

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:) Case No. 08-12229(MFW)
) (Jointly Administered)
) Chapter 11
WASHINGTON MUTUAL, INC.,)
) Courtroom 4
) 824 Market Street
Debtor.) Wilmington, Delaware 19801
)
) November 14, 2008
) 10:35 A.M.

TRANSCRIPT OF OMNIBUS HEARING
BEFORE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

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1 THE COURT: Good morning.

2 MR. KAUFMAN: Good morning, Your Honor. Lee Kaufman
3 of Richards Layton and Finger on behalf of the debtors.

4 As you know, Your Honor, we filed a first amended
5 agenda yesterday. That amended agenda did not reflect two
6 supplemental affidavits that had also been filed:

7 One, in support of Davis Wright & Tremaine's
8 retention application;

9 And one in support of McKee Nelson's retention
10 application.

11 Just this morning, just prior to the hearing, we
12 filed a second amended agenda to reflect those two supplemental
13 affidavits, as well. And I did bring copies of those for Your
14 Honor in case you didn't have them.

15 THE COURT: I don't have them. You can hand them up.

16 MR. KAUFMAN: All right. May I approach?

17 THE COURT: Yes. Just one note. When you add
18 something to the agenda, don't renumber the added item Number 4
19 should have been added at the end rather than in the middle.

20 MR. KAUFMAN: I apologize, Your Honor. I will do
21 that -- or will not do that in the future.

22 I am joined today by my co-counsel, Rob Jordan, of
23 the firm Weil Gotshal and Manges in New York.

24 And if it pleases the Court, I will turn the agenda
25 over to him.

1 THE COURT: Okay. Thank you.

2 MR. JORDAN: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. JORDAN: Rob Jordan of Weil Gotshal and Manges
5 representing Washington Mutual, Inc. and WMI Investment Corp.,
6 the debtors in these Chapter 11 cases.

7 Your Honor, just to be clear for the record, I
8 understand my pro hac vice application was entered this
9 morning.

10 THE COURT: Okay.

11 MR. JORDAN: Thank you for taking care of that. We
12 have a short agenda for you today. It's essentially five
13 matters, four of which are retentions, and the final matter is
14 on NOLs, which came before you a few weeks ago on an interim
15 basis.

16 If it pleases the Court, I'll just jump right into
17 the retention. The first retention that we have on the agenda
18 is the retention of Simpson Thacher as 327(e) special counsel
19 to the debtors. This was originally slated to be heard on
20 October 30th. There was some dialogue between Weil Gotshal and
21 Simpson Thacher and the U.S. Trustee. And on account of that
22 dialogue, all the parties agreed to push that motion to be
23 heard until today.

24 I'm happy to report there are no objections to that
25 retention. There has been a supplemental disclosure filed.

1 However, in response to some of the U.S. Trustee's comments,
2 and there have been some changes to the order that we propose
3 to submit today.

4 I also understand, to the extent that there are any
5 questions on the application, that we have two members of
6 Simpson Thacher on the phone, at least that's my belief, Barry
7 Ostrager and Peter Pantaleo. So, to the extent there are
8 questions that I'm unable to answer, perhaps they can.

9 THE COURT: All right. I had no questions. Did the
10 U.S. Trustee have any further comments?

11 MR. McMAHON: Your Honor, good morning. Joseph
12 McMahon for the Acting U.S. Trustee.

13 Debtors' counsel --

14 THE COURT: Could the parties on the phone mute their
15 phones? Thank you.

16 MR. McMAHON: Debtors' counsel will be handing up the
17 revised proposed form of order. One issue we did address, Your
18 Honor, is the role of Simpson Thacher with respect to
19 securities litigation, that is both derivative and third party
20 litigation. And we had some concern with respect to the joint
21 representation by Simpson Thacher of both the debtor,
22 Washington Mutual, Inc., and the directors and officers going
23 forward.

24 It's been resolved by an agreement between our
25 office, the debtors, and Simpson Thacher that Simpson Thacher

1 will not be representing the debtor going forward with respect
2 to that litigation. It's stayed. But as a technical matter,
3 Weil Gotshal is going to be entering its appearance on behalf
4 of Washington Mutual with respect to those matters.

