by 650%.

Goulding admitted that the concept of using a Section 363 structure came from JPMorgan. (*Id*. at 35:4-6.) He admitted that the Section 363(f) framework: (a) allowed WMI to transfer certain assets, including the Anchor Litigation, free and clear of liens, claims and encumbrances of third parties, including the LTW holders (*id.* at 34:24-35:3); and (b) allowed WMI to receive a Section 1146(a) finding that the transfers made pursuant to the Global

Settlement would be exempt from any transfer taxes (*id.* at 34:19-23). Goulding further agreed that the definition of "363 Sale and Settlement" in the Global Settlement Agreement listed many assets in which WMI was *selling* its interests pursuant to Section 363 of the Bankruptcy Code. (*Id.* at 32:11-16, 32:23-33:4.) To the extent Goulding could calculate the value, the value of the assets (TPS, Tax Refunds, Anchor Litigation, etc.) sold to JPMorgan (in excess of $7 billion) was more than the value of the assets that Goulding stated WMI would receive as part of the Global Settlement. (*Id*. at 36:20-42:9.)[38]

When Goulding was asked what was the value of certain assets being sold to JPMorgan (*i.e.*, BOLI-COLI, pension plan, intellectual property), he could not say. (*Id*. at 39:4-8, 39:21-24.) When asked what the aggregate amount of the value of assets being transferred to JPMorgan under the Global Settlement was, he had no idea. (*Id*. at 42:10-16.) When asked what percentage of assets would need to be transferred to JPMorgan in order for it to be a sale of substantially all of the assets, Goulding had no idea. (*Id*. at 75:24-76:8.) When asked who had the better argument with regard to various disputed assets which were part of the Global Settlement, Goulding either said that would be a legal conclusion which he could not competently testify to (*id.* at 69:16-21, 73:1-9), or his information was based on attorney conversations which he would not reveal (*id*. at 66:13-18, 67:13-16), or that the whole issue was approached on a "holistic" basis and could not be broken down more precisely (*id*. at 81:3-24). All of these non-responses form the basis of Goulding's meritless conclusion that the sale in the Global Settlement was not a sale of substantially all assets of WMI.

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[38] In the JPMorgan Adversary Proceeding, WMI claimed to own the Anchor Litigation, and that it was not owned by JPMorgan as the purchaser of assets of Washington Mutual Bank. As a result, Washington Mutual Bank's receivership is irrelevant, and WMI was required as part of the sale to have the Successor Company assume LTW obligations. Its failure to do so was a breach of Sections 4.2(d) and 6.3 of the 2003 Warrant Agreement.

E. Defendants Breached Section 4.4 Of The 2003 Warrant Agreement

1. WMI And Its Board Breached Their Mandatory Duty To Make Adjustments Pursuant To Section 4.4

Section 4.4 of the 2003 Warrant Agreement captures all "other events" not expressly contemplated by the rest of Article IV that could deprive the LTW holders of the value that was transferred to them at the time of issuance. Section 4.4 of the 2003 Warrant Agreement imposes a duty on WMI's Board to act in "good faith" to "fairly and adequately protect the rights" of LTW holders in accordance with the "intents and principles" of Article IV. Section 4.4 of the 2003 Warrant Agreement provides:

> If any event occurs as to which the foregoing provisions of this Article IV are not strictly applicable or, if strictly applicable, would not, in the good faith judgment of the Board, fairly and adequately protect the purchase rights of the Holders of the [LTWs] in accordance with the essential intent and principles of such provisions, then the Board may make, without the consent of the Holders, such adjustments to the terms of this Article IV, in accordance with such essential intent and principles, as will be reasonably necessary, in the good faith opinion of such Board, to protect such purchase rights as aforesaid.

(LTWX 4 at § 4.4.)

WMI has taken the position that the word "may" means that Section 4.4 is permissive. In other words, WMI's Board could arbitrarily ignore Section 4.4; the Board, in effect**,** does not need to make – or even consider making – an adjustment, even if an adjustment is necessary to "adequately protect the rights of the holders."

