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. 6575**

DEBTORS' OBJECTION TO 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 *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* [Dkt. No. 6575] (the "Petition"), filed by the Official Committee of Equity Security Holders (the "Equity Committee"). In support of this Objection, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT

1. As a threshold matter, the Equity Committee's appeal (the "Appeal") has several jurisdictional defects, each of which stand in the way of consideration for certification to the

[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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Third Circuit. First, because the Equity Committee was not "aggrieved" by the entry of the Court's January 7, 2011 Order that denied confirmation (the "January 7 Order") [Dkt. No. 6529], it lacks standing to pursue its Appeal and, accordingly, no jurisdiction exists over the Appeal. The Equity Committee opposed the Global Settlement Agreement and therefore its constituents simply have not been harmed by an order that *prevents* the Global Settlement Agreement from going into effect at this time. Second, the Equity Committee does not appeal the January 7 Order itself, but only a finding in the Court's opinion issued in connection therewith (the "Opinion") [Dkt. No. 6528], that the global settlement agreement embodied in the Debtors' plan (the "Global Settlement Agreement") is fair and reasonable. An appeal of a finding is not the proper subject of an appeal under settled Third Circuit law. Third, it is well settled that orders denying confirmation are interlocutory—the January 7 Order was not a final order and not appealable as of right under 28 U.S.C. §158(a)(1). Fourth, even if the Equity Committee's notice of appeal were construed as a request for permission to appeal an interlocutory order—a request that the Equity Committee has not even made—that request must be directed to the district court. *See* Bankr. R. 8003(c). That relief would not be merited in any event because the Equity Committee has failed to show that (1) the Appeal involves a controlling question of law (2) upon which there are substantial grounds for difference of opinion as to its correctness, and (3) allowing immediate appeal will expedite a decision on confirmation of the Debtors' proposed Plan. 28 U.S.C. § 1292(b). Accordingly, the January 7 Order does not come close to satisfying the requirements for an interlocutory appeal, *see* 28 U.S.C. § 1292(b), much less certification of a direct appeal to the Third Circuit.

2. Any appeal of the Court's findings regarding the Global Settlement Agreement must await entry of an order confirming a plan. The Equity Committee vigorously opposed

confirmation of the *Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* (the "Plan"), and the Court's January 7, 2011 Order denied confirmation—exactly the result for which the Equity Committee advocated. The Court's January 7 Order, and the Opinion, are steps forward on the path to the bankruptcy cases' eventual conclusion, not a conclusion to the Debtors' bankruptcy cases. The Debtors are in frequent and ongoing negotiations with the parties to the Global Settlement Agreement concerning the modifications to it and to the Plan necessary to remedy the deficiencies identified by the Court in its Opinion. While the Court did find the core compromises of the Global Settlement Agreement to be fair and reasonable, and its findings are now the law of the case, the Global Settlement Agreement and the Plan are inextricably linked, and the denial of confirmation makes appellate review of the subsidiary findings regarding the Global Settlement Agreement improper at this time. Indeed, no jurisdiction for this Appeal exists.

3. Even if this Court were to find that jurisdiction exists and reach the merits of the stringent statutory test for certification under 28 U.S.C. § 158(d)(2)(A), a direct path to the Court of Appeals is the exception rather than the rule, and it is particularly unwarranted because the Equity Committee fails to establish any of the statutorily required criteria: (i) a question of law for which there is no controlling authority, or which involves a matter of public importance; (ii) a question of law that requires resolution of conflicting decisions; or (iii) an issue that would materially advance the Debtors' chapter 11 cases. 28 U.S.C. §158(d)(2)(A)(i)-(iii). The matter the Equity Committee seeks to appeal—the Court's finding that the Global Settlement Agreement is reasonable—is commonly addressed under a well-established legal standard by bankruptcy courts in hundreds of chapter 11 cases each year. The Equity Committee's portrayal of its Appeal as one raising "novel" legal issues is a construct of its own imagination. The

absence of case law addressing the Equity Committee's assertion that the Court improperly acted as a "legal expert" in considering the fairness and reasonableness of the Global Settlement Agreement does not suggest that this is a novel issue where controlling authority is lacking. It suggests that the Equity Committee is far from the mainstream, long-established standards under which courts consider settlements. The Court should deny certification of a direct appeal.

