IN UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
WASHINGTON MUTUAL, INC., *et al.*,[1]	Case No. 08-12229 (MFW) (Jointly Administered)
Debtors.	**Hearing Date: April 21, 2010 at 11:30 a.m.** **Related Docket Nos. 2534, 2617, 3068**

REPLY OF VENABLE LLP TO DEBTORS' OBEJCTION TO ITS FIRST AND SECOND MONTHLY FEE APPLICATIONS AS COUNSEL FOR THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FOR INTERIM COMPENSATION AND REIMBURSEMENT OF EXPENSES

Venable LLP hereby files this Reply with respect to the Objection (the "Objection") [Docket No. 3068] filed by the debtors and debtors in possession (collectively, the "Debtors") to the First and Second Monthly Fee Applications of Venable LLP (the "Venable Applications") [Docket Nos. 2534 & 2617], as counsel to the Official Committee of Equity Security Holders, and in further support of the Venable Applications states as follows:

BACKGROUND

1. On September 26, 2008, the Debtors filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors are authorized to continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. On

[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 1301 Second Avenue, Seattle, Washington 98101.

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October 3, 2008, the Court entered an order jointly administering these cases pursuant to Federal Rule of Bankruptcy Procedure 1015(b) for procedural purposes only.

2. On January 11, 2010, the United States Trustee appointed the Official Committee of Equity Security Holders [Docket No. 2130]. The parties appointed to the Committee are Esopus Creek Value, LLC, Kenneth I. Feldman, Saul Sutton, Dorothea Barr, Joyce M. Presnall, Tyson Matthews and Michael Willingham (the "Committee"). No trustee or examiner has been appointed in these chapter 11 cases.

3. On January 11, 2010, pursuant to sections 328 and 1103(a) of the Bankruptcy Code, the Committee selected Venable to serve as counsel to the Committee. The Committee filed an application to employ Venable on January 27, 2010 (the "Application to Employ") [Docket No. 2250]. On February 22, 2010, this Court entered an order authorizing the retention of Venable as counsel to the Committee, *nunc pro tunc* to January 11, 2010 [Docket No. 2403].

4. In accordance with this Court's Amended Administrative Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals and Committee Members entered on November 17, 2008 [Docket No. 302], Venable filed the Venable Applications on March 16, 2010 and March 25, 2010.

5. The Objection filed by the Debtors was the only objection filed with respect to the Venable Applications. The Debtors assert that Venable's requested compensation should be disallowed in total because in the view of Debtors' counsel it is unjustified and provided no benefit to the estate due to the brevity of Venable's retention.

APPLICABLE LEGAL STANDARDS

6. Section 330 of the Bankruptcy Code authorizes the allowance of fees for "actual, necessary services." 11 U.S.C. §330. Whether services were actual and necessary is not determined retrospectively but at the time they were completed. *See Colliers on Bankruptcy*, ¶ 330.04(1)(b)(ii) (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (citing 11 U.S.C. §330(a)(3)(c)).

7. The Third Circuit and this Court have repeatedly found that fees incurred in the administration of an official committee and fulfillment of its statutorily mandated duties benefit the estate as actual and necessary. *See In re First Merchants Acceptance Corp. v. Bradford & Co.*, 198 F.3d 394, 403 (3d Cir. 1999) ("Fees that are demonstrably incurred in the performance of the duties of the committee... are reimbursed"); *In re Worldwide Direct, Inc.*, 259 B.R. 56, 60 (Bankr. D. Del. 2001) (enumerating the duties under section 1103 as examples of services the committee may perform for which reimbursement is proper as necessary).

8. Fees incurred by a committee in protecting the interests of its constituency and seeking to maximize value to the estate are also compensable. *See In re Channel Master Holdings, Inc.*, 309 B.R. 855, 861-62 (Bankr. D. Del. 2004) (committee analyzed sale and potential lien issues prior to turning over administration to chapter 7 trustee); *In re 14605, Inc.*, 2007 Bankr. Lexis 3147 (Bankr. D. Del. Sept. 19, 2007) (Court found actions of committee in reviewing and objecting to bidding procedures, and protecting its constituency in doing so, were reasonably likely to benefit the estate even where no higher bids were received because actions were an attempt to maximize value to estate).

9. In determining whether services were actual and necessary courts look objectively into whether the services were reasonably likely to benefit the estate based upon the services a reasonable professional would have performed under similar circumstances. *See In re Ames Department Stores*, 76 F.3d 66, 72 (2d Cir. 1996); *Channel Master Holdings*, 309 B.R. at 862.

