UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
Debtors.	:	**(Jointly Administered)**
	:	**Re: Docket No. 8065**
	:	**Hrg. Date 8/12/11 at 10:30 a.m. (EDT)**

DEBTORS' OBJECTION TO MOTION OF CERTAIN DIME LTW HOLDERS FOR AN ORDER APPOINTING AN OFFICIAL COMMITTEE OF DIME LTW HOLDERS

Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors"), file this objection to that certain Motion of Certain Dime LTW Holders, Pursuant to Bankruptcy Code § 1102, for an Order Appointing an Official Committee of Dime LTW Holders, dated July 1, 2011 [D.I. 8065] (the "Motion") filed by certain purported holders (the "Movants") of Litigation Tracking Warrants™ (the "LTWs"), and respectfully represent as follows:

PRELIMINARY STATEMENT

1. This last breath gambit seeking appointment of an LTW Committee should be denied because, as recognized in the objection filed by the United States Trustee [D.I. 8335], holders of LTWs are adequately represented by two existing committees. Equally important, however, is that LTW interests are being advanced zealously by the named plaintiffs (large, sophisticated hedge funds) and their counsel in an adversary proceeding styled Nantahala Capital Partners, LP v. Washington Mutual,

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Suite 2500, Seattle, Washington 98104.

Inc. (In re Washington Mutual, Inc.), Adv. Proc. No. 10-50911 (MFW) (the "LTW Adversary Proceeding"), at the confirmation hearing, and at any other hearing that such counsel believes its input is relevant. Such counsel has convinced the Court to require the Debtors to post a $337 million reserve, the maximum amount requested by LTW holders in the event they are successful in litigation, which demonstrates the adequacy of representation for LTW holders' interests. Accordingly, Movants' claim that LTW interests will not be protected absent appointment of a *third* committee in these cases is without merit and does not present the sort of extraordinary circumstances necessary to grant such relief. Moreover, the extreme delay in bringing the Motion – less than two weeks before the hearing on confirmation of the Debtors' plan and thirty-three months into these chapter 11 cases – coupled with the expense and difficulty attendant to the appointment of a new committee, mandates denial of the Motion.

2. Early on in these cases, on October 15, 2008, the United States Trustee appointed a statutory committee of unsecured creditors, the Official Committee of Unsecured Creditors (the "Creditors' Committee"). A little over a year later, the United States Trustee appointed a statutory committee of equity security holders, the Official Committee of Equity Security Holders (the "Equity Committee") on January 11, 2010. The Equity Committee has actively and diligently participated in the Debtors' chapter 11 cases since its appointment, and is adequately and effectively representing the interests of *all* equity security holders, including the holders of LTWs (which the Debtors believe represent common equity interests in WMI). Acting with equal diligence, the Creditors' Committee has also been actively involved in the Debtors' cases and has been zealously advocating in favor of its constituents. In the event that holders of LTWs are determined

to hold claims against the Debtors, then their interests as creditors are adequately represented by the Creditors' Committee – as they will receive the exact same treatment as holders of general unsecured claims under the Debtors' plan. In either case, LTW holders are more than adequately represented by the existing committees.

ARGUMENT

3. Section 1102(a)(2) of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") provides that additional committees of creditors or equity security holders may be appointed if necessary to assure adequate representation of such stakeholders.[2] In this regard, Movants suggest that holders of LTWs are not adequately represented in the Debtors' chapter 11 cases because (i) the interests of such holders allegedly "diverge significantly" from the interests represented by the two existing official committees, the Creditors' Committee and the Equity Committee, and (ii) the named plaintiffs and their counsel who currently are representing on a putative class-wide basis the interests of holders of LTWs in, among other respects, the prosecution of the LTW Adversary Proceeding regarding the appropriate characterization (as debt or equity) of the LTWs may, at some point in the future, decide that they no longer are willing to pursue or fund this litigation. Motion at 5-6, 9-14. Neither of these arguments is persuasive.

4. The appointment of an additional official committee "is considered 'extraordinary relief' and should be 'the rare exception'." In re Spansion, Inc., 421 B.R.