FACTS

4. On October 6, 2010, the Debtors filed the Plan and, commencing on December 1, 2010, and ending on December 7, 2010, the Court held a four-day hearing to consider confirmation of the Plan, as amended and modified, including approval of the Global Settlement Agreement embodied therein (the "Confirmation Hearing"). At the conclusion of the Confirmation Hearing, the Bankruptcy Court took the matter under advisement.

5. On January 7, 2011, the Bankruptcy Court entered the January 7 Order and associated Opinion, finding that the compromise and Global Settlement Agreement embodied in the Plan is fair, reasonable, and in the best interests of the Debtors, the Debtors' creditors, and the Debtors' chapter 11 estates, but determining that the Plan could not be confirmed absent certain identified modifications. Opinion at 60, 67, 78-79, 80. On January 19, 2011, the Equity Committee filed a Notice of Appeal regarding the Court's finding that the Global Settlement Agreement is "fair and reasonable." Notice of Appeal at 1. [Dkt. No. 6573.] The Equity Committee also filed this Petition and a Motion to Shorten Notice and Schedule a Hearing on the Petition ("Motion to Shorten"), requesting a hearing the following day. [Dkt. No. 6576.]

6. On January 19, 2011, the Debtors filed an Objection to the Motion to Shorten [Dkt. No. 6586], and appeared before the Court at the hearing on January 20, 2011. This Court

denied the Motion to Shorten and set the hearing on the Petition for February 8, 2011, with a deadline of February 1, 2010 for the Debtors to respond to the Petition.

7. The Debtors intend to file a Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the "Modified Plan"). The Modified Plan, like the Plan, will incorporate the Global Settlement Agreement, as amended. Accordingly, this Court will be considering a Modified Plan and an amended Global Settlement Agreement in the coming weeks.

ARGUMENT

A. No Jurisdiction Exists Because the Equity Committee Lacks Standing to Appeal the Denial of Confirmation.

8. The Court need not address whether certification of the Equity Committee's appeal to the Third Circuit is proper, because there is no jurisdiction for an appeal in the first place. The Equity Committee lacks standing to bring this appeal because it is not "aggrieved" by the January 7 Order. *E.g.*, *Drelles v. Metro. Life Ins. Co.*, 357 F.3d 344, 348 (3d Cir. 2003). "Litigants are 'persons aggrieved' if the order diminishes their property, increases their burdens, or impairs their rights." *Gen. Motors Acceptance Corp. v. Dykes (In re Dykes)*, 10 F.3d 184, 187 (3d Cir. 1993). A party is not aggrieved, for purposes of standing to appeal, if it challenges only subsidiary findings within an opinion, but not the order or judgment itself. Thus, the Third Circuit has made clear that it does "not recognize[] standing to appeal where a party does not seek reversal of the judgment but asks only for review of unfavorable findings." *Drelles*, 357 F.3d at 348 (rejecting cross-appeal objecting to findings of fact contained within an opinion).

9. Additionally, "[s]tanding is viewed more restrictively in the bankruptcy context, because bankruptcy proceedings typically involve a myriad of parties who are indirectly affected by every order issued by the bankruptcy court." *Certain Underwriters at Lloyds, London v.*

Future Asbestos Claim Rep. (In re Kaiser Aluminum Corp.), 327 B.R. 554, 558 (D. Del. 2005). "Under this standard, an appealing party must do more than simply show that the contested order gives rise to a 'case or controversy' under Article III." *See Enter. Bank, Inc. v. Young (In re Fryer)*, No. 06-4866, 2007 WL 1667198, at *2 (3d. Cir. June 11, 2007) (citing *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 215 (3d Cir. 2004)). Instead, "only those whose rights or interests are directly and adversely affected pecuniarily by an order of the bankruptcy court may bring an appeal." *In re PWS Holding Corp.,* 228 F.3d 224, 249 (3d Cir. 2000) (internal quotation marks and citation omitted).

10. The Equity Committee, which opposed confirmation, cannot establish that its rights have been impaired or its property diminished *by the denial of confirmation*, which is the order it attempts to appeal. As a result of the January 7 Order, the Global Settlement Agreement *cannot* take effect. Because the Equity Committee is not harmed by an order that *prevents* the Global Settlement Agreement from going into effect at this time, it is not aggrieved by the January 7 Order. *E.g.*, *Dykes*, 10 F.3d at 187. The Equity Committee may disagree with the Court's subsidiary finding in its corresponding Opinion regarding the fairness of the Global Settlement Agreement, (Pet. at 3), but Third Circuit precedent squarely forecloses jurisdiction to pursue an appeal of an adverse finding when the Order entered by the Court denied confirmation—the very result sought by the Equity Committee. *Drelles*, 357 F.3d at 348.

