

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

WASHINGTON MUTUAL, INC., *et al.*,

Debtors.

Chapter 11

Case No. 08-12229 (MFW)
(Jointly Administered)

Re: Docket Nos. 8065, 8335, 8337 & 8372

**REPLY IN SUPPORT OF MOTION OF CERTAIN DIME LTW HOLDERS,
PURSUANT TO BANKRUPTCY CODE § 1102, FOR AN ORDER
APPOINTING AN OFFICIAL COMMITTEE OF DIME LTW HOLDERS**

Jim Alderson, Brad Christensen, Austin Hopper, Rodney McFadden, Edward Mintz, Richard Squires and Chuck Warltier (collectively, the “Movants”), each an LTW holder and party in interest in the above-captioned cases, by their undersigned counsel, proffer the following reply to the various objections and oppositions of Debtors, the United States Trustee, and the Official Committee of Unsecured Creditors raised in response to the 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”).¹

BACKGROUND

1. On July 1, 2011, the Moving Dime LTW Holders filed the Motion for appointment of an Official Committee of Dime LTW Holders. On July 28, 2011 the United States Trustee filed an objection to the Motion (the “Trustee’s Objection”) [D.I. 8335]. On the same day, July 28, 2011, the Official Committee of Unsecured Creditors (the “Creditors’ Committee”), filed an objection to the Motion (the “Creditors’ Committee Objection”) [D.I. 8337]. On August 3, 2011, Debtors filed an objection to the Motion (the “Debtors’ Objection”, and together with the Trustee’s Objection and the Creditors’ Committee Objections, the

¹ Capitalized terms not otherwise defined herein have the meanings ascribed to such terms in the Motion.



“Objections”) [D.I. 8372]. Movants dispute many of the assertions, contentions and misstatements of material fact contained in the various objections and hereby file this consolidated reply.

ARGUMENT

A. Dime LTW Holders are Not Represented by the Existing Official Committees

2. In its opposition, the United States Trustee states that “the Movants fail to allege any credible basis why, even if their views diverge on some issues from some of the other creditors, the existing Committees, which are often tasked with representing parties with conflicting interests, would not adequately represent their interests.” (Trustee’s Objection, ¶ 14). Debtors and the Creditors’ Committee suggest that the LTW Claims are equity interests, and therefore are represented by the Official Committee of Equity Security Holders (the “Equity Committee”). They argue in the alternative that should the LTW Holders prevail in the adversary proceeding entitled *Nantahala Capital Partners, LP, et al. v Washington Mutual Inc., et al.*, Adv Pro No. 10-50911 (MFW) (the “Adversary Proceeding”) then the Creditors’ Committee “can effectively represent their interests.” Debtors continue with the disingenuous notion that “LTW holders are more than adequately represented by the existing committees.” (Debtors’ Objection, ¶ 7).

3. Movants do not believe that LTW holders possess equity interests and therefore they have no basis for representation by an Equity Committee. More outrageous is the misrepresentation by Debtors that “Movants’ concern is not that its representation is inadequate now; it is that it may become inadequate in [the] future” (Debtors’ Objection, ¶ 9). To the contrary, Movants are concerned that Dime LTW Holders have **no** representation by the Creditors’ Committee **now**. This is underscored by the quote above in which the Debtors

acknowledge that such representation will only occur **if** the Adversary Proceeding is decided in Plaintiffs' favor.

4. Indeed, throughout these proceedings, the Creditors' Committee has acted in opposition to the interests of LTW holders. On May 18, 2010 the Creditors' Committee filed a joinder to Debtors' defense of the adversary proceeding (Adv Proc No. 10-50911, D.I. 10). Even before commencement of the Adversary Proceeding, the Creditors' Committee went on record as opposing the claims of LTW holders, asserting their incorrect belief that LTWs were equity interests and thus not entitled to discuss matters with the Creditors' Committee (See Exhibit A)². Indeed, it appears that with the assistance of FTI Consulting, an entity advising the Creditors' Committee and funded by this bankruptcy estate, and in the absence of an Official Committee of Dime LTW Holders the Creditors' Committee, the Creditors' Committee was engaged in the negotiations which resulted in trading away the interests of Dime LTW Holders without their input or representation.³ (See Exhibit B) Specifically, the communication that is Exhibit B was sent in response to a review of documents showing that such negotiations occurred as early as 2009, well before the filing of the Adversary Proceeding.