10. The reasonableness of requested compensation is determined by the nature, extent, value and time spent on such services. *In re Lan Assoc. XI, LP*, 192 F.3d 109, 122 (3d Cir. 1999) (citing 11 U.S.C. §330). The factors a court uses to determine the reasonableness of the fees incurred are not limited to those cited in section 330, however. *Id.* at 123. Other factors courts have considered include the novelty and difficulty of the questions raised in the case, the skill required to perform the legal services properly, the preclusion of other employment by the professional due to acceptance of the case, the customary fee charged in similar cases, the experience, reputation and ability of the professional, and the undesirability of the case. *Id.* n.8. These factors were addressed in detail in the Venable Applications and will not be repeated here.

VENABLE PROVIDED ACTUAL, NECESSARY AND VALUABLE SERVICES

11. During the compensation periods covered by the Venable Applications, January 11, 2010 through February 28, 2010, Venable's services to the Committee both supported the Committee's discharge of its fiduciary duties, and were actual, necessary and valuable. Specifically, the projects in which Venable spent considerable time include:

- Responding to the Debtors' 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 (the "Motion to Disband");

- Drafting by-laws, confidentiality agreements, minutes, and holding Committee meetings;

- Organizing a process to retain, and negotiating the retention of, a financial advisor for the Committee;

- Reviewing the Debtors' organizational and capital structure;

- Familiarizing itself and the Committee with the litigation and claims the Debtors have spent the prior sixteen months prosecuting;

- Researching claims and investigating possible options for a plan of reorganization; and

- Commencing an adversary proceeding seeking to compel the Debtors to hold an annual meeting.

12. Through these services, Venable: (i) supported the continued existence of the Committee through its response to the Motion to Disband, (ii) supported the administration of the Committee through its drafting of by-laws and assistance with Committee meetings; (iii) assisted with the retention of professionals, including attorneys and financial advisors to advise the Committee; (iv) evaluated potential litigation claims, which may ultimately redound to the benefit of the Debtors' creditors and equity security holders, and (v) acted to facilitate the lawful corporate governance of the Debtors, through the commencement of an adversary proceeding seeking to compel Washington Mutual, Inc. ("WMI") to hold an annual meeting and properly elect a board of directors. Venable's services are indistinguishable in substance from those performed by committee counsel in *Channel Master Holdings* and almost any other committee case in which fiduciaries act on behalf of a constituency.

THE DEBTORS' OBJECTION SHOULD BE OVERRULED

13. The Objection – which argues without explanation that Venable's services did not benefit the estate – is nothing more than a thinly veiled re-argument of the Motion to Disband. The Debtors asserted in their Motion to Disband that they were insolvent and the Committee had no economic interest in these chapter 11 cases.[2] The Court overruled the Motion to Disband at the January 28, 2010 hearing finding that:

> There is clearly evidence both ways as to the insolvency of the Debtor. And if the Debtors' pleadings filed in this case are accepted, I think the Debtor believes that it is not hopelessly insolvent...With respect to whether there's adequate protection of the interests of...the equity holders, which is the other prong of a determination of whether or not the decision was inappropriate. I think that certainly falls in favor of equity...I think that the fact that we have § 1102 in the Code makes it clear that there are instances where other parties have a right to ...a place at the table.

See Transcript of Proceedings, page 59, attached hereto as Exhibit A. Obviously, the Court's decision should not be eviscerated by denying the committee adequate representation through a denial of compensation to counsel.

14. Here the tasks Venable performed were absolutely essential to the formation of the Committee and their evaluation of the case. In the first instance, Venable successfully defended the Committee's right to exist and put into place the administrative prerequisites for the Committee to function (e.g. by-laws, confidentiality agreements, minutes and Committee meetings) as well as assisting the Committee in identifying, interviewing, and selecting a financial advisor.

15. Venable next performed all of the functions that would be necessary for any committee and its financial advisors to generally assess the case, the pending

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[2] Curiously, this assertion is contrary to the Debtors' own plan of reorganization dated March 26, 2010, which provides for the distribution of liquidating trust interests to preferred equity holders.

litigation claims and possible plans of reorganization. Venable's work in this regard included meeting with and interviewing the Debtors' attorneys and professionals, special litigation counsel and the unsecured creditors' committee, reviewing and analyzing the legal merits of the pending litigation claims, analyzing the Debtors' organizational and capital structure and making recommendations to the Committee.

16. In addition, Venable identified the Debtors' failure to adhere to the requirements of its organizational documents and initiated adversary proceeding number 10-50731 (MFW), now pending before the Court, which seeks an order compelling WMI to hold its first annual meeting since these bankruptcy cases were filed and properly elect a board of directors.