5 THE COURT: All right. Will they be withdrawing
6 their representation of the debtor with respect to those
7 matters?

8 MR. McMAHON: Yes, that is my understanding.

9 THE COURT: Okay. Can the Simpson Thacher
10 representatives on the phone confirm that?

11 MR. PANTALEO: Your Honor, good morning. Peter
12 Pantaleo. I can confirm that. We'll work with Weil Gotshal to
13 substitute for Simpson, and obviously we'll withdraw.

14 THE COURT: All right.

15 MR. JORDAN: Your Honor, if it pleases the Court, I
16 have a black line here of the order that I could, if you will
17 permit, bring up to you and we can just walk through the
18 changes really quickly.

19 THE COURT: Yes. Do you want to give me the final,
20 too?

21 (Pause)

22 THE COURT: Thank you.

23 MR. JORDAN: Your Honor, I'm not going to burden the
24 Court's time with some of the nits that are reflected in this
25 red line. But I do want to turn your attention to Page 2 --

1 Pages 2 and 3, which more carefully delineates the services
2 that will be rendered by Simpson Thacher in connection with
3 these cases.

4 In the middle of Page 3, you'll note that there is a
5 so ordered paragraph that reflects the representation that the
6 U.S. Trustee just made with respect to Weil Gotshal stepping
7 into the shoes of Simpson Thacher in connection with those
8 lawsuits where Simpson Thacher represented WMI and the
9 directors and officers.

10 THE COURT: Well, Schedule A isn't attached. To the
11 supplemental declaration or to the original declaration? It's
12 the original.

13 MR. JORDAN: It's to the initial declaration, Your
14 Honor.

15 THE COURT: Well, do you want to give me a copy
16 because it's not attached in either the binder or --

17 MR. JORDAN: May I approach, Your Honor?

18 THE COURT: You may.

19 (Pause)

20 THE COURT: So, Simpson is withdrawing with respect
21 to all of the matters listed on Schedule A?

22 MR. JORDAN: No.

23 MR. PANTALEO: We are withdrawing, Your Honor, from
24 our representation of the debtors and its subsidiaries.
25 Obviously we'll continue to represent the individual defendants

1 in those actions.

2 THE COURT: But in all of the actions listed on
3 Schedule A, you're withdrawing your representation of --

4 MR. PANTALEO: Yes, at the request of the U.S.
5 Trustee.

6 THE COURT: All right. All right. Then -- any other
7 significant changes? No?

8 MR. JORDAN: No, Your Honor.

9 THE COURT: All right. Anybody else wish to be heard
10 on that application then?

11 (No audible response heard)

12 THE COURT: All right. I'll enter the revised order
13 as agreed.

14 MR. JORDAN: Thank you, Your Honor.

15 Your Honor, the next application is for Davis
16 Wrights. They're also seeking to be retained as 327(e) counsel
17 on behalf of the debtors to represent the debtors in a variety
18 of litigations and provide some day-to-day corporate
19 counseling.

20 Your Honor, in effect, there were the same issues
21 with Davis Wright as there were with Simpson Thacher that were
22 discussed with the U.S. Trustee. And those issues are also
23 reflected in a black line, which I'd like to approach the bench
24 and provide to you.

25 THE COURT: All right.

1 MR. JORDAN: In fact, Your Honor, would it make it
2 easier -- we have black lines for most of the orders. If it
3 will make things easier and more efficient, I could walk all of
4 them up right now.

5 THE COURT: Yes, hand all the black lined and the
6 originals.

7 (Pause)

8 THE COURT: Okay. Thank you.

9 (Pause)

10 THE COURT: Okay.

11 MR. JORDAN: Your Honor, just quickly running through
12 the black line. First of all, on Page 1, it just reflects that
13 there was a supplemental affidavit that was filed with the
14 Court.

15 And then similar to the Simpson Thacher order, it
16 more carefully delineates the services that will be provided on
17 Page 2 of the black line.

18 And it basically -- if you note -- you'll note in the
19 last sentence of the paragraph that carries over onto Page 3,
20 it notes that DWT is also not being employed to represent WMI
21 in connection with certain derivative and class action which,
22 as I mentioned before, is the same situation as Simpson
23 Thacher.