[2] Pursuant to section 1102(a)(1), the United States Trustee may appoint additional committees. "While the United States trustee is vested with discretion as to whether to appoint additional committees, the standard set forth in section 1102(a)(2) provides useful guidance." 7 Colliers on Bankruptcy ¶ 1102.02[4] at 1102-16 (16th ed. 2009).

151, 156 (Bankr. D. Del. 2009) (quoting Exide Techs. v. Wis. Inv. Bd., 02-1572-SLR, 2002 WL 32332000, at *1 (D. Del. Dec. 23, 2002); In re Dana Corp., 344 B.R. 35, 38 (Bankr. S.D.N.Y. 2006)); In re Trans World Airlines, Inc., No. 92-115, 1992 WL 168152, at *3 (Bankr. D. Del. Mar. 20, 1992) ("The reconciliation of differing interests of creditors within a single committee is the norm, and the appointment of a separate committee is an extraordinary remedy. Separate committees impose additional administrative expenses on the debtor's estate which adversely affects the debtor's ability to reorganize." (citation omitted)). This principle applies equally to the consideration of whether to appoint additional equity committees (see, e.g., Spansion, 421 B.R. at 156) or additional creditors' committees. E.g., In re Garden Ridge Corp., No. 04-10324 (DDS), 2005 WL 523129, at * 3 (Bankr. D. Del. Mar. 2, 2005).

5. Because the Bankruptcy Code does not define "adequate representation," case law provides various formulations of the factors to be considered in determining whether to appoint an additional committee. For example, courts have looked to "the number of shareholders, the complexity of the case, and whether the cost of an additional committee significantly outweighs the concern for adequate representation." Spansion, 421 B.R. at 156 (noting that the movants must show, *inter alia*, that "they are unable to represent their interests in the bankruptcy case without an official committee"). Other factors to consider include the ability of existing committees to function, the nature of the case, the standing and interests of the various constituencies, the ability of stakeholders to participate in the case without an official committee, the potential to recover expenses pursuant to section 503(b), whether different classes may be treated differently under the debtor's plan, and the tasks that a committee or separate committee is to perform. See

Garden Ridge Corp., 2005 WL 523129, at * 2. Furthermore, "[s]ome courts apply a two part test: first, whether the appointment of an additional committee is necessary to assure that the movants are adequately represented; and, second, whether the court should exercise its discretion and order the appointment." Id. "Regardless of the factors considered, the decision [to appoint an additional committee] is not to be taken lightly, and involves a delicate balancing of various and sometimes diverging interests." Id. (citations omitted).

6. In this case, because (i) there already exist two committees to represent the interests of holders of LTWs, and the United States Trustee has determined that such committees are representing the interests of the Movants and other holders of LTWs, (ii) a sophisticated, well represented group of hedge funds are advancing such interests in the LTW Adversary Proceeding and in objecting to disclosure statements and confirmation of the Debtors' chapter 11 plan, and (iii) official committees are not appointed for the advancement of parochial litigation interests, all factors counsel against the appointment of an additional official committee.

A. Holders of LTWs Are Adequately Represented by the Two Existing Committees.

7. The Equity Committee and its team of retained professionals have actively and diligently participated in the Debtors' chapter 11 cases, and are adequately and effectively representing the interests of all equity security holders, including the LTW holders (who the Debtors believe hold common equity interests in WMI). Members of the Equity Committee have a fiduciary duty to act on behalf of all common and preferred equity interest holders and, indeed, upon information and belief, a majority of the members of the Equity Committee hold common equity interests themselves. Further,

the Creditors' Committee, which operates as an estate fiduciary representing the interests of unsecured creditors, has been intimately involved in these cases since the very beginning, and if the LTW holders in the LTW Adversary Proceeding prevail in their assertion that the LTW interests represent claims against the Debtors, then that committee can effectively represent their interests. In either case, LTW holders are more than adequately represented by the existing committees. Interestingly, none of the Movants have sought appointment to either the Equity Committee or the Creditors' Committee, something that, if requested, the United States Trustee would have considered and perhaps granted.

