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

| | |
|---|---|
| In re:<br><br>WASHINGTON MUTUAL, INC., *et al.*,<br><br>Debtors. | Chapter 11<br><br>Case No. 08-12229 (MFW)<br><br>Jointly Administered<br><br>**Re: D.I. Nos: 9389, 9472, 9482, 9486, 9487, 9494, 9504** |
| NANTAHALA CAPITAL PARTNERS, LP *et al.*, individually and on behalf of all holders of Litigation Tracking Warrants originally issued by Dime Bancorp,<br><br>Plaintiffs,<br><br>v.<br><br>WASHINGTON MUTUAL, INC., *et al.*,<br><br>Defendants. | Adv. Pro. No. 10-50911 (MFW)<br><br>**Hearing Date: February 1, 2012 at 10:30 a.m. (ET)**<br><br>**Re: D.I. Nos: 314, 323, 324, 325** |

# CLASS REPRESENTATIVES' REPLY TO OBJECTIONS TO MOTION FOR APPROVAL OF SETTLEMENT RESOLVING ADVERSARY PROCEEDING BETWEEN DEBTORS AND CLASS REPRESENTATIVES FOR THE LTW HOLDERS

Axicon Partners, LLC, Blackwell Capital Partners, LLC, Brennus Fund Limited, Costa Brava Partnership III, LLP, Nantahala Capital Partners, LP ("**Nantahala**") and Sonterra Capital Master Fund, Ltd. (collectively, the "**Class Representatives**"), by their undersigned attorneys, hereby file this reply to the objections made to the Motion of Debtors dated January 11, 2012 ("**Settlement Motion**") for an order pursuant to Section 105(a) of the Bankruptcy Code, Bankruptcy Rules 7023 and 9019, and Federal Rule of Civil Procedure 23(e), approving the

Stipulation and Agreement ("**Settlement**") between the Debtors and the Class Representatives for the LTW holders[1] resolving the above-captioned adversary proceeding ("**Adversary Proceeding**") and the LTW holders' proofs of claim. In support thereof, the Class Representatives allege as follows:

1. There were only seven pleadings filed in response to the Settlement Motion. One pleading filed by Wells Fargo Bank N.A. ("**Wells Fargo**") recites why it is unhappy, as to certain matters, but ultimately concludes that the "PIERS Trustee is not objecting to the settlement . . . ." Wells Fargo Response, p. 4. While the Class Representatives disagree with certain statements made in the Wells Fargo pleading, there is no need to dwell on these differences since Wells Fargo is not objecting to the Settlement.

2. No creditor or stock holder of the Debtors has objected to the Settlement Motion from the Debtors' Estates' perspective.

3. Another pleading filed, which is not an objection to the Settlement, was made by Broadbill Investment Corp. ("**Broadbill**"), a former plaintiff in the Adversary Proceeding. In its pleading, Broadbill seeks an entitlement to be reimbursed for legal fees expended by it in connection with the Adversary Proceeding. The Class Representatives do not object to Broadbill preserving its asserted right to be reimbursed provided that Broadbill serve notice of its fee request on all LTW holders, and the matter will thereafter be subject to this Court's approval.

4. The remaining five pleadings were filed by individual LTW holders (Thomas Menake, Linda Neufield, J. Philip Max, David Shutvet and Ben Bush). The overwhelming majority of the LTW holders have not objected to the Settlement. The five pleadings have similar arguments; all of the arguments are addressed below:

---

[1] Terms used herein and not otherwise defined shall have the meanings ascribed to them in the Settlement Motion.

(a) The Argument that the Settlement Amount is Too Low. The Class Representatives did the best that they could under the circumstances. The Court's January 3, 2012 opinion ("**Trial Opinion**") determined, after trial, that the LTW holders held common equity interests, and not claims against the Debtors. In order to change that result, the Class Representatives would have been required, among other things, to appeal the Trial Opinion, and there was no assurance that the LTW holders would prevail on the appeal(s).

The Class Representatives also would have been required to litigate whether they could preserve the $337 million Disputed Claims Reserve, or whether it would have been reduced to zero as a result of the Trial Opinion. The Wells Fargo pleading indicates that such litigation would have been forthcoming. If the Court would have eliminated the Claims Reserve, and then the Debtors consummated their Seventh Amended Plan, the LTW holders would have been required to litigate whether their appeal of the Trial Opinion had been rendered equitably moot by the consummation of the Seventh Amended Plan.