5. It strains credulity for the Debtors to contend that the Creditors' Committee can and will represent the interests of LTW holders, and for the United States Trustee to not take note of the Creditors' Committee's persistent and resilient opposition to Dime LTW Holders' claims. The Creditors' Committee has been nothing but hostile and adversarial to the interests of LTW Holders and to suggest otherwise is either fanciful or a deliberate misrepresentation of plain and obvious fact.

² Attached hereto as Exhibit A is an email correspondence dated February 4, 2010 between Creditors' Committee counsel and one of the Movants.

³ Attached herewith as Exhibit B is an email correspondence dated June 1, 2009 between one of the Movants and FTI Consulting, financial advisor to the Creditors' Committee.

6. Additionally, the Debtors have posited that “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” (See Debtors’ Objection at ¶7). The absurdity of a Dime LTW Holder joining the Unsecured Creditors Committee, at this juncture, cannot be underscored enough, especially where, as here, the Committee has intervened in the Adversary Proceeding by joining the Debtors in opposition to the Dime LTW Holders. It would be as equally absurd and patently improper for a Dime LTW Holder to join the Equity Committee for two principal reasons. First, the members of the Equity Committee represent a constituency to which the LTW Holders do not belong. Secondly, the LTW Holders have claims that rank senior to the interests of Equity Holders.

7. Finally, it should be noted that the proceeds of the Anchor Litigation were assets held in Trust by WMI, as Trustee, for the benefit of the Dime LTW Holders. Before the Anchor Litigation drew to a final conclusion, WMI (the Trustee of the assets) filed bankruptcy. The Debtors then attempted to transfer ownership of the assets in its “control” but for which it did not have actual “ownership” to another entity. This is no more permissible and should be viewed as no less unconscionable than a case where the Trustee in the Trust Department at the local Bank files personal bankruptcy and then attempts to satisfy his or her creditors with other people’s money. Outside of bankruptcy, a new Trustee would be appointed to oversee the assets. Since there is no existing Committee to take that role, a separate committee to act as fiduciary is appropriate.

B. The Financial Resources of Certain Dime LTW Holders to Fund Litigation Is Irrelevant

8. Both Debtors and the Creditors’ Committee suggest that because several institutional investors are funding an adversary proceeding that is proper for the entire class to be

supported by such beneficence. It is impressive how generous both Debtors and the Creditors' Committee are with other peoples money. To date, upon information and belief, the Nantahala adversary proceeding, which serves to benefit **ALL** Dime LTW Holders, has been funded by a very small minority of Dime LTW Holders. Debtors continue to remind this Court that lead plaintiffs are "sophisticated" and "well funded." It is remarkable how Debtors remain silent about the thousands of other LTW holders who are fortunate to have representation though the generosity of these "sophisticated" investors that Debtors seek to demonize.⁴

9. Debtors are fully aware of the financial constraints of individual LTW holders. In yet another clever act in Debtors' war of financial attrition, in its 43rd and 44th omnibus objections to claims, Debtors attempted to overwhelm individual claimants by suggesting that each claim be dealt with individually. Debtors continually rise before this Court expressing concern for the costs of these proceedings. Yet, Debtors' counsel was happy to expend considerable financial resources to engage in thousands of individual proceedings against Dime LTW Holders. Such frivolity would have served the dual purpose of frustrating the claims of smaller and less sophisticated Dime LTW Holders as well as creating a litigation cash cow for Debtors' counsel. However, as was demonstrated by the withdrawal of the lead plaintiff in the adversary proceeding, absent appropriate class funding, smaller and/or less sophisticated Dime LTW Holders are at the mercy of a handful of institutional investors to prosecute their claims against a well funded and sophisticated Debtor and an equally well funded and sophisticated adversary in the Creditors' Committee.

