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. 8672 & 8791**

DEBTORS' PARTIAL OPPOSITION TO THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS' CONDITIONAL MOTION FOR LEAVE TO CROSS-APPEAL PORTIONS OF THE BANKRUPTCY'S COURT'S SEPTEMBER 13, 2011 ORDER AND OPINION

Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors"), file this partial opposition to the conditional *Motion for Leave to Cross Appeal* [D.I. 8791] (the "Conditional Motion") from the Bankruptcy Court's September 13, 2011 order denying confirmation [D.I. 8613] (the "September Order") and the Bankruptcy Court's accompanying opinion [D.I. 8612] (the "September Opinion") filed by the Official Committee of Equity Security Holders (the "Equity Committee"), and respectfully represent as follows:[2]

PRELIMINARY STATEMENT

1. The Equity Committee argues that the September Order and the September Opinion are not final and appealable. See Conditional Mot. at 4. Nonetheless, the Equity Committee seeks leave to cross-appeal four issues in the event the Court grants other

[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, Washington 98104.

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Conditional Motion.

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parties' motions for leave[3]—all of which the Equity Committee opposes. Id.; see also generally *The Official Committee of Equity Security Holders' Opposition to the Motions for Leave to Appeal Filed by Aurelius Capital Management L.P., the Official Committee of Unsecured Creditors, Appaloosa Management L.P., Centerbridge Partners, L.P. and Owl Creek Asset Management, L.P., and the Joinder Filed by the Debtors* [D.I. 8811] (the "Equity Committee Opposition").

2. Specifically, the Equity Committee conditionally requests permission to cross-appeal those portions of the September Order holding that: (1) the federal judgment rate should be calculated as of the petition date (the "FJR Calculation Issue"); (2) the Debtors proposed the *Modified Sixth Amended Plan of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code* filed on February 8, 2011 [D.I. 6696] (as has and may be further amended, the "Modified Plan") in good faith; and (3) the Debtors' $335 million settlement with the WMB Bondholders is reasonable. See Conditional Mot. at 4. Additionally, the Equity Committee seeks leave to appeal a fourth matter—the January 7, 2011 Opinion and Order of the Bankruptcy Court denying confirmation (the "January Opinion & Order"), from which the Equity Committee previously filed a notice of appeal [D.I. 6573] and a motion for leave to appeal [Dist. D.I. 7], all of which remain pending in the District Court in Civ. A. No. 11-158 (GMS). See id.

3. But only one of the four issues the Equity Committee seeks leave to appeal—the FJR Calculation Issue—is directly related to any of the Pending Motions for Leave;

[3] Motions for leave to appeal were filed by Aurelius Capital Management LP ("Aurelius") [D.I. 8672] (the "Aurelius Appeal Motion"), Appaloosa Management, L.P. ("Appaloosa"), Owl Creek Asset Management, L.P. ("Owl Creek"), and Centerbridge Partners, L.P. ("Centerbridge" and together with Aurelius, Appaloosa, Owl Creek and Centerbridge, the "Settlement Noteholders") [D.I. 8674] (the "AOC Appeal Motion"), and the Official Committee of Unsecured Creditors [D.I. 8727] (the "Creditors' Committee Appeal Motion"). The Debtors' filed a joinder to the Creditors Committee Motion [D.I. 8781] (the "Debtors' Appeal Motion"). All of these filings, collectively, will be referred to as the "Pending Motions for Leave."

and the Equity Committee's Conditional Motion fails otherwise to independently satisfy the requirements for a permissive appeal under 28 U.S.C. § 158(a)(3). The Court should deny the Pending Motions for Leave as to all issues *other than* the Bankruptcy Court's grant of standing to the Equity Committee. If, however, the Court grants leave to appeal the Bankruptcy Court's decision that the applicable interest rate is the federal judgment rate, then the Debtors believe it would be appropriate to allow a simultaneous appeal of the FJR Calculation Issue.

BACKGROUND

4. On September 26, 2008 (the "Commencement Date"), each of the Debtors commenced with the Bankruptcy Court a voluntary case pursuant to 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(a) and 1108 of the Bankruptcy Code.

5. On October 15, 2008, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed the Official Committee of Unsecured Creditors (the "Creditors' Committee"). On January 11, 2010, the U.S. Trustee appointed an official committee of equity security holders in these chapter 11 cases (the "Equity Committee").

6. On February 8, 2011, the Debtors filed the Modified Plan, premised upon that certain Second Amended and Restated Settlement Agreement, dated as of February 7, 2011, by and among the Debtors, JPMorgan Chase Bank, National Association ("JPMC"), the Federal Deposit Insurance Corporation (the "FDIC"), as receiver (the "FDIC Receiver") for Washington Mutual Bank ("WMB") and in its corporate capacity ("FDIC Corporate"), and the Creditors' Committee (as amended, the "Global Settlement Agreement").