Even assuming the LTW holders only held common equity interests, it was not clear under the Seventh Amended Plan how much the LTW holders would receive, and what such common equity interests would be worth. The Seventh Amended Plan presented various conversion (LTW to common equity) formulas (based on the Debtors' common stock price at various points in time), and essentially asked the Court to decide at the Confirmation Hearing which formula was appropriate in the context of (i) a bankruptcy filing that occurred over three years ago, and (ii) a Plan which contemplated a massive dilution of the Debtors' common stock before a Trigger Event (as defined in the Amended Agreements) had occurred. The LTW holders' Reorganized Equity recovery varied significantly based on which conversion formula was ultimately approved by the Court. Further, since there was no Final Judgment in the Anchor

Litigation, the amount of the Adjusted Litigation Recovery (as defined in the Amended Agreements) was still not finally determined. Moreover, there was a disagreement between the Debtors and the Class Representatives as to the costs and expenses, and tax rate, which should be applied for the determination of the Adjusted Litigation Recovery.

In their objection to the Disclosure Statement to the Seventh Amended Plan, the Class Representatives urged the Court to adopt a formula which would have given the LTW holders in excess of 70% of the amount presently allocated to common stockholders. If the LTW holders would have pressed those arguments, and there was a perceived risk that the LTW holders would prevail, the Class Representatives had a serious concern as to whether the 70/30 allocation of the Reorganized Equity between the preferred interests and the common interests would still be advocated by the Plan Proponents; the concern being that if the common holders were diluted too much by the LTW holders, certain parties might advocate that more value should be given to the preferreds. The Seventh Amended Plan did not provide for a firm allocation between the preferred and the common interests, and so the possibility of a new, and less favorable deal to the common equity interests, still exists. Furthermore, the Class Representatives were concerned that holders of preferred equity interests would object to the 70/30 split as being too favorable to the common equity, and that notwithstanding whatever LTW conversion formula was approved by the Court, the amount allocated to the common equity would nevertheless be dramatically reduced.

In addition to all of the foregoing, there is a wide range as to what the Reorganized Equity is worth, and how tradable the Reorganized Equity will be. In all events, the value of the Reorganized Entity has great uncertainty since it will be highly dependent on the profitability of future acquisitions to be made.

Funding the litigation activity for all of these efforts would have been a major strain on the Class Representatives who essentially "pushed all their chips into the middle" in funding the Adversary Proceeding, through trial. As noted on prior occasions, the Class Representatives hold less than 18% of the LTWs, but had 100% of the burden in funding litigation activities. There was simply no assurance that any future litigation funding would bring about a demonstrably better result.

Based on all of these factors, the decision was made to settle the Adversary Proceeding, and achieve the certainty of a recovery for the LTW holders. The general unsecured claim bargained for (the best currency) was grudgingly provided by the Debtors. As the PIERs Trustee noted in its pleading, this was not an easy concession to get. The Equity Committee, in turn, was trying to preserve its fragile and limited recovery to its constituency, and did not want to be significantly diluted by the LTW holders. The array of consideration that the Class Representatives got for all LTW holders was the best that it could achieve in a late stage, reslicing of the finite bankruptcy estate pie.

(b) The Argument that the Settlement Should Not Preclude Litigation in the Court of Claims as to Who Owned the Anchor Litigation. The Settlement resolves issues relating to the Adversary Proceeding, which dealt exclusively with whether the LTW holders had claims against, or equity interests in, the Debtors. Except for the issues relating to the WMI directors' obligations under Section 4.4 of the Amended Agreements, the Adversary Proceeding did not deal with claims against third parties.

Issues relating to third party releases of third party claims are part of the Seventh Amended Plan. In order to get a distribution under the Seventh Amended Plan, LTW holders

will need to timely make an election which, if given, would release claims against certain third parties, including JPMC. However, that is strictly their option to do so, or not.

The issue as to who owned the Anchor Litigation was clearly raised in the Adversary Proceeding. The Trial Opinion states at page 31 that "the LTWs do not entitle the LTW holders to an interest in the Anchor Litigation itself." The Global Settlement Agreement states that the Anchor Litigation is being transferred to JPMC free and clear of all claims and interests of LTW holders. It appears that the objectors to the Settlement would like to make the argument that this Court did not have subject matter jurisdiction to decide these issues because no part of the Anchor Litigation recovery was ever owned by the Debtors, and the issue should have been litigated, and still should be determined, in another forum. It is not clear whether the objectors are asking the Court to invalidate its prior rulings, or they are just throwing down a "marker" so they can litigate the issue somewhere else. If the latter (throwing down a "marker"), that is not an objection to the Settlement. If the former (invalidating prior rulings) they have not made that type of motion, or specifically requested that type of relief.