10. The Creditors' Committee opines that Movants are a "well-funded group" "clearly capable of hiring counsel to represent their individual pecuniary interests." Indeed

⁴ Movants take note of class plaintiffs response [D.I. 8388] in which it is reported that Debtors "attached a list of approximately 15,000 names of individual LTW holders, and a list of approximately 100 bankers and brokers holding LTWs through the Depository Trust Company."

Movants are bearing full costs of their own representation as purportedly are class plaintiffs in the Adversary Proceedings.⁵ The same cannot be said for the Creditors' Committee who is funded by the Debtors' estate. Would the Creditors' Committee wish to institute means testing as a basis for establishment of official committees? There are among the ranks of the creditors, settling note holders, and their representative indentures trustee's entities with substantial financial resources quite capable of funding their own representation. It is the pinnacle of hypocrisy for the Creditors' Committee to not question the ability of those they represent to fund litigation while long term individual investors some of whom have held Dime LTWs since their creation in 2000 have their representation be wholly dependent upon the resources of a small number of Dime LTW Holders who have, at considerable expense, risen to defend the claims of the entire class.

11. Just as the resources and attributes of individual creditors and equity investors are irrelevant to a determination regarding the establishment of an official committee, so too are the resources and characteristics of individual Dime LTW Holders. The issue here is one of fundamental fairness and the need to ensure protection of all Dime LTW Holders irrespective of their ability to fund litigation. The issue here is to ensure that small individual Dime LTW Holders be assured fair, proper, and adequate representation in these proceedings and not be dependent upon the generosity and mercy of a handful of Dime LTW Holders who at their own expense have stepped forward to protect the interests of a class.

C. The Motion for an Official Committee of Dime LTW Holders is Timely

12. Debtors, in their objection, recite the time line of these proceedings arguing that the most recent event, the withdrawal of Broadbill Investment Corp. ("Broadbill") is not

⁵ While Movants have hired counsel to file the instant Motion, it should not be assumed that Movants have the financial wherewithal to retain counsel for other matters in these bankruptcy cases, or in the Adversary Proceeding.

relevant. (Debtors' Objection, ¶¶ 15 and 16). Perhaps Debtors are correct that establishment of an Official Committee of Dime LTW Holders is something that should have occurred earlier in these proceedings. That such a committee was not established earlier should in no way preclude the need and appropriateness for formation of a committee at the present time.

13. Even more puzzling is the objection by the Creditors' Committee. They remind the Court that "one of the primary functions of official committees is to negotiate the plan of reorganization." (Creditors' Objection, ¶ 25) In furtherance of their argument, they note that "creditors voted overwhelmingly in favor of approval of the Modified Sixth Amended Plan" (Creditors' Objection, ¶ 25). Indeed, the Creditors' Committee who participated in the fundamentally flawed and unconfirmable Plan of Reorganization rejected by this Court in January 2011 has done little since the rejection of that plan to cure its infirmities. That the Creditors' Committee persists in promulgating inequitable and unconfirmable plans is not an argument against creation of a Dime LTW Committee, but is further evidence that the Creditors' Committee, together with the Debtors, is not capable of moving the process forward in fulfillment of its fiduciary role in these bankruptcy proceedings. Creation of an Official Committee of Dime LTW Holders would put at the table creditors, albeit with divergent interests, sharing a common goal in finding an equitable and expedient conclusion to these proceedings. That the Creditors' Committee endorses inequitable and unconfirmable plans is not an argument against but rather a strong argument for the creation of an Official Committee of Dime LTW Holders.

WHEREFORE, for all the foregoing reasons, the Movants believe that the relief requested in the Motion is appropriate and timely and that the Motion should be granted.