7. The Modified Plan defined a Postpetition Interest Claim, in part, as:

> A Claim against any of the Debtors or the Debtors' estates for interest accrued in respect of an outstanding obligation or liability that is the subject of an Allowed Claim during the period from the Petition Date up to and including the date of final payment in full of such Allowed Claim, calculated at the contract rate set forth in any agreement related to such Allowed Claim . . . .

Modified Plan § 1.151 (emphasis added).

8. Certain parties in interest objected to the Modified Plan on the basis that it failed to comply with the Bankruptcy Code, including the best interests of creditors test, because it provided for the payment of postpetition interest on Creditors' Claims (as defined in the Modified Plan) at their contract rate of interest rather than at the federal judgment rate.[4] The Equity Committee objected to confirmation of the Modified Plan, alleging, among other assertions, that (i) the proposed distribution to holders of WMB Senior Notes in Class 17A was improper because such entities held no legitimate claims against the Debtors' estate;[5] and (ii) the Modified Plan could not be confirmed because it was not filed in good faith because the Debtors favored the Settlement Note Holders and the negotiation of the Global Settlement Agreement was dominated by the Settlement Note Holders.[6]

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[4] See, e.g., *Objection to Confirmation of the Modified Sixth Amended Plan of Affiliated Debtors by Class Representatives of Dime Litigation Tracking Warrants*, dated June 16, 2011 [D.I. 7912]; *Objection of the Official Committee of Equity Security Holders to Confirmation of the Modified Sixth Amended Plan of Reorganization*, dated July 1, 2011 [D.I. 8192]; *Supplemental Objection of the Consortium of Trust Preferred Security Holders to Confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, Filed on February 7, 2011*, dated May 13, 2011 [D.I. 7480].

[5] See *Objection of the Official Committee of Equity Security Holders to Confirmation of the Modified Sixth Amended Plan of Reorganization*, dated July 12, 2011 [D.I. 8073] ("Equity Committee Confirmation Objection") ¶ 92. The Equity Committee Confirmation Objection was previously filed under seal on July 1, 2011 at D.I. 8073.

[6] See id. at 16-18.

9. Commencing on July 13, 2011, the Bankruptcy Court held a hearing to consider confirmation of the Modified Plan. On September 13, 2011, the Bankruptcy Court entered the September Opinion and related September Order (a) determining that the Bankruptcy Court has jurisdiction to approve the Global Settlement Agreement and to confirm the Modified Plan, (b) reaffirming its conclusion that the Global Settlement Agreement (and its successor Second Amended and Restated Settlement Agreement) and the transactions contemplated therein, including the $335 million distribution to the WMB Bondholders on account of and in full satisfaction of their purported claims against WMI, are fair, reasonable, and in the best interests of the Debtors, the Debtors' creditors, and the Debtors' chapter 11 estates, (c) finding, among other things, that the Modified Plan (i) was not proposed in bad faith (satisfying the good faith requirement under section 1129(a)(3)), see September Op. at 73, and (ii) is feasible (satisfying the feasibility requirement under section 1129(a)(11)), see id. at 103, (d) identifying certain modifications in the Modified Plan that, if incorporated, would render the plan confirmable under the requirements of the Bankruptcy Code, and (e) ordering the parties to mediation (the "Mediation"). The September Opinion also granted the Equity Committee's motion for standing to prosecute claims for equitable disallowance against certain creditors (the "Standing Ruling"). The September Order stayed the Standing Ruling pending the Mediation.

10. In the September Opinion, the Bankruptcy Court ruled that a debtor may pay postpetition interest to creditors when the debtor is solvent because, pursuant to section 726(a) of the Bankruptcy Code, under a chapter 7 liquidation, unsecured creditors are entitled to postpetition interest on their claims before shareholders may receive any distributions. See id. at 74-75. After discussing conflicting case law concerning whether "the legal rate" due under section 726(a)(5) of the Bankruptcy Code means the federal judgment rate or the contract rate,

the Bankruptcy Court ruled that the "federal judgment rate is the appropriate rate to be applied under section 726(a)(5), rather than the contract rate." See id. at 77-78 (the "FJR Ruling").

11. The Bankruptcy Court also determined in the September Opinion that postpetition interest paid at the federal judgment rate should be calculated as of the petition date, because section 726(a) "expressly provides that such interest shall be paid 'at the legal rate from the date of the filing of the petition' suggesting that it is the interest rate effective on the petition date that should be used." Id. at 88 (quoting 11 U.S.C. § 726(a)(5)).