(c) The Argument that the Class Action Lawyers Should Have Sued JPMC, as the Successor to WMB -- the Alleged "Owner" of the Anchor Litigation. A bit of background is required to respond to this argument.

(i) The FDIC sale to JPMC of WMB's assets occurred in September 2008, and the Debtors' bankruptcy case were also filed that month. The original Broadbill declaratory judgment action was filed in April 2010. Any LTW holder who wanted to assert claims against JPMC based on their alleged ownership of the Anchor Litigation could have taken steps to do so, at a minimum, during this 18 month interval, and for that matter could have raised the subject matter jurisdiction issue with this Court relating to the Anchor Litigation at any time.

(ii) One LTW holder actually litigated in another forum the issue as to whether the FDIC, as the successor to WMB, had to recognize the LTW holders' rights in the Anchor Litigation by virtue of the Amended Agreements. In an August 6, 2010 decision ("**D.C. Decision**"), a copy of which is attached hereto as Exhibit "A," the United States District Court for the District of Columbia dismissed the LTW holder's complaint with prejudice, holding that the LTW holder's rights under the Amended Agreements were against the Debtors only, and not WMB, or its successor -- the FDIC. *See* D.C. Decision, at p. 7-8.

(iii) The Broadbill declaratory judgment action was filed as a result of the Debtors' proposed sixth plan of reorganization which embodied the Global Settlement. Prior to filing this plan, the Debtors and JPMC were in litigation in this Court as to which entity (the Debtors versus JPMC, as the purchaser of WMB's assets) owned particular assets, including the Anchor Litigation. The Global Settlement provided that the Anchor Litigation belonged to JPMC and that its right to this asset would be free and clear of any obligations to the LTW holders. The proposed plan provided that the LTW holders only held equity securities and, therefore, would receive no distribution thereunder. Both Broadbill and Nantahala objected to the Disclosure Statement raising issues that the Amended Agreements and the Global Settlement gave rise to claims by the LTW holders against the Debtors. Broadbill filed a declaratory judgment action as to this particular issue: whether LTW holders had claims against, and not equity interests in, the Debtors. The Debtors moved to dismiss the Broadbill declaratory judgment action, and Broadbill and Nantahala both opposed the dismissal motion. In response, the Debtors filed omnibus objections to the proofs of claim filed by the LTW holders, and sought to stay the Broadbill declaratory judgment action in favor of the omnibus claims objections proceedings. Both Broadbill and Nantahala opposed that relief, and ultimately, the Court ruled that the

Broadbill declaratory judgment action should go forward, Nantahala should be joined as a plaintiff, and the claims objections should be stayed. The Court suggested a procedure that the declaratory judgment action be treated as a class action so that there would be one proceeding which decided the issue whether the LTW holders had claims against, and not equity interests, in the Debtors. The essential allegations of the Broadbill declaratory judgment action -- whether the LTW holders had claims against, and not equity interests in, the Debtors -- became the essence of the class action complaint.

(iv) In opposing confirmation to the Debtors' sixth amended plan, and opposing the Debtors' summary judgment motion, Broadbill and Nantahala argued that the LTW holders were promised 85% of the net recovery in the Anchor Litigation, and that if the Global Settlement were approved and JPMC would be deemed to be the owner of the Anchor Litigation, the Debtors would nevertheless be liable to the LTW holders for that lost value. In the Court's January 7, 2011 decision denying confirmation of the sixth amended plan (at page 50), it held that to the extent the LTW holders had rights in the Anchor Litigation ("a lien or other interest") it would be payable out of the proceeds of the Global Settlement. The Court held that, among other things, the Global Settlement was a fair compromise and that the Section 363 sale of the Anchor Litigation to JPMC free and clear of the LTW holders' interests was proper because, even if the LTW holders had a senior right to that asset, it would be paid by the Debtors from the Disputed Claims Reserve ($337 million). *See id.* The Court also ruled that if a creditor wanted to get a distribution on its claims from the Debtors, it would be required to give a third party release to JPMC since a substantial portion of the proceeds to be paid under the proposed plan emanated from the Global Settlement.