Dated: August 9, 2011
Wilmington, Delaware

PINCKNEY, HARRIS & WEIDINGER, LLC

By: /s/ Donna L. Harris

Donna L. Harris (DE No. 3740)
Kevin M. Capuzzi (DE No. 5462)
1220 North Market Street, Suite 950
Wilmington, DE 19801
Telephone: (302) 504-1497
Facsimile: (302) 655-5213
dharris@phw-law.com
kcapuzzi@phw-law.com

Counsel to the Movants

EXHIBIT "A"

From: Jim10463@aol.com [mailto:Jim10463@aol.com]
Sent: Monday, August 08, 2011 6:13 PM
To: Donna Harris
Subject: Fwd: Email to Alderson from WMI Unsecured Creditors Committee

From: rajohnson@AkinGump.com
To: Jim10463@aol.com
CC: jeffs@amnat.com, ulcanvay@hotmail.com
Sent: 2/4/2010 5:31:11 P.M. Mountain Daylight Time
Subj: RE: Washington Mutual Unsecured Creditors Committee

Dear Mr. Alderson:

I am responding to your emails dated Jan. 26, 2010 and Feb. 3, 2010. As you know, Akin Gump is counsel to the Official Committee of Unsecured Creditors (the "Creditors Committee") of Washington Mutual Inc. ("WMI") and WMI Investment Corp. ("WMIIC"). We are not counsel to any single creditor nor are we counsel to the equity holders of DIMEQ. I would like to caution you that there is not an attorney-client relationship between you and me. Accordingly I am not in a position to offer you any legal advice, including with respect to the terms of the DIMEQ Litigation Tracking Warrants.

Nevertheless I can tell you that the Creditors Committee is aware of the DIMEQ Litigation Tracking Warrants. The references that you have seen to our work regarding the Keystone and Anchor goodwill litigation relates to our assessment of the potential impact of the litigation on the recoveries to the WMI bankruptcy estate -- not on the recoveries of DIMEQ Litigation Tracking Warrant holders.

As you may know, the United States Trustee recently appointed an Official Committee of Equity Holders (the "Equity Committee"). Counsel to the Equity Committee is Greg Cross of Venable LLP. Perhaps he can be of greater assistance to you since DIMEQ is an equity security.

Sincerely,

Robert Johnson

Robert A. Johnson
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
Tel. (212) 872-1077
Email: RAJohnson@AkinGump.com

From: Jim10463@aol.com [mailto:Jim10463@aol.com]
Sent: Wednesday, February 03, 2010 7:12 PM
To: Johnson, Robert

Cc: jeffs@amnat.com; ulcanvay@hotmail.com

Subject: Re: Washington Mutual Unsecured Creditors Committee

Mr. Johnson,

Please respond to my earlier email regarding DIMEQ, the DIME LTW's. It is my understanding from looking at the billing summaries that Akin Gump is involved in the matter.

Thank You,

Jim Alderson

February 3, 2010

In a message dated 1/26/2010 4:50:15 P.M. Pacific Standard Time, Jim10463@aol.com writes:
Hi Mr. Johnson,

I am a shareholder of the Litigation Tracking Warrants that trade under the symbol DIMEQ. I would just like you to confirm that Akin Gump has made the unsecured creditors committee aware of the existence of the warrants and the fact that per the existing warrant agreement that 85% of the net proceeds are to be paid to the DIMEQ holders.

Please confirm to me that Akin Gump and the Washington Mutual Creditors' Committee are both aware of this fact and are taking steps to protect the shareholders of DIMEQ.

The bill submitted to the Bankruptcy Court indicated you have spent a considerable amount of time on this issue.

Thank you for your prompt response.