Plaintiffs argued on summary judgment that the word "may" does not absolve WMI's Board of responsibility to protect the rights of LTW holders; rather, it merely establishes that WMI's Board would not have to solicit the consent of the LTW holders to make the requisite adjustment. This reading is based on the language of Section 4.4, in which the term used is not just "may," it is "may make," and it is followed by the phrase "without the consent of the

Holders…." "May make," in this context, is logical because the consent of the holders otherwise would have been required.[39]

The Court has already rejected Defendants' argument that the meaning of this provision is unambiguous. (LTWX 219 at 10-12.) And the extrinsic evidence proves that Defendants' interpretation is wrong and Plaintiffs' interpretation, that Section 4.4 is mandatory, not permissive, is correct.

As set forth at length above, the purpose of the LTWs, and thus the intent of the parties to the Warrant Agreements, was unquestionably to provide the LTW holders with 85% of the net proceeds of the Anchor Litigation. Any ambiguity in Section 4.4 must be interpreted in light of this purpose. Sarkozy, the ostensible creator of LTWs, testified that Section 4.5 of the Golden State Warrant Agreement (which was substantially similar in substance to the Dime/WMI Warrant Agreements) provided that the Board of Golden State had certain obligations under particular circumstances. (LTWX 195 at 87:7-12.) Specifically, when asked if he had an understanding of what constituted the essential intents and principles underlying the LTWs (*id.* at 87:19-21, 88:4-6), Sarkozy stated: "[T]he idea [of the LTWs] was to transfer 85 percent of any after-tax recovery to the holders of the LTW. So, I think, what this means is, if the mechanics – in this case, of Article IV – don't do that, then we'll try to find another way to get it to." (*Id.* at 88:10-16.)

Remarkably, Defendants' own expert witness, Dr. Chamberlain, testified that, in her opinion as a financial expert, the distinction between "may" and "shall" in this context is irrelevant. At trial, Defendants presented Dr. Chamberlain with several warrant agreements of

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[39] Specifically, Section 7.2 of the 2003 Warrant Agreement states, in pertinent part: "[a]ny amendment or supplement to this Agreement that has an adverse effect on the interests of the Holders will require the written consent of the Holders of a majority of the then outstanding Warrants." (LTWX 4 at § 7.2.)

various entities to make the point that the language of Article IV appeared in all the agreements and was thus standard, boilerplate language.[40] Dr. Chamberlain noted that the Dime 2000 Warrant Agreement contained the phrase "the Board may make, without the consent of the holders, such adjustments . . ." while the IndyMac Warrant Agreement (LTWX 69) simply stated that the Board "shall make" such adjustments.[41] (TR3 at 43:8-18.) Dr. Chamberlain nonetheless concluded that the IndyMac Warrant Agreement and the Dime 2000 Warrant Agreement "looked very similar" to her, adding "I think ***an equity analyst or financial analyst looking at that would say, yep, looks the same to me and move on***." (*Id*. at 42:14-16 (emphasis added).)

Plaintiffs' interpretation of Section 4.4 is also buttressed by Section 5.1(a) of the Warrant Agreements, which makes clear that the Warrant Agent has no duties to protect the rights of LTW holders (as contrasted, for example, with an indenture trustee, whose conduct is governed by the Trust Indenture Act of 1939, 15 U.S.C. § 77).[42] Section 4.4 must therefore be interpreted as "tasking" WMI's Board with protecting LTW holders (who at the time of the LTW's issuance were shareholders of Dime). Taken together, Sections 4.4 and 5.1(a) make clear that WMI's Board, rather than the Warrant Agent, was responsible for protecting the rights of the LTW holders if an event occurred for which an Adjustment is required.

Further, Defendants' reading that the Board may be arbitrary in exercising its discretion to "protect the rights" of the LTW holders in "good faith" and in accordance with the "intent and

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[40] Chamberlain's observation was overstated. The Section 4.4 equivalent was only in one of the ten agreements (Indy Mac). (*See* LTWX 69 § 4.03.)