(v) Before filing an objection to the Disclosure Statement in March 2010, Nantahala retained Schindler, Cohen and Hochman ("**SCH**"), one of the class counsel herein, to analyze the Amended Agreements, including the rights of LTW holders thereunder. SCH brought in King & Spalding ("**K&S**") to analyze the bankruptcy proceedings and the claims that could be asserted against the Debtors. K&S told SCH and Nantahala that it would not be part of any litigation against JPMC, and it was agreed that if any claims needed to be brought against JPMC, SCH would be the one to do so. Nantahala considered various options presented by SCH and it was decided to bring claims against the Debtors in the Bankruptcy Court. The opposition to the Debtors' sixth plan, and the participation in the Broadbill declaratory judgment emanated from that decision by Nantahala. The evolution of the Broadbill declaratory judgment to a class action did not change the essence of the proceeding which was limited to establishing in this Court the claims that the LTW holders had against the Debtors.

(vi) The issue as to who owned the Anchor Litigation clearly was raised in the Adversary Proceeding. The Class Representatives argued, that even if it was determined that JPMC, as purchaser of the assets of WMB, owned the Anchor Litigation, it would not change the Debtors' obligation under the Amended Agreements to transfer to the LTW holders value equal to 85% of the net recovery in the Anchor Litigation. The Class Representatives further argued that the LTW holders actually held a beneficial interest in the Anchor Litigation and that, as a result, the Debtors had a liability to transfer that value to the LTW holders.

The Class Representatives also argued that the net recovery in the Anchor Litigation should end up with the Debtors (and not WMB) for the benefit of the LTW holders. This position -- that the Debtors (and not WMB) controlled the recovery in the Anchor

Litigation -- was consistent with the Debtors' asserted position in the JPMC Adversary Proceeding and supported the LTW holders' arguments against the Debtors and the Board of Directors for breaches of the Amended Agreements. For example, under Section 4.2(d) of the Amended Agreements, if the Debtors (not WMB) sold substantially all of their assets, it would be a Combination (as defined in the Amended Agreements), and in the context of a Combination, the Debtors had an obligation to require the purchaser of substantially all of its assets to assume the obligations to the LTW holders under the Amended Agreements. The Class Representatives argued that the Global Settlement was a sale of substantially all of the Debtors' assets, and the Anchor Litigation was part of that sale by the Debtors. In other words, by arguing that the Debtors were selling a piece of the Anchor Litigation, as contrasted to WMB owning that piece, the LTW holders contended that the Debtors breached the Amended Agreements by not causing JPMC to assume the obligations to the LTW holders. Similarly, it was argued that the Debtors' Board, after the bankruptcy filing, breached its obligations to the LTW holders by not protecting them in this regard. In short, this Section 4.2(d) argument could not have been made with the same effectiveness if it were assumed that JPMC owned a piece of the Anchor Litigation, that the sale was made, not by the Debtors, but by the FDIC, and that all of these actions took place before the bankruptcy.

In addition, the LTW holders argued that the Debtors' Board had an obligation under Section 4.4 of the Amended Agreements to act in good faith to protect the essential intent and principles of the Amended Agreements. The Class Representatives argued that the Debtors and their Board of Directors breached the Section 4.4 obligations when they sold the Anchor Litigation to JPMC (as compared to retaining the litigation, which was what occurred in respect of the American Savings goodwill litigation), and when it failed to cause JPMC to

assume the LTW holders' obligations (as it had with other liabilities associated with assets sold to JPMC) as part of the Global Settlement. This Section 4.4 argument as to postpetition conduct by the Debtors and their Board of Directors could not have been made if the Anchor Litigation had been transferred by the FDIC to JPMC prior to the Debtors' bankruptcy.

(vii) If any LTW Holder wanted to assert a property interest in the Anchor Litigation in a forum other than the Bankruptcy Court, it would have been required to seek authorization first from this Court since the Debtors claimed the Anchor Litigation to be an asset of their bankruptcy estates. This Court already had the Anchor Litigation ownership issue before it as part of the JPMC Adversary Proceeding so it would have been questionable that such authorization by this Court would have been granted since, to do so, would have then had two tribunals deciding at the same time essentially the same issue.

(viii) The bottom line is the Class Representatives did forcefully raise the issue in the Adversary Proceeding that the LTW holders had a beneficial interest in the Anchor Litigation and the Debtors should pay the LTW holders for such value. This Court rejected that argument. Mr. Bush has essentially argued, with the benefit of hindsight, that a different and better result for the LTW holders would have occurred if that same issue was litigated before a different Judge (in the Court of Claims). While the Class Representatives disagree with the Trial Opinion, they have never, and do not now question the Court's good faith resolve to administer justice in these proceedings.