B. No Jurisdiction Exists Because Subsidiary Findings Contained in the January 7 Order Do Not Satisfy the Finality Requirement for an Appeal.

11. The Equity Committee's appeal is fatally defective for the additional reason that no finality exists. Even assuming the Equity Committee could appeal subsidiary findings within an Order by which it is not aggrieved—which it cannot do—the findings on the fairness of the Global Settlement Agreement do not satisfy the finality requirement for appellate jurisdiction.

By its plain terms, the Global Settlement Agreement is not effective unless and until the Court enters an order confirming a plan that incorporates it; and until then, any plan remains subject to modification in accordance with the January 7 Order. *See* Global Settlement Agreement § 7.2; Opinion at 60, 67, 78-79, 80 (requiring modification of release provisions in Plan and in Global Settlement Agreement). Accordingly, the Equity Committee's appeal is premature and improper. *Cf. Turner v. Frascella Enters., Inc. (In re Frascella Enters., Inc.)*, 388 B.R. 619, 623-24, 626 (Bankr. E.D. Penn. 2008) (noting that appeal of settlement agreement in a non-final order was premature because, "given the possibility that the Settlement Agreement may never be implemented, it seems that the Appeal Motion is asking the district court for an impermissible advisory opinion"). All that is known from the January 7 Order is that the Global Settlement Agreement *cannot* take effect at this time.

12. The jurisdictional defect here is not merely one of form versus substance, as in *Official Bondholders Comm. v. Chase Manhattan Bank (In re Marvel Entm't Group, Inc.)*, 209 B.R. 832, 836 (D. Del. 1997), which the Equity Committee erroneously suggests supports its ability to appeal the Court's findings on the Global Settlement Agreement absent a separate order. Pet. at 2, n.4. *Marvel* involved an appeal from the bankruptcy court's oral granting of a temporary restraining order "enjoining the exercise of shareholder voting rights to replace [the debtor's] board of directors," for which no formal written order was entered. 209 B.R. at 834, 836. Because the ruling on the TRO was clearly evidenced by the transcript setting forth the court's decision and undeniably took effect as a final order, the district court determined that the absence of a formal order entered on the docket did not preclude appellate jurisdiction. *See id.* at 836-37 ("[T]the transcript of the hearing . . . provides sufficient information to review the bankruptcy court's decision which this court has concluded is otherwise final and appealable.").

Here, unlike *Marvel*, the debate is not over form versus substance, but over the *finality* of this Court's findings and the effect of such findings on the Equity Committee absent a final order that would permit the Global Settlement Agreement to take effect. Because the Court's findings arise in an order that *denies* confirmation and thus *prohibits* the Global Settlement Agreement from taking effect, the finality of the findings remains contingent upon the entry of a future final order that aggrieves the Equity Committee. *See Drelles*, 357 F.3d at 348. At this time, however, no finality exists, and jurisdiction is therefore lacking over the Equity Committee's Appeal.

13. The lack of finality regarding the subsidiary finding on the fairness of the Global Settlement Agreement is underscored by the general rule that a denial of confirmation is not a final judgment, order, or decree appealable under 28 U.S.C. § 158(a)(1). *See, e.g., Flor v. Bot Fin. Corp. (In re Flor)*, 79 F.3d 281, 283 (2d Cir. 1996) (concluding that "denial of confirmation of a Chapter 11 plan is nonfinal"). When, as here, proceedings can continue and the petition has not been dismissed, "the bankruptcy court['s] den[ial] or withhold[ing of] confirmation of a proposed . . . plan . . . is not final for purposes of appeal." *Simons v. Fed. Deposit Ins. Co. (In re Simons)*, 908 F.2d 643, 644 (10th Cir. 1990). The contingencies that render a denial of confirmation unappealable confirm why no finality exists, as well, as to a subsidiary finding that cannot and will not take effect until all contingencies regarding plan confirmation have been resolved.