[41] Significantly, the Indy Mac agreement, like a draft of the Golden State Warrant Agreement that used the word "shall" (LTWX 55 at § 4.5), did not contain the word "make" or the phrase, "without the consent of the holders." (*See* TR3 at 43:16-18.) This strongly suggests that the custom and practice is that these clauses are to be mandatory and the word "shall" only changed to "may" for exactly the reason Plaintiffs argue, to accommodate the idea that the consent of the holders would not be required.

[42] Section 5.1(a) of the 2003 Warrant Agreement states: "The Company hereby appoints the Warrant Agent to act as agent of the Company as expressly set forth in this Agreement." (LTWX 4 § 5.1(a).)

principles" makes no sense, because it would render Section 4.4 and each of the above-quoted terms, a nullity. The law does not permit such an interpretation. It is well established that every word, phrase or term of a contract must be given effect and meaning. *See Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992). A court should interpret a contract in a manner that gives reasonable meaning to all of its provisions. *See id.*; *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 566-67 (9th Cir. 1988).

Finally, the January 4, 2002 Agreement specifically provided that WMI agrees to make all future necessary adjustments under Article IV as may be required. (LTWX 2 at 1.) This language is obviously not permissive.

In sum, to interpret the ambiguity in Section 4.4 in light of the extrinsic evidence of the LTWs' purpose and "to give reasonable meaning to all of its provisions" is to conclude that Defendants' reading of Section 4.4 is unsupportable. Section 4.4 provides a mechanism by which WMI's Board must, in good faith, take action to protect the rights of LTW holders. WMI's and its Board's failure to make, or even consider, the adjustment required by Section 4.4 – to provide a Plan that pays the LTWs in cash as a claim – is a breach of their express duty under the 2003 Warrant Agreement.

2. WMI And The Board Actively Breached Their Obligations To The LTW Holders

Defendants admit that the WMI Board neither asked for, nor received, the advice required by Section 4.4, and never even considered the issue of making an Adjustment. Goulding, who, as part of his role with WMI attended Board meetings (*see* TR4 at 30:6-7), testified that he did not recall the WMI Board discussing: whether JPMorgan should assume the LTW obligations under the 2003 Warrant Agreement (*id*. at 30:14-18); the "intents and principles" of the 2000 Warrant Agreement (*id*. at 79:5-8.); whether an adjustment should be

made to the 2003 Warrant Agreement to preserve the intent and principles of the 2000 Warrant Agreement, that being the value of the Anchor Litigation previously transferred to the LTW holders (*id*. at 79:9-13); or why, under the Global Settlement, WMI is retaining the American Savings goodwill litigation and transferring the Anchor good will litigation to JPMorgan (*id*. at 82:14-22). Goulding's testimony is a clear depiction of the Board's failure to protect the LTW holders, as it was required to do under the 2003 Warrant Agreement.[43] Moreover, in responding to Plaintiffs' interrogatory concerning WMI's and the Board's obligations under section 4.4 of the 2003 Warrant Agreement, WMI answered that "the WMI Board of Directors had no obligation to obtain the referenced advice under Section 4.4 of the Amended Agreement, and no such advice was provided." (LTWX 221 at No. 17.)

Even more to the point, as explained in the next two sections, WMI and its Board have not just been passive; they have been actively working against the interests of LTW holders, in violation of their Section 4.4 duty.

a. The Settlement Noteholders Gave Away The Anchor Litigation To JPMorgan As Part Of The Global Settlement Negotiations To Enhance Their Personal Plan Recoveries, And WMI Then Acquiesced To Their Proposal

Goulding testified that WMI originally bargained with JPMorgan to retain the Anchor Litigation and then ultimately – in a horse trading, "holistic fashion" – gave it to JPMorgan. What Goulding did not want to say, until he was confronted with the settlement proposals, was that two of the Settlement Noteholders (Appaloosa and Centerbridge) engaged in direct Global Settlement negotiations with JPMorgan in August 2009, and they offered to give JPMorgan the

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[43] Like Goulding, McQuade testified that she did not recall the board ever considering the issue of whether it was proper to transfer the recovery of the Anchor Litigation to JPMC. (*See* LTWX 194 at 98:6-13.) Thus, WMI's board never considered the issue at all, as contrasted with considering the issue and exercising its so-called "option" to do nothing when something was required. The failure to even consider the issue undermines Defendant's flawed interpretation and is itself a breach of the WMI board's duty to the LTW holders.