(ix) In sum, the class action was the outgrowth of a declaratory judgment action dealing with the particular issue as to whether the LTW holders had claims against, and not equity interests, in the Debtors. The issue of whether the LTW holders had a beneficial interest in the Anchor Litigation was raised and decided by this Court. Assuming the

LTW holders had no beneficial interest in the Anchor Litigation, the claims against the Debtors were stronger if it was ultimately determined that the Debtors, as compared to WMB (or its successor, JPMC) owned the Anchor Litigation. The only real purpose to argue that WMB owned the Anchor Litigation was to use that alleged fact as a springboard to change the venue so that another court could decide whether the LTW holders held a beneficial interest in the Anchor Litigation. The Debtors' asserted position in the JPMC Adversary Proceeding that it owned the Anchor Litigation, the structure of the Global Settlement which stated that this disputed asset (the Anchor Litigation) would be transferred to JPMC free of the rights of the LTW holders, and the structure of the sixth amended plan which provided that any distributions thereunder would be conditioned on giving JPMC a third party release -- all of which preceded Nantahala's involvement in these bankruptcy cases -- essentially dictated that the Bankruptcy Court would be the venue to decide whether the LTW holders had a beneficial interest in the Anchor Litigation. In any event, the LTW holders' contract claims based on the Amended Agreements clearly had to be brought against the party to those Agreements, the Debtors, and not WMB. All LTW holders' claims arising from a breach of the Amended Agreements needed to be the subject of a proof of claim filed in the Bankruptcy Court, and the adjudication of such claims is typically made by the Bankruptcy Court. It would have been extremely difficult to ask the Bankruptcy Court to decide issues relating to breaches of the Amended Agreements while not also ruling on the fundamental issue as to whether the Amended Agreements gave the LTW holders a beneficial interest in the Anchor Litigation. It would also have been a highly risky strategy to abandon all claims against the Debtors for breaches of the Amended Agreements in order to preserve a change of venue argument for the chance that another court might favorably decide the singular issue of whether the LTW holders had a beneficial interest in the Anchor Litigation.

(d) The "Opt Out" Argument. There is no requirement to provide LTW holders with an opt out right to the Settlement for this type of class action. Rule 23(e) of the Federal Rules of Civil Procedure, made applicable to this matter pursuant to Rule 7023 of the Federal Rules of Bankruptcy Procedures, provides as follows:

> (e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

This Adversary Proceeding was not certified under Rule 23(b)(3) so subsection (e)(4) does not apply. Subsection (e)(2) states that the settlement can bind class members if the Court approves the settlement after a hearing and after finding it fair, reasonable and adequate. In accordance with subsection (e)(5), the class was provided notice of the Settlement and the opportunity to object, and the Court is being asked to approved the Settlement as being fair, reasonable and adequate to the LTW holders.

(e) The Legal Fees Argument. The issues relating to the reimbursement of legal fees paid by the Class Representatives will be the subject of a fee application to be

approved by the Court. In this case, the Class Representatives who have carried the burden in this litigation and settlement should be placed on the same playing field as all other LTW holders, and thereafter participate *pro rata*, in the Settlement recovery.

WHEREFORE, the Class Representatives believe that the Settlement should be approved, the objections to the Settlement overruled, and that they be granted such other and further relief as if just and proper.

Dated: January 30, 2012
Wilmington, Delaware

THE ROSNER LAW GROUP LLC

*/s/ Frederick B. Rosner*
Frederick B. Rosner (DE # 3995)
824 N. Market Street, Suite 810
Wilmington, DE 19801
Telephone: 302-777-1111
*rosner@teamrosner.com*

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

-and-

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

*Counsel for Class Representatives*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| EDWARD MINTZ,<br><br>Plaintiff,<br><br>v.<br><br>FEDERAL DEPOSIT INSURANCE CORPORATION,<br><br>Defendant. | ) | Civil Action No. 09-1894 (PLF) |

MEMORANDUM OPINION

This matter is before the Court on the motion of the defendant, the Federal Deposit Insurance Corporation ("FDIC"), to dismiss the plaintiff's complaint. In connection with its motion to dismiss, the FDIC has also filed a motion requesting that the Court take judicial notice of a statement contained in an SEC filing. Plaintiff Edward Mintz has responded to the defendant's motions by filing a motion of his own, one that seeks a stay of these proceedings pending the outcome of a related bankruptcy proceeding in federal court in Delaware. After consideration of the parties' arguments, the relevant law, and the entire record in this case, the Court will grant the FDIC's motion to dismiss the complaint and deny the remaining motions as moot.[1]