14. This is especially true because denial of confirmation is not the end of these chapter 11 cases. The Debtors are diligently working on a Modified Plan and ultimately will pursue its confirmation. *Bentley v. Boyajian (In re Bentley)*, 266 B.R. 229, 233 (B.A.P. 1st Cir. 2001) (holding order denying confirmation "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).") (citations omitted). "In the case of a denial of confirmation of a plan, . . . 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." *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277, 283 (5th Cir. 2000). Here, the Court denied confirmation of the Plan but specifically noted that it could be confirmed if "the deficiencies explained herein are corrected." Opinion at 2. Accordingly, the January 7 Order, which contemplates confirmation only upon satisfaction of contingencies, is not final for purposes of an appeal because debtors' and creditors' interests remain in flux while proceedings continue and until the Debtors seek confirmation of the Modified Plan. *Giesbrecht v. Fitzgerald (In re Giesbrecht)*, 429 B.R. 682, 687 (B.A.P. 9th Cir. 2010) (holding that "an order denying confirmation of a plan is considered to be interlocutory and not a final order unless the underlying case is also dismissed."); *Simons*, 908 F.2d at 645 (noting that "the debtor, unsuccessful with one reorganization plan, may always propose another plan[,] . . . a prospect which negates any determination of finality."); *In re MCorp Fin. Inc.*, 139 B.R. 820, 822-23 (S.D. Tex. 1992) (holding that denial of confirmation "does not end the bankruptcy proceedings or terminate the particular interests of the debtors or the creditors[;] . . . this confirmation is a continuing process.").

15. *In re Armstrong World Industries, Inc.*, 432 F.3d 507 (3d Cir. 2005), does not suggest a different outcome here. In *Armstrong*, the *debtor* contested denial of confirmation rather than amend its plan pursuant to the district court's order. Thus, "practical considerations in the interests of judicial economy require[d] that [the Third Circuit] hear the appeal." *Id.* at 511. Under those fact-specific circumstances, the Third Circuit held the denial of confirmation appealable.

16. Here, by contrast, the Debtors are working to address the concerns raised in the January 7 Order by negotiating a Modified Plan. In such instances, court have specifically found appeals to be improper. *See Broken Bow Ranch v. Farmers Home Admin. (In re Broken Bow Ranch)*, 33 F.3d 1005, 1008 (8th Cir. 1994) ("bankruptcy court orders refusing to confirm plans of reorganization under Chapter 13 and Chapter 11 were not final decisions for purposes of 28 U.S.C. § 158(d)" where the bankruptcy court "retained jurisdiction and had described what type of modified plan the court would be willing to confirm" contemplating "the submission and consideration of a modified plan of reorganization"). Permitting an appeal would not be in the interest of judicial economy, because appellate review of any ultimate approval of an amended Global Settlement Agreement—as embodied in the Modified Plan—may occur following the entry of a final order confirming the Modified Plan. Additionally, permitting the *Armstrong* debtors' appeal of the denial of confirmation of a plan it proposed (an order that actually aggrieved those debtors/appellants) is procedurally and factually distinct from allowing the Equity Committee to appeal denial of confirmation of a plan that it has consistently opposed (an order from which it is not aggrieved). Had the *Armstrong* debtors been required to propose and confirm a modified plan before seeking appellate review, the bankruptcy court's original decision denying confirmation would be rendered unreviewable.

17. Fundamental jurisdictional requirements should not and cannot be relaxed merely because the Equity Committee fears that equitable mootness may occur if they must wait to appeal a final confirmation order that renders the Global Settlement Agreement effective—assuming the Court enters such an order. *See* Pet. at 2. The potential for equitable mootness exists routinely in bankruptcy proceedings and may or may not be factor here if the Court

confirms a plan that renders the Global Settlement Agreement effective.[2] Tellingly, the Equity Committee cites no authority authorizing a premature appeal from a non-final order for which a party lacks standing. Indeed, a direct appeal is not the appropriate remedy for risk of mootness. *See infra* Part E(i); *Bepco LP v. Globalsantafe Corp. (In re 15375 Mem'l Corp.)*, No. 06-10859, 2008 WL 2698678, at *1 (D. Del. July 3, 2007) (holding that certification is an inappropriate means of addressing the risk of mootness of a bankruptcy appeal).

C. The Equity Committee Has Not and Cannot Satisfy the Factors Meriting an Interlocutory Appeal of the Court's January 7 Order of the Plan.