24 I don't know if the U.S. Trustee would like to add
25 anything to that.

1 THE COURT: All right. And that's sufficient for the
2 U.S. Trustee?

3 MR. McMAHON: Your Honor, good morning again. Joseph
4 McMahon for the Acting U.S. Trustee. It is.

5 THE COURT: Okay. All right. I'll enter that
6 revised order then.

7 MR. JORDAN: Thank you, Your Honor. Your Honor, the
8 next item on the agenda is the retention of McKee Nelson under
9 section 327(e) of the Bankruptcy Code as special tax counsel.
10 Debtors seek to retain them in connection with certain audits
11 that are currently being conducted with respect to a financing
12 transaction from '04 and '05, and also an audit with respect to
13 tax years 2001, 2003.

14 There have been no objections to this application
15 either. I have provided you with a black line order to reflect
16 the fact that a supplemental declaration was filed with respect
17 to this retention, as well. And that supplemental declaration
18 was merely meant to further explain in more detail some of the
19 aspects of the retention and some of the -- there were some
20 concerns that the U.S. Trustee had.

21 My understanding is that his concerns have been
22 assuaged. And that he has no further comments to the order.

23 THE COURT: That was the only issue the U.S. Trustee
24 had?

25 MR. McMAHON: That was, Your Honor.

1 THE COURT: All right. Then I'll enter the revised
2 order granting the application then.

3 MR. JORDAN: Your Honor, the final -- thank you for
4 entering that order.

5 Your Honor, the final retention that we have on the
6 agenda, the fourth and final, is the retention of Gibson Dunn,
7 also under Section 327(e) of the Bankruptcy Code as special tax
8 counsel.

9 They, too, will be -- they will also be retained to
10 deal with certain IRS appeals that are distinct from McKee
11 Nelson, also deal with certain refund suits and tax claim
12 issues, all of which are necessary and of benefit to the
13 debtors.

14 There was, again, no objection to this retention,
15 Your Honor. But there were some comments that were provided,
16 and those comments are reflected in the black line that I've
17 provided to you, which I could walk you through.

18 THE COURT: Well, you're confirming what Gibson Dunn
19 is doing is not related to what the Madan --

20 MR. JORDAN: That's my understanding. I believe Dora
21 Arash is on the phone, and she could --

22 MS. ARASH: Yes, I'm on, Your Honor. This is Dora
23 Arash from Gibson Dunn and Crutcher.

24 THE COURT: All right.

25 MR. JORDAN: Your Honor, looking at Page 2 of the

1 black line that I've provided to you, the order now delineates
2 the services that will be provided by Gibson Dunn.

3 The concern, Your Honor, was that the services, as
4 outlined in the original application, were too broad. So, the
5 order makes it clear that Gibson Dunn will not be providing any
6 bankruptcy assistance with respect to the tax matters. And
7 that Weil Gotshal will be doing that, serving as the
8 gatekeeper, in effect, with respect to this retention and the
9 other.

10 And my understanding is that this order now
11 accurately reflects some of the comments of the U.S. Trustee in
12 that he no longer has any issues with the order. But I've
13 asked him to confirm that.

14 MR. McMAHON: So confirmed, Your Honor.

15 THE COURT: All right. The revised order looks fine
16 to me and I'll enter that then.

17 MR. JORDAN: Thank you, Your Honor. The last item on
18 the agenda is the motion of the debtors pursuant to 105(a) and
19 362 of the Bankruptcy Code for a final order establishing
20 notification procedures and approving restrictions on certain
21 transfers of interest in the debtors.

22 Your Honor, if it's okay with the Court, I would like
23 to take a minute or two of recess. There's some last second
24 comments that came to my attention and I would like to think
25 about and work with counsel on, if you wouldn't mind.

1 THE COURT: That's fine.

2 MR. JORDAN: It shouldn't take long to resolve.

3 THE COURT: All right. We'll take a short recess
4 then.

5 MR. JORDAN: Thank you.

6 THE COURT: Thank you.

7 (Recess 10:52 A.M./Reconvene 11:06 A.M.)

8 THE COURT: You may proceed.

9 MR. JORDAN: Rob Jordan again, Your Honor. Thank you
10 for accommodating the short recess. We wanted to bring an air
11 of excitement to an otherwise dry agenda.

12 As I stated before we took the recess, the next
13 motion is the motion on the notification of procedures and
14 restrictions on certain transfers of interest in the debtors.

15 That motion was filed on October 24th. Interim order
16 was entered on 11 -- November 7th. And we are here now to
17 obtain entry of a final order.