17. The Debtors further assert, without justification, that Venable should be denied compensation for its work because the Committee has decided to work with new counsel in the future. There is no support for the Debtors' position. All of the aforementioned work had to be performed for the Committee to properly function and to the extent it encompassed review and analysis, has been and/or will be shared with the Committee's financial advisors and new counsel.

18. In the Objection, the Debtors provide no specific time entry which provided no value or was unnecessary; they simply make a blanket statement that every service Venable performed was unreasonable and/or unnecessary. "Where an objector ... seeks to disallow any of the requested fees, it is the objector...who must identify *precisely* the deficiency in the application." *In re Klika*, 2008 Bankr. Lexis 462, *10 (Bankr. D. Del. Feb. 29, 2008) (citing *In re Busy Beaver Bldg. Ctrs., Inc.* 19 F.3d 833, 846 (3d Cir. 1994)) (emphasis added). The Debtors fail to meet this burden.

19. Similarly, the cases cited by the Debtors in their Objection are wholly inapplicable. Although the Debtors have objected to Venable's fees in their entirety, both of the cases they rely upon, *In re Chas. A. Stevens & Co.* and *In re Associated Grocers of Colorado, Inc.*, dealt with the reduction of a professional's fees because individual aspects of their fee requirements were viewed as excessive. *In re Chas. A. Stevens & Co.*, 105 B.R. 866 (Bankr. N.D. Ill. 1989); *In re Associates Grocers of Colorado, Inc.*, 137 B.R. 413 (Bankr. D. Colo. 1990).

20. At no point did the time expended by Venable outweigh the potential benefits to the estate. The litigation claims, which Venable investigated, are estimated in the tens of billions of dollars and dwarf the $390,625.00 in fees incurred for the first seven weeks of the Committee's existence in this case. *One way to view reasonableness is by comparison.* The Debtors' attorneys charged $1,822,321.75 in fees during the first five weeks of the case alone, while the creditors' committee's attorneys charged $1,693,723.50 for the same period of time. Venable's fees of $390,625.00 are less than 25% of each set of attorneys' fees for a comparable period of time with comparable tasks performed.

21. Finally, the Debtors should not be allowed to complain about Venable's fees because their actions caused many of the fees to be incurred. It was the Debtors who objected to the Committee's continued existence and necessitated the time spent responding to the Motion to Disband. The Debtors also generally refused to provide information, refused to involve the Committee in settlement discussions, and refused to assist the Committee's review of the case in most instances (including explaining their position on the core of these cases or the strengths and weaknesses of their litigation

claims). These efforts to shut out the Committee necessitated Venable professionals doing their own spade work to educate the Committee so that it could make informed decisions about the Debtors' future actions.

CONCLUSION

For the foregoing reasons, the Objection should be overruled and the compensation sought in the Venable Applications should be allowed.

Dated: April 16, 2010

Respectfully submitted,

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EXHIBIT A

the Imperial decision and the Edison decision that it's an abuse of discretion. Whether reviewing under (a)(1) or the other provisions of §1102. I think that in this instance, we all know what the standard is for abuse of discretion. Whether the United States Trustee acted irrationally, capriciously, or arbitrarily. And I, quite frankly, cannot find that on the record before me. There is clearly evidence both ways as to the insolvency of the Debtor. And if the Debtors' pleadings filed in this case are accepted, I think the Debtor believes that it is not hopelessly insolvent. That it has legitimate claims against others that would result in there being sufficient funds in this estate to pay all creditors in full. I don't have to find that the Debtor is going to win those. I think the standard is not to make a final determination as to whether the Debtor is insolvent, just whether I can determine that the Debtor is hopelessly insolvent. And again, on this record, I cannot find that. I think the evidence that the debt and equity in this case are still trading, at any number, establishes that at least the market thinks that the Debtor is not hopelessly insolvent. With respect to whether there's adequate protection of the interests of the Equity Committee, excuse me, the equity holders, which is the other prong of a determination of whether or not the decision was inappropriate. I think that certainly falls in favor of the equity. While the Debtor

CERTIFICATE OF SERVICE

I, Gregory A. Taylor, hereby certify that, on April 16, 2010, I caused one copy of the foregoing to be served upon the parties listed below in the manner indicated.

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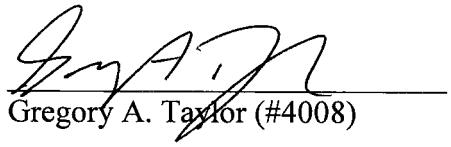

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