18. Because the January 7 Order is not final, it is not appealable as a matter of right and may be appealed only as an interlocutory order with permission of the district court under 28 U.S.C. §158(a)(3). *See In re Phila. Newspapers, LLC*, 418 B.R. 548, 556 (E.D. Pa. 2009). And, even if the Notice of Appeal could be interpreted as a motion for leave to seek an interlocutory appeal under Bankruptcy Rule 8003(c), that motion can be decided only by the district court and therefore affords no basis for this Court to consider, much less grant, the Petition. *See* Bankruptcy Rule 8003(c) (specifying that motion for permission to take interlocutory appeal is filed in the bankruptcy court then transmitted to the district court for decision). An interlocutory appeal of the January 7 Order would not be appropriate in any event, however, because the Equity Committee has failed to show that (1) the Appeal involves a controlling question of law (2) upon which there are substantial grounds for difference of opinion as to its correctness, and (3) allowing immediate appeal will expedite a decision on confirmation of the Debtors' proposed Plan. 28 U.S.C. § 1292(b); *Phila. Newspapers*, 418 B.R. at 557 (applying standards in bankruptcy appeal); *Luke Oil Co. v. SemCrude, L.P. (In re SemCrude, L.P.)*, 407 B.R. 553, 556-

[2] Moreover, equitable mootness is a doctrine grounded in "equitable" or "prudential" considerations. *See In re Continental Airlines*, 91 F.3d 553, 559 (3rd Cir. 1996). The Equity Committee can suggest no reason for this Court to guard against promotion of equity or prudence.

57 (D. Del. 2009) (same). Thus, the Petition should be denied because granting a permissive interlocutory appeal lies beyond this Court's authority and is unwarranted in any event.

19. Because "an interlocutory appeal represents a deviation from the basic judicial policy of deferring review until the entry of a final judgment, the party seeking leave to appeal . . . must . . . demonstrate that *exceptional circumstances* exist." *Luke Oil*, 407 B.R. at 557. (emphasis added); *see also Phila. Newspapers*, 418 B.R. at 557 (granting the interlocutory appeal only because of the "urgency of resolving the [auction bid procedures] in light of the Auction" scheduled in two weeks); *Frascella Enters.*, 338 B.R. at 623 (cautioning that "leave to file an interlocutory appeal[,] . . . is itself an extraordinary measure that is not lightly granted."). Accordingly, the statutory criteria in 28 U.S.C.§ 1292(b)—which the Equity Committee cannot meet—do not necessarily end the inquiry. "Leave to file an interlocutory appeal may be denied for reasons apart from this specified criteria, including such matters as the appellate docket or the desire to have a full record before considering the disputed legal issue." *Luke Oil*, 407 B.R. at 557.

20. In *Frascella Enterprises*, the bankruptcy court found it "extremely unlikely" that a district court would grant leave to appellants to file an interlocutory appeal in circumstances similar to those presented here. 338 B.R. at 623 (evaluating interlocutory appealability in denying stay of order enforcing settlement agreement). Specifically, the court found that the parties' disagreement with its factual determinations (as opposed to a question of law), the absence of cases reflecting a "divergence of opinions . . . so as to demonstrate doubt over the applicable standards," and the fact that overturning the court's ruling would lead only to further hearings (as opposed to an advanced resolution of the matter) did not satisfy the standard for interlocutory review. *Id.* at 622-24.

21. Similarly, here, "[i]t is extremely unlikely that the District Court will find [that the] appeal involves a controlling issue of *law*," because the main dispute is with the "inherently factual issues which [the court] decided based upon the record submitted by the parties, not issues of law." *Id.* at 622-23 (emphasis in original). The Equity Committee's Appeal centers on the Court's *findings* based upon the sufficiency evidence and facts before it, a fundamentally factual issue that is inappropriate under the first factor required for an interlocutory appeal.

22. Additionally, the Equity Committee cannot point to a substantial difference of opinion on the issue, the second factor necessary for an interlocutory appeal. "Mere disagreement with the court's determination does not create a 'substantial ground[] for difference of opinion'" sufficient to grant an interlocutory appeal. *Id.* at 624; *see also Patrick v. Dell Fin. Servs.*, 366 B.R. 378, 386 (M.D. Penn. 2007) ("[A] substantial ground for difference of opinion must arise out of genuine dispute as to the correct legal standard.").

23. Finally, as in *Frascella Enterprises,* a successful appeal would lead to further litigation instead of materially advancing ultimate resolution of the issues, negating the third factor required for leave to pursue an interlocutory appeal. *See* 388 B.R. at 624.