---

[1] The following papers were reviewed in connection with the pending motions: plaintiff's complaint ("Compl."); Compl., Ex. 1 at 1 (entitled "Exhibit A to Claim of Edward Mintz and All Similarly Situated Persons") ("Ex. A"); Compl., Ex. 3 ("Warrant Agreement"); Compl., Ex. 4 (Dime Bancorp prospectus issued on December 26, 2000) ("Prospectus"); defendant's motion to dismiss the complaint ("MTD"); plaintiff's motion for stay; FDIC-Receiver's request to take judicial notice; defendant's reply in support of its motion to dismiss; plaintiff's reply to defendant's opposition to his motion to stay ("Pl.'s Reply"); and defendant's

Dockets.Justia.com

## I. BACKGROUND

### *A. Dime Bancorp and Litigation Tracking Warrants*

According to his complaint and the various documents attached to and incorporated into it, plaintiff Edward Mintz is a former shareholder of the now-defunct Dime Bancorp, Inc., the holding company of Dime Savings Bank of New York, FSB ("Dime Savings"). See Ex. A; Warrant Agreement at 2. In 1995 Dime Bancorp acquired Anchor Savings Bank ("Anchor"), which merged into Dime Savings. Ex. A; Prospectus at 1. After the merger, Dime Savings, as the legal successor to Anchor, pursued certain legal claims against the United States in Anchor's name ("the Anchor Litigation"). Prospectus at 1. The damages claimed by Dime Savings under alternative theories of liability were substantial, ranging from $512 million to $980 million. Id.

In 2000, several years before the Anchor Litigation yielded an initial judgment, the Board of Directors of Dime Bancorp announced that it wished to "pass along the potential value of our claim against the government to our existing shareholders in the form of tradeable securities." Prospectus at 1. To realize that goal, Dime Bancorp released a "Warrant Agreement," a contract among Dime Bancorp itself, EquiServe Trust Company, N.A., and EquiServ Limited Partnership. Warrant Agreement at 1. Pursuant to that agreement, EquiServe Trust Company, N.A., and EquiServ Limited Partnership (collectively referred to as "the Warrant Agent") issued to each holder of Dime Bancorp's common stock a number of "Litigation Tracking Warrants" ("LTWs") equal to the number of shares of common stock held by that shareholder. Id. at 4. By their terms, those warrants would become exercisable only if (1) Dime

---

supplemental memorandum in support of its motion to dismiss.

Savings won a final judgment in the Anchor Litigation; (2) the amount of damages awarded to Dime Savings as part of that judgment ("the Anchor Award") exceeded various litigation and other costs incurred by Dime Bancorp and/or Dime Savings; and (3) Dime Bancorp received any necessary regulatory approval for the issuance of the common stock underlying the LTWs. Id. at 3.

In the event that the warrants did become exercisable, each LTW would confer upon its holder the right to purchase at par value that number of Dime Bancorp common shares whose aggregate stock price equaled a certain portion of the Anchor Award divided by the total number of LTWs issuable under the Warrant Agreement. Warrant Agreement at 7. In other words, the number of shares for which an LTW would be exercisable was directly dependent on the size of the Anchor Award.

In January of 2002, Dime Bancorp was acquired by Washington Mutual, Inc. ("WM Inc."), the holding company of Washington Mutual Bank ("WM Bank"). Ex. A; see Am. Nat'l Ins. Co. v. JPMorgan Chase & Co., Civil Action No. 09-1743, 2010 WL 1444533, at *1 (D.D.C. Apr. 13, 2010) (explaining that WM Inc. is the former holding company of WM Bank).[2] Several years later, in 2008, the United States Court of Federal Claims determined that Anchor Savings Bank was entitled to receive approximately $356,455,000 in damages from the United

[2] While the plaintiff does not actually explain the relationship between Washington Mutual Bank and Washington Mutual, Inc. in his pleadings, the Court takes judicial notice of this highly relevant and easily verifiable fact. See Abhe & Svoboda, Inc. v. Chao, 508 F.3d 1052, 1059 (D.C. Cir. 2007) ("In determining whether a complaint states a claim, the court may consider facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." (citation and internal quotation marks omitted)); United States v. Philip Morris USA, Inc., Civil Action No. 99-2496, 2004 WL 5355971, at *1 (D.D.C. Aug. 2, 2004) ("Judicial notice may be taken of historical, political, or statistical facts, or any other facts that are verifiable with certainty.").

States. See Anchor Sav. Bank, FSB v. United States, 597 F.3d 1356, 1360 (Fed. Cir. 2010); see generally Anchor Sav. Bank, FSB v. United States, 81 Fed. Cl. 1 (Fed. Cl. 2008). That determination was largely upheld on appeal, although the Federal Circuit remanded the case, instructing the Claims Court to reexamine its calculation of the damages award to discern whether the award should not in fact be larger. See Anchor Sav. Bank, FSB v. United States, 597 F.3d at 1373-74.