8. Any attempt to spin LTW holders' interests as distinct from the other members of these committees is unpersuasive; section 1102(a) of the Bankruptcy Code does not create a right to the appointment of additional committees for every "unique" class of creditors or equity security holders. Spansion, 421 B.R. at 163 ("The statutory focus of § 1102(a)(2) is not whether the equity holders are *exclusively* represented, but whether they are *adequately* represented.") (citation omitted, emphasis added). This principle is evidenced by the prior decision of the United States Trustee to deny a similar request in these cases made by certain holders of trust preferred securities. Moreover, the allegation that members of the existing committees may have interests that diverge from the specific interests of holders of LTWs is insufficient to justify the appointment of a third committee. "Mere conflict between members of the Official Committee is no basis for the appointment of an additional committee[.]" Garden Ridge Corp., 2005 WL 523129, at *4 ("A committee of unsecured creditors often consists of creditors with a variety of viewpoints, and thus conflicts are not uncommon, especially when creditors are

acting individually to protect their separate business interests."); Mirant Ams. Energy Mktg., L.P. v. Official Comm. of Unsecured Creditors of Enron Corp., No. 02 Civ. 6274 (GBD), 2003 WL 22327118, at * 8 (S.D.N.Y. Oct. 10, 2003) ("A rule of decision based purely on whether separate classes of creditors have differing interests would lead to the unnecessary proliferation of committees at an astronomical cost to the bankruptcy estates.") (citation omitted).

9. Furthermore, Movants' concern is not that its representation is inadequate now; it is that it may become inadequate in future. This is not the applicable standard. See id. at *10 (dismissing as "speculative" appellant's argument concerning "potential future conflicts"); In re Dana Corp., 344 B.R. at 38-40 (refusing asbestos-creditors' request to appoint additional committee because of future possibility of conflict); In re Baldwin-United Corp., 45 B.R. 375, 375 (Bankr. S.D. Ohio 1983) (refraining from judgment concerning a "potential conflict"). Accordingly, courts find that adequate representation is lacking only when conflicts prevent an official committee from upholding its fiduciary duties or being able to function as a single unit or reach consensus on important issues. Garden Ridge Corp., 2005 WL 523129, at *4; In re Sharon Steel Corp., 100 B.R. 767, 777-78 (Bankr. W.D. Pa. 1989). That is not the case here.

B. LTW Interests Are Being Advanced by the Named Plaintiffs and Their Counsel in the LTW Adversary Proceeding.

10. The real concern conveyed by the Motion is that neither the Equity Committee nor the Creditors' Committee is pursuing the LTW Adversary Proceeding on behalf of holders of LTWs and, in fact, the Creditors' Committee has actually intervened in opposition to the LTW holders. See Motion at 13-14. But advocating a particular litigation position is not the role of a committee. See Mirant Ams. Energy Mktg., 2003

WL 22327118, at *6 ("The principal purpose of creditors' committees is not to advocate any particular creditor class's agenda, but rather to strike a proper balance between the parties such that an effective and viable reorganization of the debtor may be accomplished.") (citation omitted).

11. Hence, it would be improper to appoint a committee solely geared towards a specific litigation issue, such as the LTW Adversary Proceeding. See In re Enron Corp., 279 B.R. 671, 692 (Bankr. S.D.N.Y. 2002) ("The Court does not believe the estate should fund a distinct group of creditors to litigate an issue that would appear to be in their interest alone and provide no benefit to the estate."); Trans World Airlines, 1992 WL 168152, at *3 ("Official committees are not designed to provide a speaker's platform for a particular creditor."); Sharon Steel Corp., 100 B.R. at 780 (declining to appoint an additional committee where the request "boil[ed] down to an appeal to this court to give this one group separate legal representation and the opportunity to request the court to retain its own professionals at the expense of Sharon's estate").