24. Moreover, as this Court concluded in the Opinion, modification of the releases and change of control provisions in the Plan may necessitate changes to the Global Settlement Agreement in order to resolve any conflicting provisions. *See* Opinion at 79. Thus, for reasons in addition to the Equity Committee's failure to satisfy the three statutory factors, an interlocutory appeal would be inappropriate because considering the merits of the Global Settlement Agreement prior to confirmation would require the parties and the appellate court to spend time, money, and energy assessing a settlement that will continue to be in flux until this Court enters a final order confirming a Modified Plan that incorporates an amended Global

Settlement Agreement. Accordingly, even if Bankruptcy Rule 8003(c) authorized the Court to grant a permissive appeal, which it does not, no basis for a permissive appeal exists.

D. The Equity Committee Has Failed to Establish Grounds to Certify a Direct Appeal.

25. A direct appeal is appropriate only when either "(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision . . . or involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case." *Weber v. U.S. Trustee.*, 484 F.3d 154, 157 (2d Cir. 2007) (citing 28 U.S.C. § 158(d)(2)(A)(i)-(iii)). "The focus of the statute is explicit: on appeals that raise controlling questions of law, concern matters of public importance, and arise under circumstances where a prompt, determinative ruling might avoid needless litigation." *Id.* at 158. None of those circumstances are present in this case; accordingly, this Court should deny certification.

(i) There Is Clear Controlling Precedent in this Circuit on the Issue Presented, Which Is Not a Matter of Public Importance.

26. The Equity Committee claims to appeal an issue of first impression, but its Petition confirms that what it actually seeks to challenge is nothing more than an application of controlling precedent to the specific facts of this case. The statute does not contemplate use of the direct-appeal mechanism in these circumstances. Instead, "[c]ourts have interpreted the 'controlling precedent' prong of 28 U.S.C. § 158(d)(2)(A)(i) to require that there be 'no governing law on the issue before the court.'" *In re Nortel Networks Corp.*, No. 09-10138(KG), 2010 Bankr. LEXIS 812, at *4 (Bankr. D. Del. Mar. 18, 2010) (citing *Drilling Co. v. SemCrude, L.P.* (*In re SemCrude, L.P.*), 407 B.R. 82, 111 (Bankr. D. Del. 2009)). Simply applying controlling law to the facts at hand, as this Court did, does not suffice. *See Nortel Networks*,

2010 Bankr. LEXI 812, at *5. Nor should a court conclude that a case presents a question of first impression "merely because the Debtor-Appellants have innovated a novel argument." *Reorg. Debtors v. Blue Dog Props. Trust (In re Goody's Fam. Clothing, Inc.)*, Civ. No. 09-409 (RMB), 2009 U.S. Dist. LEXIS 67011, at *5 (D. Del. June 30, 2009). The Equity Committee's attempt at innovative gloss cannot disguise the fact that the legal issue implicated by this appeal—the standard for evaluating the fairness of a settlement agreement—is squarely controlled by Third Circuit precedent.

27. Ample authority supports the standard used by this Court in finding that the Global Settlement Agreement is "fair and equitable." *Prot. Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (providing standard). Courts in the Third Circuit uniformly consider four principal factors in weighing whether a proposed settlement is fair, reasonable, and in the best interests of a debtor's estate: (1) the probability of success in litigation, (2) the likely difficulties in collection, (3) the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it, and (4) the paramount interest of the creditors. *Will v. Nw. Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006); *Fry's Metals, Inc. v. Gibbons (In re RFE Indus., Inc.)*, 283 F.3d 159, 165 (3d Cir. 2002).

28. The Equity Committee does not allege that this Court departed from the standard in making its fairness finding. Pet. at 9. Rather, the Equity Committee's challenges are to the "legal analysis of the merits of the claims being settled," in other words, the Court's evaluation of the evidence before it. *Id.* at 3. In an effort to innovate a purportedly novel issue of law, the Equity Committee theorizes that the Court "stepped into the role of the legal expert" in analyzing the merits of the various disputes between the settlement parties, making its own determination