18 Your Honor, there were -- since the interim order was
19 entered, and since the hearing -- that first hearing, there
20 have been no additional objections filed. There were three
21 pleadings or pieces of paper filed prior to the interim order.
22 One was by the FDIC, which was a limited objection in which
23 they basically assess -- or assert that that objection is not
24 an issue for the hearing now with respect to this motion being
25 approved.

1 There was a -- some pleadings filed by JPMorgan
2 saying that they would like some language in the order, which
3 we accommodated in the last order, and we have altered somewhat
4 in the last couple of minutes, which I will put on the record
5 in a moment. And then finally there was a reservation of
6 rights of Fir Tree to file an objection prior to this hearing,
7 Your Honor. And then no objection was ever filed to my
8 knowledge.

9 Your Honor, we have a black line that we've provided
10 to you. It reflects very minor change, but now we also have
11 this new change. So, I guess first, I'd like to ask the Court
12 how Your Honor would like to proceed. We could address those
13 changes first, and then if Your Honor would like, I can offer a
14 proffer.

15 THE COURT: That's fine.

16 MR. JORDAN: Or, Your Honor, if it would please the
17 Court, perhaps the proffer from the interim hearing could be
18 incorporated by reference into this record in light of the fact
19 that no additional objections have been filed.

20 THE COURT: That's fine. Will your proffer today be
21 any different from what you proffered at the interim?

22 MR. JORDAN: No, it wouldn't.

23 THE COURT: All right. Then unless there is an
24 objection, I'll incorporate the proffer that was made at the
25 interim hearing.

1 MR. JORDAN: Thank you, Your Honor. First looking at
2 the black line that we provided to you, first I'd like to note
3 that this order reflects the changes that were discussed at the
4 interim hearing, they're consistent. The only change that is
5 reflected in this black line relative to the interim order that
6 was filed is on Page 7, and that's with respect to the transfer
7 agent. It basically says -- it says, "Ordered that in the
8 event that the transfer agent executes a transfer as
9 instructed, the transfer agent solely in its capacity as
10 transfer agent shall not incur liability to any party, solely
11 with respect to such action in the event such transfer is
12 determined to be in violation of the order."

13 THE COURT: All right.

14 MR. JORDAN: Your Honor, the new change that was just
15 discussed as to Footnote 3 of the order, which originally said,
16 "The debtors do not intend the relief requested in the motion
17 to affect the rights, titles and interests, if any, of WMB or
18 WMB/FSB."

19 The request has been made to change that footnote to,
20 "This order does not affect the rights, titles and interests,
21 if any, of WMB or WMB/FSB with respect to the tax attributes."

22 I have written that out, if you'd like to see it in
23 writing, I can walk it up to you.

24 THE COURT: Say it again?

25 MR. JORDAN: Sure. It's "This order does not affect

1 the rights, titles and interests, if any, of WMB or WMB/FSB
2 with respect to the tax attributes."

3 THE COURT: All right.

4 MR. JORDAN: Your Honor, the only other item I'd like
5 to note with respect to this motion is that -- and I sort of
6 alluded to it a moment ago, in that this order, like the
7 interim order, notes that any parties that are seeking to sell
8 or purchase any of these interests must notice the Washington
9 Mutual, Inc. noteholder group.

10 I understand that Mr. Rosen, at the last hearing,
11 noted on the record that the debtors would also consult with
12 White and Case on behalf of the Washington Mutual, Inc.
13 noteholder group with respect to their position, pro or con,
14 regarding such a notice. And I just wanted to make that
15 representation again here today.

16 THE COURT: Okay.

17 MR. JORDAN: Your Honor, that's all I have on that
18 motion. I would ask that it be approved.

19 MS. FELDSTEIN: Your Honor?

20 THE COURT: Yes.

21 MS. FELDSTEIN: I'm sorry. This is Hydee Feldstein
22 from Sullivan and Cromwell representing JPMorgan Chase.

23 THE COURT: Yes.

24 MS. FELDSTEIN: I may have misheard the footnote, or
25 I may have erred in reviewing the footnote in the first

1 instance. But I had understood that the purpose of the
2 footnote was to preserve all parties' rights with respect to
3 the tax attributes, and that would include JPMorgan Chase.