12. To the extent holders of LTWs require representation of their particular interests, such representation has been more than adequately provided by the named plaintiffs pursuing the LTW Adversary Proceeding who, as mentioned above, appeared at the confirmation hearing and many others. Indeed, Movants agree that the plaintiffs "have done *a remarkable job* of representing LTW holders throughout the adversary proceeding thus far." Motion at 10 (emphasis added). These plaintiffs – led by experienced counsel from three separate law firms – are well funded, sophisticated entities holding substantial interests in the Debtors, albeit at steeply discounted vulture rates, who have actively participated in the Debtors' cases for over one year, have

successfully defended the Debtors' motion for summary judgment in the LTW Adversary Proceeding, convinced the Court to require the Debtors to reserve funds in the maximum amount requested by such holders in the event that they are successful in litigation, triumphed over the Debtors' motion to dismiss claims against the Debtors' directors in the litigation, and have represented holders of LTWs in every key aspect of the Debtors' cases (including, among other things, persuading the Court to force the Debtors to make certain changes to the disclosure statement, ballots, and chapter 11 plan). See id. at 11 (listing six major accomplishments of class counsel in the LTW Adversary Proceeding). In several cases, courts have found that the existence of an "informal committee" constitutes sufficient representation to preclude the appointed of an additional official committee. See, e.g., Spansion, 421 B.R. at 164 (finding that the "Ad Hoc Equity Committee" was "adequately represent[ing]" interests of equity security holders in the case "without the need for an 'official' committee"); Garden Ridge Corp., 2005 WL 523129, at *4 (refusing to appoint an official committee of landlords where, among other things, the landlords had formed an informal committee that could be heard as a party in interest and could later seek reimbursement pursuant to section 503(b) of the Bankruptcy Code); In re Winn-Dixie Stores, Inc., 326 B.R. 853, 858 (Bankr. M.D. Fla. 2005) ("[T]he Court finds that the Plan Participants are able to participate in the cases without an official committee, either through an ad hoc committee or on an individual basis.").

13. To the extent the ostensible purpose of the Motion was to ensure that LTW holders are represented at the confirmation hearing, it is groundless and moot. Indeed, on the very day Movants filed the Motion, counsel for the plaintiffs in the LTW Adversary Proceeding filed a reply to an objection to confirmation, and actively

participated in the hearing on confirmation of the Debtors' proposed plan over a two-week period in July – further illustrating their resiliency and ardent dedication to advancing the interests of LTW holders. Thus, any "concern[] over the continued funding of the LTW Adversary proceeding, going forward" is not "quite palpable" as Movants claim – it is baseless. Motion at 10. If Movants are concerned that the current plaintiffs in the LTW Adversary Proceeding will "take their ball and go home," then Movants' current counsel – who filed the 18-page Motion for appointment of an LTW committee and obviously is familiar with the issues in the underlying LTW disputes – is more than capable of replacing them. See id. at 12.

14. Recognizing that the named plaintiffs and their counsel in the LTW Adversary Proceeding have provided adequate representation (id. at 10), the Motion primarily focuses on a speculative concern that, at some point in the future, the plaintiffs may decide to withdraw, and there may be no holder of LTWs willing to pursue and fund the LTW Adversary Proceeding.[3] This unfounded apprehension is unconvincing and does not warrant the burden and expense that would result from the imposition of a duplicative committee. See, e.g., Albero v. Johns-Manville Corp. (In re Johns-Manville Corp.), 68 B.R. 155, 163 (S.D.N.Y. 1986) (affirming bankruptcy court's denial of a request for the appointment of an official committee of equity holders where unofficial groups had participated effectively in the case and the record did not support the equity

[3] In support of this argument, the Motion points to an alleged selloff in the market subsequent to one of the named plaintiffs withdrawing from the LTW Adversary Proceeding as evidence that holders of LTWs have concerns over future funding of the LTW Adversary Proceeding. Motion at 7-8. Perhaps, instead, investors read this withdrawal as a signal about the weakness of the plaintiffs' case in the LTW Adversary Proceeding.

holders' argument that the informal committee might cease activity at any time). Moreover, nothing precludes Movants or any other holder of LTWs from hiring their own counsel and participating in the Debtors' cases in the event the named plaintiffs withdraw. See Spansion, 421 B.R. at 163 (noting that even if the debtor, its management or the existing official committee were not adequately representing the movants' interests, the movants could do so themselves). Merely because Movants do not want to have to fund this litigation or the pursuit of other legal theories or objections does not justify forcing the Debtors' estates to bear such costs. Additionally, Movants could apply for reimbursement pursuant to section 503(b) of the Bankruptcy Code if they provide a substantial contribution to the Debtors' estates. See id. at 164.