regarding the Debtors' likelihood of prevailing on the litigation claims. *Id.* at 12. The Equity Committee then characterizes its manufactured "Court as a legal expert" theory as an issue of first impression. *Id.* at 12-13. This argument is legally absurd and unworthy of consideration, much less direct certification to the Third Circuit. It is axiomatic that a court may exercise the traditional judicial function of considering the legal claims and factual assertions of the parties to the settled disputes and making a fairness finding based on these objective facts. Doing so satisfies its legal and fact-finding obligations under the *TMT Trailer* standard without converting the court into an expert witness. Under the Equity Committee's theory, a court could never assess, for example, likelihood of success on the merits in a motion for a preliminary injunction or a stay pending appeal, because that process of evaluating legal claims would transform the court into an expert witness. The purported absence of authority considering the Equity Committee's strained and meritless argument, does not convert it into a legal issue of "first impression" appropriate for direct appeal. When, as here, "the doctrine was applied appropriately . . . and the appellant was given a full and fair opportunity to test that application," appellant has failed to raise a question of law for which controlling authority is lacking in this circuit. *Official Comm. of Unsecured Creditors of Motor Coach Indus. Int'l, Inc. v. Motor Coach Int'l, Inc. (In re Motor Coach Indus. Int'l, Inc.)*, No. 08-12136, 2009 WL 435295, at *1 (D. Del. Feb. 23, 2009) (affirming denial of certification).

29. Nor is the resolution of this question a matter of public importance. Courts narrowly interpret this prong, holding that "[t]o constitute a matter of 'public importance,' the issue on appeal must transcend the litigants and involve a legal question, the resolution of which will advance the cause of jurisprudence to a degree that is usually not the case." *Nortel Networks Corp.*, 2010 Bankr. LEXIS 812, at *5; *see also* COLLIER ON BANKRUPTCY 5.06[5][b] (16th ed.)

("The bar for certification under [the public importance standard] should be set high."). "An appeal that impacts only the parties, not the public at large, is not 'a matter of public importance.'" *Nortel Networks Corp.*, 2010 Bankr. LEXIS 812, at *5 (denying certification) (internal citations omitted).

30. Having just argued that the issue was one of "first impression," the Equity Committee switches gears and asserts that its appeal is a matter of public importance because "as evidenced by the *Spansion* case, it arises with some degree of frequency in bankruptcy cases." Pet. at 15 (discussing *In re Spansion Inc.*, No. 09-10690(KJC), 2009 WL 1531788 (Bankr. D. Del. June 2, 2009)). Further, the Equity Committee argues that it risks the appeal becoming moot because, in the event of confirmation of a subsequent plan, "the legal issue raised here . . . and faced by many parties adversely affected by settlements in bankruptcy cases will be shielded from review." *Id.* The presence of any issues in *Spansion, one case*, hardly proves that the issue is important to "many parties" and the public at large—particularly when that case is factually distinguishable, as discussed below. Moreover, mootness, while routinely a risk in bankruptcy proceedings, is not a factor that the statute or the courts consider worthy of meriting a direct appeal. *15375 Mem'l Corp.*, 2008 WL 2698678, at *1 (holding that certification is an inappropriate means of addressing mootness).

31. Nor is the Equity Committee's insistence that the process "must be fair and transparent" so "that the Equity Committee can preserve its appellate rights" a matter of *public* importance. Pet. at 15. Instead, it is clear that the Equity Committee seeks to advance its *own* agenda through a ruling particular to the complexities of its *own* case. Thus, the matter is not one of public importance meriting direct appeal. *Nortel Networks Corp.*, 2010 Bankr. LEXIS 812, at *5-6.

(ii) The Equity Committee Fails to Identify Conflicting Decisions.

32. The Equity Committee has not identified conflicting decisions on the issue identified for appeal: "can a court find the settlement is fair and equitable absent evidence as to the legal analysis of the merits of the claims being settled?" Pet. at 3. The Equity Committee points to only one decision, *Spansion*, 2009 WL 1531788, which it erroneously asserts is "in severe tension" with the January 7 Order. Pet. at 13. No severe tension exists. *Spansion* did not hold that, as a matter of law, a plan proponent *must* introduce evidence of the *legal analysis* into the record to establish the fairness of the settlement. Rather, it held that, on the unusual facts presented in that particular case, there were insufficient grounds to find the settlement fair and equitable. Specifically, the *Spansion* court remarked that "the Debtors have provided little information as to the specifics of the Actions to provide a basis for evaluating the strengths and weaknesses of the litigation," and noted that the debtors' representative testified, incredibly, that "in reviewing the Settlement Agreement and making his proposal to the Board of Directors, he did not rely upon advice from counsel." 2009 WL 1531788, at *7. *Spansion's* holding that "[*u*]*nder these circumstances*, it seems unlikely that a reasonable evaluation of the merits and litigation . . . could have been made without taking into account the advice of patent litigation counsel," (*id.* at *8 (emphasis added)), called into question the debtor's process in that case. By no stretch, however, did *Spansion* set forth a requirement that debtors introduce their professionals' (or any other professional's) legal analysis *as evidence*, thereby jeopardizing attorney-client privilege. Moreover, here, unlike in *Spansion*, the Debtors introduced ample evidence, through documents and testimony, and "the Debtors' admitted they relied on the advice of counsel." Opinion at 22. Accordingly, the Debtors satisfied the requirements under *Spansion*, and the January 7 Order conforms to, rather than conflicts with, that decision.