4 As I heard Mr. Jordan read the footnote, it did not
5 seem to incorporate that. So, as a point of clarification, I
6 believe that any rights of JPMorgan Chase would obviously be
7 derivative of whatever rights WMB, WMB/FSB and the FDIC might
8 have had in connection with those attributes. But I wouldn't
9 want the record to reflect that it was -- that the reservation
10 of rights would be limited solely to those two entities, and
11 not to whatever rights either -- and it's not my place to speak
12 to the FDIC, but whatever rights my client, JPMorgan Chase,
13 might have had therein.

14 THE COURT: What's the debtors' position on that?

15 MR. JORDAN: Your Honor, to the extent that those
16 rights are derivative, WMB, in connection with the transaction,
17 we don't have a problem with that.

18 THE COURT: All right. Do you want to suggest
19 language? Or is the language sufficient with that statement on
20 the record?

21 MS. FELDSTEIN: Your Honor, is there a problem with
22 simply inserting, "Or JPMorgan Chase" in the footnote after
23 WMB/FSB? Mr. Jordan, would that be acceptable?

24 MR. JORDAN: With the caveat that's -- perhaps with
25 the parenthetical that says, "To the extent that those rights

1 are derivative of WMB or WMB/FSB."

2 THE COURT: Is that fine?

3 MS. FELDSTEIN: I don't have my tax counsel on the
4 phone, Your Honor. I'm not certain what the difference is
5 between what Mr. Jordan is saying, and what I am saying. And
6 that's my only hesitation.

7 THE COURT: Well, why don't the parties work out the
8 language and submit it later today under certification of
9 counsel?

10 MS. FELDSTEIN: Thank you, Your Honor. Mr. Jordan, I
11 would have my tax partner available on the phone, if you wanted
12 to call me immediately after this hearing.

13 MR. JORDAN: We could certainly talk offline. It may
14 not be an issue. It says -- it does say, "If any." So --

15 MS. FELDSTEIN: I understand that, which is why I
16 don't understand it needs to be limited.

17 MR. JORDAN: Okay. So -- that's fine. We could --
18 we could just keep -- add in JPMorgan.

19 MS. FELDSTEIN: Thank you.

20 THE COURT: All right. Do you want to interlineate
21 that and hand it up? Or do you want to take a moment?

22 MR. CLEARY: Your Honor, Blake Cleary of Young
23 Conaway Stargatt and Taylor on behalf of FDIC.

24 Before we add that language, I would like to consult
25 with my co-counsel on this issue. My understanding of this

1 language was it was JPMorgan's language to begin with, and it
2 didn't contain the words, "JPMorgan" in the original footnote.
3 The intent to modify the footnote was to not to get into the
4 issue that's being discussed here.

5 But if perhaps we had another five minutes, if we
6 could indulge the Court for a few more minutes, maybe we can
7 consult with Ms. Feldstein by telephone, and then we could
8 maybe get to an understanding that this language as proposed
9 may be sufficient. But at least we could discuss it.

10 THE COURT: All right. I'll give you another five
11 minutes to try and work it out. I do have an 11:30, though,
12 so --

13 MR. CLEARY: Thank you, Your Honor.

14 THE COURT: Let's take a short recess.

15 MR. JORDAN: Thank you, Your Honor.

16 (Recess 11:14 A.M./Reconvene 11:25 A.M.)

17 THE COURT: All right. Now where are we?

18 MR. JORDAN: Thank you, Your Honor. Rob Jordan, Weil
19 Gotshal.

20 Unfortunately, Your Honor, despite your flexibility
21 in providing us some time, we have not worked out this
22 footnote. So, I think in light of your schedule, what we
23 should do is work it out outside of court and submit a
24 certification of counsel after the language has been agreed to.

25 THE COURT: That's fine.

1 MR. JORDAN: Great. And that's all I have for
2 today.

3 THE COURT: All right. Thank you. We stand
4 adjourned.

5 MR. JORDAN: Thank you.

6 (Whereupon, at 11:25 A.M. the hearing was adjourned.)

7

8

CERTIFICATE

9

10 I certify that the foregoing is a correct transcript from
11 the electronic sound recording of the proceedings in the
12 above-entitled matter.

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15 /s/ Karen Hartmann

Date: November 19, 2008

16 TRANSCRIPTS PLUS

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