12. The September Order expressly provided for a further status conference and, at that conference, held on October 6, 2011, the Bankruptcy Court ruled that all issues remaining as an impediment to confirmation, including the FJR Ruling, and all issues related to the Standing Ruling should be mediated.

13. On October 11, 2011, the Bankruptcy Court entered an Order Appointing Mediator [D.I. 8780] (the "Mediation Order"), which, among other things, required the parties subject to mediation, including the Equity Committee and the Settlement Noteholders, to submit mediation statements to the Court-appointed mediator, the Honorable Raymond Lyons. On October 16, 2011, the parties submitted mediation statements setting forth the issues that each party believes the mediator must address, including, without limitation, all issues that each party believes remain as an impediment to confirmation of the Modified Plan. The initial mediation conference commenced on October 19, 2011.

14. Various parties filed notices of appeal and, in some instances, motions for leave to appeal from certain aspects of the September Order and September Opinion. Pertinent to the Conditional Motion are the Aurelius Appeal Motion, the AOC Appeal Motion, and the Creditors' Committee Appeal Motion. The Debtors, in the Debtors' Appeal Motion, joined the

Creditors' Committee Appeal Motion. These Pending Motions for Leave all seek to appeal that portion of the September Order and September Opinion granting standing to the Equity Committee to prosecute a claim for equitable disallowance against the Settlement Noteholders based on their alleged insider trading. The Aurelius Motion additionally seeks leave to appeal the FJR Ruling, and the Debtors opposed that portion of the Aurelius Motion. See *Debtors' Limited Opposition to Motion of Aurelius Capital Management L.P. for Leave to Appeal Under 28 U.S.C. § 158(a) with Respect to Determination of Appropriate Rate of Postpetition Interest* [D.I. 8783] (the "Debtors' Limited Opposition").

ARGUMENT

I. The Conditional Motion Should Be Denied as to All Issues Other Than the FJR Calculation Issue, Because the Equity Committee Cannot Satisfy the Stringent Requirements for a Permissive, Interlocutory Appeal.

15. Although not identical to the FJR Ruling from which Aurelius seeks leave to appeal, the FJR Calculation Issue that the Equity Committee raises in its Conditional Motion involves a related subject matter. As a preliminary matter, the Debtors agree with the Equity Committee that the FJR Ruling is not a final order appealable as of right. See Debtors' Limited Opp. at 6-10; Equity Committee Opp. at 29. Nor can Aurelius satisfy the requirements for a permissive interlocutory appeal of the FJR Ruling under 28 U.S.C. § 158(a). See Debtors' Limited Opp. at 10-11; Equity Committee Opp. at 29. Should, however, the Court disagree and grant the Aurelius Motion as to the FJR Ruling, the Debtors do not oppose the Equity Committee's Conditional Motion for leave to cross-appeal on the FJR Calculation Issue. See Conditional Mot. at 4-7.

16. In all other respects, however, the Court should deny the Conditional Motion, because not one of the other three issues for which the Equity Committee seeks leave

(the "Remaining Issues") satisfies the stringent standards for a permissive appeal under 28 U.S.C. § 158(a)(3). See, e.g., In re Phila. Newspapers, LLC, 418 B.R. 548, 556 (E.D. Pa. 2009) (analogizing to 28 U.S.C. § 1292(b) standards in permissive bankruptcy appeal under 28 U.S.C. § 158(a)); In re Del. & Hudson Ry. Co., 96 B.R. 469, 473 (D. Del. 1989) (requiring "exceptional circumstances [to] justify a departure from the basic policy of postponing review until after the entry of final judgment"). Specifically, none of the Remaining Issues presents (i) a controlling question of law, (ii) upon which there are substantial grounds for difference of opinion, that would (iii) expedite a decision on confirmation of the Debtors' proposed plan, as is required for a permissive appeal. See, e.g., Luke Oil Co. v. SemCrude, L.P. (In re SemCrude, L.P.), 407 B.R. 553, 556-57 (D. Del. 2009); In re Phila. Newspapers, 418 B.R. at 557; In re Del. & Hudson Ry. Co., 96 B.R. at 472-73. The Equity Committee has the burden of establishing that each one of the Remaining Issues satisfies *all* three factors. In re Del. & Hudson Ry. Co., 96 B.R. at 473; see also In re W.R. Grace & Co., No. 08-118, 2008 WL 4234339, at *2 n.5 (D. Del. Sept. 4, 2008); Patrick v. Dell Fin. Servs., 366 B.R. 378, 385 (M.D. Pa. 2007). The Equity Committee fails to carry its burden on any of the Remaining Issues.