On September 25, 2008, after the Claims Court had issued its initial award in the Anchor Litigation, the United States Office of Thrift Supervision closed WM Bank and placed it in receivership, with the FDIC as its receiver. Compl. ¶ 16. The next day, WM Inc. filed a petition for bankruptcy, initiating a complex case in the United States Bankruptcy Court for the District of Delaware. See In re Washington Mutual, Inc., Case No. 08-12229, Voluntary Petition (Chapter 11) at 1 (Bankr. Del. Sept. 26, 2008). The FDIC, WM Inc., and JPMorgan Chase Bank, National Association, which acquired WM Bank from the FDIC, are currently vigorously contesting in the Delaware proceedings the proper disposition of various assets held by WM Inc. and/or WM Bank. Compl. ¶¶ 4, 18.

*B. Mr. Mintz's Claim*

Parties who wish to assert an interest in the assets of a failed financial institution for which the FDIC acts as a receiver may file a claim for review by the FDIC. See 12 U.S.C. § 1821(d)(5)-(6). The FDIC will allow the claim if it is timely and "is proved to the [FDIC's] satisfaction." Id. § 1821(d)(5)(B).

Mr. Mintz alleges that he owns some of the LTWs issued by Dime Bancorp. Ex. A. On December 29, 2008, he filed an administrative claim with the FDIC on behalf of himself

and "all similarly situated parties." Id. His claim documents made no specific request for particular action by or payments from the FDIC in its capacity as WM Bank's receiver, but instead stated that Mr. Mintz and other warrant holders "have or might have claims against" WM Bank because "a [WM Bank] affiliate or a successor in interest may intend to assert ownership of the [Anchor] Litigation damage recovery and unjustly disregard legal obligations arising under the litigation tracking warrants." Id. Mr. Mintz submitted a copy of the Warrant Agreement as part of his claim. See Ex. 1.

In a letter dated August 6, 2009, the FDIC informed Mr. Mintz that it had disallowed his claim because it had "not been proven to the satisfaction of the Receiver." Ex. 2. Mr. Mintz then filed a complaint in this Court. In that complaint Mr. Mintz purports to act on behalf of "all holders of the [Litigation Tracking] Warrants," Compl. ¶ 22, and alleges that "the FDIC . . . may be the successor to Dime Bancorp, Inc. and WMB, and would therefore be subject to the Warrants and related agreements." Id. ¶ 18. He asserts that the FDIC has engaged in conduct amounting to breach of contract or anticipatory breach of contract because it "is asserting full ownership of the proceeds of the *Anchor Savings Bank* case, in violation of its obligations under the Warrants and related agreements." Id. ¶¶ 31-37.

## II. DISCUSSION

### *A. Standard of Review*

The FDIC has moved to dismiss Mr. Mintz's claims pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. While the FDIC's arguments concerning the sufficiency of Mr. Mintz's complaint under Rule 12(b)(6) relate to his individual claims, its argument predicated on Rule 12(b)(1) attacks only Mr. Mintz's attempt to serve as the

representative of a class of similarly situated persons. See MTD at 6-9. Because the Court finds that Mr. Mintz's complaint fails to state a claim upon which relief may be granted, it will dismiss the complaint on that ground. It therefore will not discuss the FDIC's arguments regarding subject matter jurisdiction over the plaintiff's class claims.

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows dismissal of a complaint if a plaintiff fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), the Supreme Court noted that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]'" Id. at 544 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)); see also Erickson v. Pardus, 551 U.S. 89, 93-94 (2007); Aktieselskabet AF 21 v. Fame Jeans Inc., 525 F.3d 8, 15 (D.C. Cir. 2008). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion to dismiss, to provide the "grounds" of "entitle[ment] to relief," a plaintiff must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. at 555; see also Papasan v. Allain, 478 U.S. 265, 286 (1986). The Court stated that there was no "probability requirement at the pleading stage," Bell Atlantic Corp. v. Twombly, 550 U.S. at 556, but "something beyond . . . mere possibility . . . must be alleged[.]" Id. at 557 The facts alleged in the complaint "must be enough to raise a right to relief above the speculative level," id. at 555, because Rule 8(a)(2) requires a "showing," rather than a "blanket assertion," of entitlement to relief, id. at 555 n.3. The complaint must be sufficient "to state a claim for relief

that is plausible on its face." Id. at 570. The Court referred to this newly clarified standard as "the plausibility standard." Id. at 560 (abandoning the "no set of facts" language from Conley v. Gibson).