James F. Alderson
81-280 Legends Way
La Quinta, CA 92253

cc Jeff Shultz, VP American National Bank Trust Department
Brad Christenson

IRS Circular 230 Notice Requirement: This communication is not given in the form of a covered opinion, within the meaning of Circular 230 issued by the United States Secretary of the Treasury. Thus, we are required to inform you that you cannot rely upon any tax advice contained in this communication for the purpose of avoiding United States federal tax penalties. In addition, any tax advice contained in this communication may not be used to promote, market or recommend a transaction to another party.

The information contained in this e-mail message is intended only for the personal and confidential use of the recipient(s) named above. If you have received this communication in error, please notify us immediately by e-mail, and delete the original message.

EXHIBIT “B”

From: Jim10463@aol.com [mailto:Jim10463@aol.com]
Sent: Tuesday, August 09, 2011 9:55 AM
To: Donna Harris
Subject: Corrected version Use this one FTI consulting emails to Alderson

In a message dated 8/5/2009 10:18:53 A.M. Mountain Daylight Time, Melissa.Ellis@FTIConsulting.com writes:

Dear Jim –

I believe it would be best for you to contact someone advising Washington Mutual directly to address your concerns. FTI's client is not Washington Mutual.

You can contact Andrew Siegel at Joele Frank. asiegel@joelefrank.com

Regards,
Melissa

Thanks Melissa

In a message dated 6/18/2009 10:55:12 A.M. Mountain Daylight Time, Melissa.Ellis@FTIConsulting.com writes:

Dear Jim –

I am coordinating with the attorneys handling this matter to get you a response.

Regards,
Melissa

From: Jim10463@aol.com [mailto:Jim10463@aol.com]
Sent: Wednesday, June 17, 2009 4:51 PM
To: Ellis, Melissa
Cc: jeffs@amnat.com; ulcanvay@hotmail.com
Subject: Re: Dime Litigation Warrants

Hi Melissa,

I believe I am due the courtesy of a response to my earlier email. Please advise if you are going to respond or not. Many of us are concerned that our rights to 85% of the net proceeds are being intentionally overlooked. If so this is a serious concern.

Thank you,

James Alderson

In a message dated 6/1/2009 4:56:02 P.M. Pacific Daylight Time, Jim10463 writes:

Hi Melissa,

My name is James Alderson. I am a retired CPA and hold a significant number of shares of DIMEZ, the litigation tracking warrants that are involved in the Washington Mutual / JPM matter.

I noticed on the latest FTI bill that you had incurred time in April on the goodwill litigation. The explanation said "Determine treatment of goodwill litigation in counter proposal". Can you please tell me what the counter proposal was, and also what the proposal being countered was?

Thank you,

James Alderson

June 1, 2009

CERTIFICATE OF SERVICE

I, Donna L. Harris, certify that on August 9, 2011, I caused a copies of the Reply in Support of Motion of Certain Dime LTW Holders, Pursuant to Bankruptcy Code § 1102, for an Order Appointing an Official Committee of Dime LTW Holders to be served upon the parties listed below via electronic mail.

Jane M. Leamy, Esquire
Trial Attorney
United States Trustee Office
844 King Street, Suite 2207
Wilmington, DE 19801
Jane.M.Leamy@usdoj.gov

David B. Stratton, Esquire
David M. Fournier, Esquire
James C. Carignan, Esquire
John H. Schanne, II, Esquire
Pepper Hamilton LLP
1313 N. Market Street, Suite 5100
Wilmington, DE 19801
strattond@pepperlaw.com
fournied@pepperlaw.com
carignan@pepperlaw.com
schannej@pepperlaw.com

Fred S. Hodara, Esquire
Robert A. Johnson, Esquire
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
fhodara@akingump.com
rajohanson@akingump.com

Mark Collins, Esquire
Michael J. Merchant, Esquire
Travis A. McRoberts, Esquire
Julie A. Finocchiaro, Esquire
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, DE 19801
collins@rlf.com
Merchant@rlf.com
mroberts@rlf.com
finocchiaro@rlf.com

Brian S. Rosen, Esquire
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
brian.rosen@weil.com

/s/ Donna L. Harris
Donna L. Harris (DE No. 3740)