17. First, the Equity Committee's appeal from the Bankruptcy Court's determination that the Modified Plan was proposed in good faith does not present a controlling issue of law. See, e.g., In re Del. & Hudson Ry. Co., 96 B.R. at 473. The Equity Committee's own description of this issue belies any notion that it is legal in nature and confirms, instead, that the good-faith ruling was based on the Bankruptcy Court's factual assessment of the evidence in the record. See Conditional Mot. at 7-8 (referring to the ruling as "the good faith *finding*" and citing the Bankruptcy Court's statement that it was "*unconvinced* that [the Settlement Noteholders'] actions had a negative impact on the Plan or tainted the [Global Settlement

Agreement]") (emphasis added); see also, e.g., In re Del. & Hudson Ry. Co., 96 B.R. at 473 (dismissing interlocutory appeal of order that was based "upon a careful examination of the relevant facts," presenting no "controlling question of law").

18. Nor would a permissive, interlocutory appeal on this issue expedite a decision on confirmation of the Debtors' proposed plan. The Equity Committee conclusorily asserts that a "final, appellate ruling" prior to the filing of another proposed plan will save the Debtors and their estates time and expense, but it offers no explanation as to how. See Conditional Mot. at 9. To the extent the Equity Committee is contending that permitting an interlocutory appeal would avoid a later appellate reversal of whatever plan the Bankruptcy Court ultimately confirms, that argument not only assumes that the Equity Committee's challenge is valid—which it is not—but also nullifies the gatekeeping requirements for a permissive appeal, see, e.g., In re Del. & Hudson Ry. Co., 96 B.R. at 473, as it would transform every interlocutory complaint into an appealable ruling, rather than reserving permissive appeals for cases in which "exceptional circumstances" exist. Id. Moreover, allowing the Equity Committee to present its appeal on the "good faith finding" at this time will require the estate to use its limited resources not only to focus on moving forward with the Modified Plan, but also to litigate an interlocutory ruling that can and must be pursued following a final judgment and that, at this stage, will serve only to impede efficient administration of these cases.

19. Second, the same infirmities that preclude interlocutory review of the good-faith finding also doom the Equity Committee's interlocutory challenge to the Bankruptcy Court's reasonableness ruling on the settlement with the WMB Bondholders. See Conditional Mot. at 9-10. The Conditional Motion concedes outright that this issue is not one of law, but of fact: "[T]he record for the confirmation proceedings *lacks evidence* to support the merit of the

WMB Noteholders Claim and the significant amount that will be distributed to the WMB Senior Notes pursuant to the Modified Plan." Id. at 10. And the Equity Committee does not even attempt to argue that an interlocutory appeal on this issue would expedite a decision on confirmation of the Debtors' proposed plan. See generally id. These deficiencies are fatal and require denial of the Conditional Motion as to the WMB Boldholders issue. See, e.g., In re Del. & Hudson Ry. Co., 96 B.R. at 472-73.

20. Finally, the Equity Committee impermissibly attempts to use its Conditional Motion to cross-appeal from the September Order and September Opinion as a vehicle to jumpstart its *previous* appeal from a *different* ruling: the Bankruptcy Court's January Opinion & Order. As the Debtors already have demonstrated, no jurisdiction exists for the Equity Committee's prior appeal from the January Opinion & Order, which must await a final order of confirmation *that still has not been entered.* See *Debtors'/Appellees' (I) Opposition to the Motion of the Official Committee of Equity Security Holders for Leave to Appeal and (II) Cross Motion to Dismiss the Appeal for Lack of Jurisdiction* [Dist. D.I. 11]. The Equity Committee's prior appeal—and the Debtors' motion to dismiss that prior appeal for lack of jurisdiction—remain pending in the District Court (Civ. A. No. 11-158 (GMS)) and should be ruled on in the context of that distinct matter. It would be procedurally improper to circumvent that process by bootstrapping the Equity Committee's interlocutory appeal from the January Opinion & Order to this new, attempted interlocutory appeal from the September Order and September Opinion—especially when neither appeal presents the "exceptional circumstances" required for permissive, interlocutory review. In re Del. & Hudson Ry. Co., 96 B.R. at 473.

IV. CONCLUSION

21. For the reasons stated above, the Debtors respectfully request that the Court deny the Equity Committee's Conditional Motion as to all issues except the FJR Calculation Issue. If the Court grants the Aurelius Motion on the FJR Ruling, the Debtors do not oppose the Conditional Motion as to the FJR Calculation Issue.

Dated: October 25, 2011
Wilmington, Delaware

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