33. Nor are *In re Warwick Lumber & Supply Co.*, 153 B.R. 12 (Bankr. D. R.I. 1993) and *In re Nat'l Health & Safety Corp.*, No. 99-18339DWS, 2000 WL 968778 (Bankr. E.D. Pa. July 5, 2000), in conflict with the January 7 Order. Contrary to the Equity Committee's assertions, these cases do not support the notion that "no reasonableness finding can be made without evidence in the record setting forth legal analysis supporting such a conclusion." Pet. at 13. In fact, *Warwick Lumber* held that *despite* the testimony of counsel, the evidence as to the reasonableness of the settlement was insufficient, thus indicating that testimony of counsel is but one means of providing evidence of reasonableness. 153 B.R. at 13. In *National Health*, the court rejected the proposed settlement (without requiring testimony from counsel) on the basis that the parties failed to show that the settlement was related to the underlying causes of action and, instead revealed that it was merely "negotiated in consideration of [the creditor's] support of the plan." 2000 WL 968778, at *2. Neither case, therefore, conflicts with the January 7 Order.

34. The reality is that, despite its labeling of the Appeal as raising "a legal question," the Equity Committee seeks to have the Third Circuit determine "the nature and quanta of evidence sufficient to hold that a settlement is fair and reasonable." Pet. at 13. Such review would necessarily entail a review of the facts and circumstances particular to this case, rendering certification wholly inappropriate. *Am. Home Mortg. Inv. Corp. v. Lehman Bros. Inc. (In re Am. Home Mortg. Inv. Corp.)*, 408 B.R. 42, 44 (D. Del. 2009) (declining certification where questions involved application of law to facts at hand); *15375 Mem'l Corp.*, 2008 WL 2698678, at *1-2 (declining certification where questions involved were fact intensive and involved application of state law); *In re Marrama,* 345 B.R. 458, 474 (Bankr. D. Mass. 2006) (declining to certify appeal where there was no significant dispute in the legal standards involved, despite absence of controlling case law in the First Circuit); *In re Fields*, No. 05-60595/JHW, 2006 WL

4455764, at *3 (Bankr. D.N.J. Oct. 24, 2006) (declining to certify appeal where court was unaware of conflicting decisions and case turned on straightforward application of statutory provisions).

35. Finally, even if there were some disagreement on the issue presented (whether interpreted as legal or factual)—which there is not—it exists solely among bankruptcy courts, and a "review by the district court would be most helpful[,] . . . [as c]ourts of appeals benefit immensely from reviewing the efforts of the district court to resolve such questions." *Weber*, 484 F.3d at 160. Were this Court to "[p]ermit[] direct appeal too readily [it] might impede the development of a coherent body of bankruptcy case-law." *Id.* In this case, "percolation through the district court would cast more light on the issue and facilitate a wise and well-informed decision." *Id.* at 161.

(iii) A Direct Appeal Would Not Materially Advance These Chapter 11 Cases.

36. The Petition should be denied for the additional reason that the Appeal would impede rather than "materially advance" these chapter 11 cases. *See* 28 U.S.C. 158(d)(2). As noted, the logical next step in the advancement of the Debtors' chapter 11 cases is to permit the Debtors' to modify, file and seek confirmation of a revised plan of reorganization per the January 7 Order. A piecemeal appeal regarding a finding on a settlement that does not become effective (and remains subject to modification) until a revised plan is confirmed is a waste of judicial and estate resources. If the Court were to deny confirmation again, the appeal will have been pointless. If the Court confirms the Plan, then the Equity Committee inevitably will appeal that order too, resulting in a second appeal. Accordingly, this premature appeal would unduly disrupt, not materially advance, the bankruptcy proceedings and should be denied. *15375 Mem'l Corp.*, 2008 WL 2698678, at *1 (holding that an direct appeal of a court's findings of fact and

conclusions of law while the debtor is contemplating a revised plan is untimely and unwarranted).

CONCLUSION

For the reasons stated above, the Debtors respectfully request that the Court deny the Petition.

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