On a motion to dismiss under Rule 12(b)(6), the Court "must accept as true all of the factual allegations contained in the complaint." Erickson v. Pardus, 551 U.S. at 94; see also Bell Atlantic Corp. v. Twombly, 550 U.S. at 555. The complaint "is construed liberally in the [plaintiff's] favor, and [the Court should] grant [the plaintiff] the benefit of all inferences that can be derived from the facts alleged." Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). Nevertheless, the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions. See Kowal v. MCI Communications Corp., 16 F.3d at 1276; Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002).

*B. Liability of the FDIC*

Mr. Mintz has not advanced any tenable legal theory under which the FDIC might be liable to him, nor has he alleged in his complaint any facts from which such a theory could be inferred. According to his complaint, the FDIC is or may be "the successor in interest to [WM Bank]," Compl. ¶ 34, and if that is the case, the FDIC "must abide by its obligations to the holders of the Warrants." Id. ¶ 37. That claim fails because the facts alleged in Mr. Mintz's complaint lay no foundation for the argument that WM Bank had any obligation to the holders of the warrants issued by Dime Bancorp. The Agreement pursuant to which those warrants were issued created certain legal obligations to be fulfilled by Dime Bancorp. Because, as the complaint itself alleges, Dime Bancorp was acquired in 2002 by WM Inc., it could be plausibly

inferred at the motion-to-dismiss stage that WM Inc. might have succeeded to those obligations. But Mr. Mintz's allegations target not WM *Inc.*, but the separate entity WM *Bank*.

The complaint does not allege that WM Bank was the acquirer of Dime Bancorp. Nor does it allege any other sort of relationship between those two entities, contractual or otherwise, that might confer liability for Dime Bancorp's obligations under the Warrant Agreement upon WM Bank. Mr. Mintz's unsupported assertion that WM Bank and "possibly the FDIC" are the "successors and assigns" of Dime Bancorp, Compl. ¶ 20, does not cure this deficiency; that assertion is a mere "legal conclusion[] cast in the form of [a] factual allegation[]." Browning v. Clinton, 292 F.3d at 242 (citation and internal quotation marks omitted); see In re IndyMac Mortgage-Backed Securities, Civil Action No. 09-4583, 2010 WL 2473243, at *8 (S.D.N.Y. June 21, 2010) (rejecting a "successor-in-interest allegation . . . without any factual amplification" as "'nothing more than a legal conclusion . . . and so . . . not entitled to the assumption of truth'" (citations omitted)).

Mr. Mintz's only attempt to explain how the circumstances described in his complaint could give rise to liability on the part of WM Bank and, by extension, the FDIC is unpersuasive. According to the plaintiff,

> [u]nder the appropriate reading of the Litigation Tracking Warrants, the issuance of the stock is a condition precedent to the ability of the Bank or anyone to obtain the proceeds of the *Anchor Litigation*. The intent of the Litigation Tracking Warrants was to give to the then-shareholders of Dime Bancorp, Inc., *not the bank*, 85% of the benefits of the Anchor Savings Bank Litigation. The Litigation Tracking Warrant Holders are the only successors to the Dime Bancorp, Inc. shareholders. At the appropriate time the Plaintiff can produce full briefs supported by witnesses who participated in the issuance of the Litigation Tracking Warrants to verify that reading and intent.

Pl.'s Reply at 2 (emphasis in original). Even if the Court assumes the veracity of the strained interpretation of the Warrant Agreement urged by Mr. Mintz, that interpretation does not translate into potential liability for the FDIC. If no entity may receive the Anchor Award until the LTWs are exchanged for stock, then the FDIC or any other potential claimant to the Award would seem to be barred from obtaining it until the warrants are exercised (if they ever are) — but limitations on the ability of the FDIC to obtain the Award are not obligations to the warrant holders.

Because the allegations in Mr. Mintz's complaint are not sufficient to provide fair notice of the grounds upon which the FDIC's liability plausibly may be predicated, see Bell Atlantic Corp. v. Twombly, 550 U.S. at 555-56, the complaint must be dismissed. The dismissal of the complaint renders moot the plaintiff's motion to stay and the defendant's motion for judicial notice; as a result, those motions will be denied. An Order consistent with this Memorandum Opinion will be issued this same day.

SO ORDERED.

/s/
PAUL L. FRIEDMAN
United States District Judge

DATE: August 6, 2010