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. 6576

DEBTORS' OBJECTION TO MOTION TO SHORTEN NOTICE AND SCHEDULE HEARING ON THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS' PETITION, PURSUANT TO 11 U.S.C. § 105(a), 28 U.S.C. § 158(d)(2) AND FED. R. BANKR. P. 8001(f), FOR CERTIFICATION OF DIRECT APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT OF THE OPINION AND ORDER DENYING PLAN CONFIRMATION

Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors"), submit this objection (the "Objection") to the *Motion to Shorten Notice and Schedule Hearing on the Official Committee of Equity Security Holders' Petition, Pursuant to 11 U.S.C. § 105(a), 28 U.S.C. § 158(d)(2) and Fed. R. Bankr. P. 8001(f), for Certification of Direct Appeal to the United States Court of Appeals for the Third Circuit of the Opinion and Order Denying Plan Confirmation* [Docket No. 6576] (the "Motion to Shorten"), filed by the Official Committee of Equity Security Holders (the "Equity Committee"). In support of this Objection, the Debtors respectfully represent as follows:

INTRODUCTION

1. By its Motion to Shorten, the Equity Committee has requested that the Court consider *The Official Committee of Equity Security Holders' Petition, Pursuant to 11 U.S.C. §*

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[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, WA 98104.

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105(a), 28 U.S.C. § 158(d)(2) and Fed. R. Bankr. P. 8001(f), for Certification of Direct Appeal to the United States Court of Appeals for the Third Circuit of the Opinion and Order Denying Plan Confirmation [Docket No. 6575] (the "Certification Motion") with ***just one days' notice*** at the omnibus hearing currently scheduled for January 20, 2011 at 2:00 p.m. (the "January 20 Hearing").

2. The Motion to Shorten and the relief requested therein should be denied because (i) the Equity Committee has failed to establish the exigencies required for shortened notice, (ii) granting the Motion to Shorten would unnecessarily and unduly prejudice the Debtors and other parties-in-interest by depriving them of a fair opportunity to analyze and respond to the Certification Motion with the level of review and diligence necessary, as well as adequately prepare for a hearing on the merits of the Certification Motion, and (iii) the Certification Motion is jurisdictionally flawed because the January 7 Order is not a final, appealable order.

3. Accordingly, the Debtors object to the Motion to Shorten, and respectfully request that the Certification Motion be heard at the omnibus hearing currently scheduled for February 8, 2011 at 10:30 a.m. (the "February 8 Hearing").

ARGUMENT

4. Although the Court has the discretion to shorten the notice and objection periods with respect to a motion, the moving party must specify "***the exigencies justifying shortened notice.***" Del. Bankr. L.R. 9006-1(e) (emphasis added).

5. The only exigency that the Equity Committee cites is the Debtors' stated intent to proceed towards confirmation expeditiously. The Equity Committee has failed to demonstrate how the Debtors' currently anticipated schedule creates any sort of emergency that would justify the extreme shortening of the notice and objection periods. The only emergency here is the one

created by the Equity Committee by filing its Certification Motion and Motion to Shorten one day before the requested hearing without providing any prior notice.

6. The Equity Committee's proposed schedule — requiring the Debtors and other parties to respond to the Certification Motion and prepare for a hearing within one day — is simply unreasonable and would severely prejudice the Debtors' and other parties' ability to respond effectively and fully preserve their rights. This is especially true in this instance because of the myriad of procedural problems associated with the Certification Motion and the underlying appeal.

7. Indeed, at first blush (and without having had a chance to fully consider all of the issues raised by the Equity Committee's filing), the Certification Motion is fatally flawed because there is no automatic right of appeal from the Court's January 7 order denying confirmation of the Sixth Amended Plan. It is firmly established that an order *denying* confirmation is not a final judgment, order or decree appealable under 28 U.S.C. § 158(a)(1). *In re Flor*, 79 F.3d 281, 283 (2d Cir. 1996) (concluding that "denial of confirmation of a Chapter 11 plan is nonfinal" and holding that "the district court's order denying confirmation of Debtors' proposed plan is not a final decision unless it necessarily resolves all of the issues pertaining to a discrete claim."); *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 90 (2d Cir. 1982) (holding that "the order denying confirmation of the proposed plan is interlocutory only and hence not appealable by agreement to the court of appeals."); *In re Bentley*, 266 B.R. 229, 233 (1st Cir. 2001) ("The order denying confirmation of the proposed Chapter 13 plan was not itself a final order because the Debtors remained free to propose an alternate plan (which, if confirmed, might have mooted the issues arising from the order now on appeal).") (citing *In re Lievsay*, 118 F.3d 661, 662 (9th Cir. 1997) (order denying confirmation of chapter 11 plan is interlocutory)); *In re*

Simons, 908 F.2d 643, 644 (10th Cir. 1990) ("A number of courts have indicated that where the bankruptcy court denies or withholds confirmation of a proposed Chapter 13 plan without also dismissing the underlying petition or proceeding, its decision is not final for purposes of appeal.").