Anchor Litigation. (TR4 at 87:25-88:16.) The Settlement Noteholders were looking to enhance the recovery on their claims (at the expense of the LTW holders), and they did not have the obligation that the WMI Board had, under Section 4.4 of the 2003 Warrant Agreement, to preserve in good faith the intent and principles of the 2000 Warrant Agreement (to wit, the value transferred to the LTW holders). After the Settlement Noteholders' proposal, when WMI's Board re-engaged JPMorgan in Global Settlement discussions, it adopted the position taken by the Settlement Noteholders with respect to the Anchor Litigation, and never sought to retain the Anchor Litigation for WMI. (*Id.* at 89:14-19.) And, as noted, once the WMI Board decided to give away the Anchor Litigation to JPMorgan, it never asked JPMorgan to assume the LTW obligations under the 2003 Warrant Agreement. In sum, the WMI Board breached its obligations to the LTW holders when it decided to adopt the proposal made by two of the Settlement Noteholders in giving away the Anchor Litigation to JPMorgan.

b. Goulding Acknowledged That The LTW Holders Have Been Improperly Ignored By WMI

Goulding acknowledged that there was no attempt to involve LTW holders in the Global Settlement negotiations. (TR4 at 101:1-4.) During the negotiations, the WMI Board neither said nor did anything to protect the LTW holders. (*Id.* at 83:18-84:4.) Goulding would not confirm that which is self-evident from the record of these bankruptcy proceedings. LTWs were not listed in WMI's schedules filed in the bankruptcy case. LTW holders were not set forth on the WMI's list of equity holders filed in the bankruptcy case. LTW holders never got notice of the claims bar date even though WMI, through its Warrant Agent, had the names of over 15,000 LTW holders. Since the WMI bankruptcy filing, WMI's Warrant Agent never sent out the notices to LTW holders, as required under Section 4.5 of the 2003 Warrant Agreement, and WMI never did anything to correct this error.

In sum, WMI's Board had obligations to protect the LTW holders. Goulding's testimony and the record show that the WMI Board was active in their dereliction of duty, designing a Global Settlement and an initial Plan which would have totally disenfranchised the LTW holders. In addition Goulding's testimony reflects the "hiding the ball" gamesmanship employed by WMI to damage the LTW holders to the maximum extent possible.

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to relief as follows:

(a) a judgment declaring that the Dime LTWs are liabilities, not equity securities, and that the LTW holders have a claim in the WMI bankruptcy equal to 85% of the net recovery in the Anchor Litigation;

(b) a judgment that the LTW holders have a beneficial, economic, and expectancy interest in 85% of the net recovery in the Anchor Litigation;

(c) a judgment declaring that, by virtue of the Dime/WMI merger and the cash Combination consideration paid to Dime shareholders, under Sections 4.2(b) and (c) of the 2000 Warrant Agreement, the LTW holders are entitled to be paid 85% of the net recovery in the Anchor Litigation in cash;

(d) a judgment declaring that WMI has breached its obligations under Section 4.2(d) of the Warrant Agreements by not causing JP Morgan to assume the LTW obligations thereunder;

(e) a judgment declaring that the director Defendants have breached their fiduciary duties and obligations to the LTW holders under Section 4.4 of the Warrant Agreements;

(f) a judgment declaring that WMI has breached Section 6.3 of the Warrant Agreements because Washington Mutual Bank no longer controls the Anchor Litigation;

(g) damages resulting from breaches of the Warrant Agreements by WMI and the director Defendants;

(h) an award to Plaintiffs of the costs and disbursements of this adversary proceeding, including reasonable fees, expenses and disbursements of Class counsel; and

(i) such other and further relief as this Court may deem just and proper.

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