C. The Timing of the Motion, Coupled with the Expense and Delay Attendant to the Appointment of a New Committee, Mandates Denial of the Motion.

15. *Thirty-three months* into these chapter 11 cases, *15 months* since the Debtors first proposed plan treatment for the LTWs, *13 months* since certain LTW holders commenced the LTW Adversary Proceeding, *seven months* since the Court denied the Debtors' motion for summary judgment with respect to that litigation, *seven months* since a full reserve was established to protect the interest of LTW holders, *four months* since the Court entered a scheduling order in the LTW litigation setting a September 12, 2011 trial date, and *six weeks* since original plaintiff Broadbill Investment Corporation ("Broadbill") withdrew as a named plaintiff and was replaced by several other LTW holders in the LTW Adversary Proceeding, Movants seek appointment of an official committee for the sole purpose of shifting LTW holders' litigation costs to the

bankruptcy estate. Movants have acted with no diligence whatsoever in seeking appointment of an official committee and in filing the Motion.

16. As in the In re Kalvar Microfilm case, "the timing issue is one of the most important factors" the Court should consider in deciding the Motion. See 195 B.R. 599, 601 (Bankr. D. Del. 1996) (denying motion to appoint an equity committee). There is no support for the proposition, as stated in the Motion, that the timing of the Motion should be considered in relation to the status of the LTW Adversary Proceeding. See Motion at 15. Rather, courts generally consider the timing of a request for appointment of an additional committee relative to the status of the chapter 11 case. See In re Kalvar Microfilm, Inc., 195 B.R. at 601 ("The late timing of the motion ties in to the only remaining purpose of an equity committee in this case, which would be to object to confirmation, and litigate the valuation issue. The aforementioned costs associated with the formation of an equity committee cannot be justified in light of this purpose."). This is because "[p]erhaps the most important aspect of a committee's role is to negotiate the terms of a reorganization." In re Johns-Manville Corp., 68 B.R. at 161; see Garden Ridge Corp., 2005 WL 523129, at *3 ("The chief purpose of an official committee [of unsecured creditors] is to maximize distribution to this class."). And, because "one of its most important functions is to negotiate a reorganization plan, a committee will most effectively exercise its responsibilities at the beginning of a reorganization, prior to the formulation of a plan. By the time a reorganization plan has been submitted to the various classes of interest for voting . . . much of the opportunity for a committee to participate in a reorganization will have passed." Johns-Manville Corp., 68 B.R. at 161, 163 (finding it was "too late for a committee to exercise its most important function—

negotiating a reorganization plan—as a reorganization ha[d] already been submitted to the bankruptcy court"). Here, the Debtors' plan has been voted on, the objection deadline has passed, the LTW Adversary Proceeding plaintiffs submitted an objection to the Debtors' plan, and the hearing to consider confirmation of the plan has already occurred. Appointing a new committee now would serve no purpose other than to prosecute the LTW Adversary Proceeding which, as stated above, is insufficient to justify the imposition it would bear on the Debtors' bankruptcy estate. See supra at 8.

17. In addition, the appointment of yet another committee of equity security holders to represent the discrete interests of holders of LTWs would cause discord, delay, and significant expenses (including, among other things, material professionals fees), which would be antithetical to the efficient, economical administration of the Debtors' cases. These costs significantly outweigh any concern regarding the adequacy of representation of such LTW holders.

18. Moreover, Movants filed the Motion after the addition of *four* newly-named plaintiffs – all well-funded hedge funds – to the LTW Adversary Proceeding, who collectively own over 17 million LTWs. The addition of these newly-named plaintiffs completely addressed any concerns that LTW holders may have had over the continued funding of the LTW Adversary Proceeding.

CONCLUSION

19. Accordingly, because the Motion fails to establish a lack of adequate representation of holders of LTWs for the reasons set forth above, the Motion should be denied.

Dated: Wilmington, Delaware
August 3, 2011

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