8. As the Fifth Circuit has articulated, "In the case of a denial of confirmation of a plan, we look to whether or not the order was intended to serve as a final denial of the relief sought by the debtor. If the order was not intended to be final--for example, if the order addressed an issue that left the debtor able to file an amended plan (basically to try again)--appellate jurisdiction would be lacking." *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000). This is precisely the situation here, where the Court has denied confirmation of the Sixth Amended Plan, but specifically noted that it could be confirmed if "the deficiencies explained herein are corrected." Conf. Opinion at p.2; *see also In re Simons*, 908 F.2d 643, 645 (10th Cir. 1990) (holding that "the lower courts' denial of confirmation of debtors' proposed reorganization plan is not final for purposes of appeal under section 158(d)" and noting that "so long as the bankruptcy proceeding itself has not been terminated, the debtor, unsuccessful with one reorganization plan, may always propose another plan for the bankruptcy court to review for confirmation, , a prospect which negates any determination of finality under both principles cited above."); *In re Giesbrecht*, 429 B.R. 682, 687 (9th Cir. 2010) ("because chapter 13 plans are filed voluntarily by debtors who have the ability to amend them, an order denying confirmation of a plan is considered to be interlocutory and not a final order unless the underlying case is also dismissed."); *In re MCorp Fin. Inc.*, 139 B.R. 820, 822-23 (S.D. Tex. 1992) (holding that denial of confirmation of debtor's chapter 11 plan was not a final appealable order and explaining that "while an integral step in the process of bankruptcy administration,

[denial of the plan] does not end the bankruptcy proceedings or terminate the particular interests of the debtors or the creditors. . . this confirmation is a continuing process.").

9. The Third Circuit's decision in *In re Armstrong World Industries, Inc.*, 432 F.3d 507 (3d Cir. 2005), does not suggest a different outcome here. In Armstrong, the debtor appealed denial of confirmation on the narrow issue of whether the distribution of warrants to equity holders violated the absolute priority rule. The Third Circuit found the denial of confirmation appealable in that case because the denial of confirmation would affect the distribution of assets between creditor classes, the issue presented would require no additional fact-finding on remand, the appeal required the Court of Appeals to address a "direct question of law," and interests of judicial economy suggested prompt resolution of the issue on appeal was warranted. None of those factors is satisfied here.

10. Because the January 7 order plainly is a not a final order, it may be appealed only as an interlocutory order with permission of this Court under 28 U.S.C. § 158(a)(3). An interlocutory appeal is inappropriate for many reasons, not the least of which is that the Court did not enter any separate order approving the settlement. The only order entered was one denying confirmation, with the Court discussing many issues in an accompanying opinion. Although the opinion contains many findings on many issues, findings themselves are not separately appealable; only orders and judgments are appealable.

11. The well-established policy against piecemeal appeals requires denial of permission for an interlocutory appeal of the Court's findings regarding the settlement because, although the Court found that the Global Settlement Agreement to be fair and reasonable, it is clear that the Global Settlement Agreement requires modification based on concerns raised by the Court. The Equity Committee's assertion that no modifications to the settlement are

necessary is belied by the Court's own opinion, which noted in several places that the release provisions of the "Plan (and the Global Settlement)" must be modified. Conf. Opinion at 60, 67. That modification of the releases will necessitate changes to the settlement is self evident because the scope of the releases proposed in the plan was agreed upon by the settling parties in the Global Settlement Agreement. Furthermore, the Court specifically found that the priority clause of the Plan had to be modified to provide that the plan and confirmation order control, so changes to the releases in the plan necessarily will change the settlement agreement. Conf. Opinion at 79.

12. In addition to jurisdictional deficiencies, it seems likely that direct certification of the appeal itself is inappropriate under the standards set forth in 28 U.S.C. § 158(d)(2); which the Debtors would also need to explore and brief.

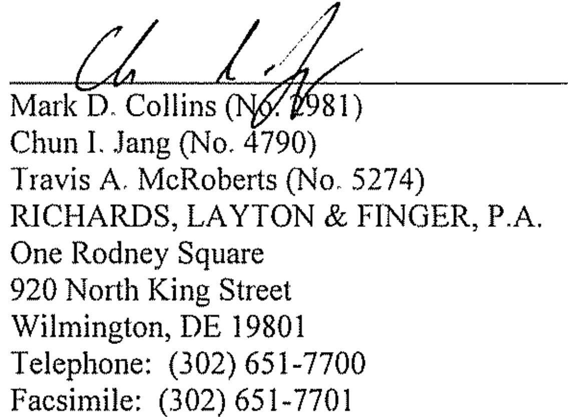
13. In sum, the Debtors intend to oppose any interlocutory appeal as a waste of estate resources, as well as a waste of judicial resources. The Motion to Shorten should be denied so all affected constituencies can fully consider and brief these issues. The Equity Committee waited 12 days after entry of the Court's order denying confirmation to start the appeal process, notwithstanding the Debtors prompt public statements immediately after the issuance of the Court's January 7 Order and opinion, that the Debtors intended to promptly modify the Plan to address the Court's findings. It is unreasonable to require the Debtors and all other constituents to respond on 24 hours notice to an improper motion for leave to take an interlocutory appeal.

14. Under these circumstances, the Debtors and other parties should be granted the full amount of time allotted to them under the Bankruptcy Rules to analyze and respond to the Certification Motion.

CONCLUSION

For the reasons stated above, the Debtors respectfully request that the Court deny the Motion to Shorten, schedule the Certification Motion to be heard at the February 8 Hearing or at a separate subsequent hearing, and grant such other relief as the Court deems just and appropriate.

Dated: January 19, 2011
Wilmington, Delaware



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