UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
Debtors.	:	**(Jointly Administered)**
	:	**Hearing Date: January 11, 2012 at 2:00 p.m.**
	:	**Re: Docket Nos. 9178, 9179, 9180 & 9181**

OBJECTION OF DEBTORS TO THE MOTION OF THE CONSORTIUM OF TRUST PREFERRED SECURITY HOLDERS FOR A STAY OF CONFIRMATION PROCEEDINGS PENDING APPEAL

Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment" and together with WMI, the "Debtors") hereby object to the Motion of the Consortium of Trust Preferred Security Holders for Stay of Confirmation Proceedings Pending Appeal, dated December 23, 2011 [D.I. 9251] (the "Motion"), filed by the consortium of holders of preferred stock automatically exchanged for trust preferred securities (the "TPS Consortium"), and respectfully state as follows:

PRELIMINARY STATEMENT

1. Although the TPS Consortium's Motion is styled as a "Motion to Stay," the first 27 of its 40 pages do nothing more than rehash failed arguments that this Court has been divested of jurisdiction to conduct any confirmation proceedings by the TPS Consortium's pending appeal of the Court's January 7, 2011 ruling in the adversary proceeding captioned

[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.

Black Horse Capital, LP et. al. v. JPMorgan Chase Bank, N.A. et. al., Adv. Pro. No. 10-51387 (MFW) (the "TPS Litigation"). This Court thoroughly considered and rejected these same arguments when raised more than six months ago in the TPS Consortium's objection to the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated February 7, 2011 [D.I. 6696] (as modified, the "Modified Plan"). See Objection of the TPS Consortium to Confirmation of the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, filed May 13, 2011 [D.I. 7482] (the "TPS Objection to Modified Plan"). As the Court properly held in its Opinion, dated September 13, 2011 [D.I. 8612] (the "September Opinion"), "[t]he correct statement of the Divestiture Rule is that so long as the lower court is not altering the appealed order, the lower court retains jurisdiction to enforce it." September Opinion at 20. By being asked to approve plan provisions providing for the transfer of the Trust Preferred Securities ("TPS") to JPMorgan Chase Bank, N.A. ("JPMC"), the Court concluded that it was not being asked to modify its decision in the TPS Litigation, but only to enforce it. September Opinion at 22-23.

2. The same situation exists regarding the Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated December 12, 2011 [D.I. 9178] (the "Seventh Amended Plan"), through which the Debtors are asking the Court to enforce—not to modify—the summary judgment ruling in the TPS Litigation. Indeed, the provisions of the Seventh Amended Plan that affect the TPS are identical to those the Court already considered in determining that it had jurisdiction to rule on the Modified Plan. The TPS Consortium's attempt to halt proceedings on the Seventh Amended

Plan in their entirety lacks any basis in law or in fact, and the Court should deny this eleventh-hour request for reconsideration of its divestiture ruling in the September Opinion.

3. The TPS Consortium's secondary request for a stay of the confirmation proceedings fares no better. To the extent the TPS Consortium believes it is running out of time to pursue its appeal, the TPS Consortium need only blame itself for starting its adversary proceeding too late. Unbelievably, the TPS Consortium waited almost two years after September 26, 2008—when WMI announced that the TPS instruments had been automatically exchanged into preferred stock and the Debtors filed their chapter 11 petitions—before initiating the TPS Litigation. Perhaps this was due to the fact that the members of the TPS Consortium purchased substantially all of their TPS after WMI filed for bankruptcy. Moreover, the TPS Consortium waited almost a full year after appealing the Court's ruling in the TPS Litigation to seek a stay.

4. The TPS Consortium offers no authority to support a stay that would prevent the Court, the Debtors, and all parties in interest from moving forward with confirmation proceedings related to the Seventh Amended Plan, simply because the TPS Consortium has appealed an order determining that its members do not own one of the assets claimed by the estate. Indeed, in the September Opinion, the Court "decline[d] to exercise its discretion under Rule 8005 not to consider the Modified Plan simply because it might render moot the TPS Consortium's appeal of the decision in the TPS Adversary." September Opinion at 22. The TPS Consortium has given the Court no reason to alter this decision with respect to the Seventh Amended Plan.

5. The TPS Consortium has not come close to making the showing necessary for the extraordinary remedy of a stay. The Court is already aware of the lack of merit in the

TPS Consortium's claims, having considered their arguments and evidence at length and disposed of them on a motion for summary judgment. Moreover, the balance of equities weighs heavily in favor of the numerous other parties who would benefit from a confirmed plan and against the TPS Consortium, which decided to roll the dice with full knowledge of the risks involved: The TPS Consortium acquired its interests *after* the automatic conversion of TPS instruments into WMI preferred stock had been publicly announced; paid a small percentage of the instruments' face value; and staked its claim on a tenuous, if not frivolous, legal position. See Opinion, dated Jan. 7, 2011, at 16 [TPS Litigation, D.I. 179] (the "TPS Summary Judgment Opinion"); Decl. of Brent J. McIntosh in Supp. of Def. JPMorgan Chase Bank, N.A.'s Mot. for Partial Summ. J., dated Nov. 2, 2010, at Exs. 13A, 13B [TPS Litigation, D.I. 108]. By contrast, hundreds of thousands of other parties with valid claims and equity interests will be deeply prejudiced by uncertainty and delay if confirmation proceedings grind to a halt, as the TPS Consortium requests.

6. As the Court knows, the Seventh Amended Plan is premised on the Second Amended and Restated Settlement Agreement, as amended (the "Global Settlement Agreement" or "GSA"), and the recent resolution of remaining impediments to confirmation (the "Settlement") among many interested parties, reached through mediation ordered by this Court in the September Opinion and *Order*, dated September 13, 2011 [D.I. 8613] (the "September Order"). The longer confirmation is delayed, the greater the chance that the GSA and Settlement could fall apart, potentially wiping out expected recoveries. Even if the GSA and Settlement remain intact, all constituents will see their recoveries delayed and some will see them eroded, perhaps entirely, by accruing interest and the costs of administering the estate. The TPS Consortium ignores these obvious injuries to others, arguing that the public interest favors its

being granted a stay to protect its right to appeal, and even asserting that it should not be required to post a bond to protect the interests of the many creditors whose claims would be jeopardized by the delay. The public interest, however, favors all efforts to move forward toward the confirmation and implementation of a plan that would honor the valid claims of interested parties and would distribute more than $7 billion in value to constituencies—including equity—who have been waiting for over three years.

7. In sum, the Court has jurisdiction to proceed with the confirmation hearing and no basis for a stay exists. The Court should deny the Motion in its entirety. In the event that the Court decides to issue a stay, the TPS Consortium should be required to post a bond in an amount that adequately protects the interests of the vast number of parties who would be affected.

BACKGROUND

8. The Court is familiar with the long procedural history of these cases leading up to the Settlement and the Seventh Amended Plan currently before the Court. Debtors therefore limit this summary to recent events pertinent to the Motion. Pursuant to the September Order and September Opinion, the Court directed certain parties to participate in mediation to explore a possible settlement of the Motion for an Order Authorizing the Official Committee of Equity Security Holders to Commence and Prosecute Certain Claims of Debtors' Estates, dated July 12, 2011 [D.I. 8179] (the "Standing Motion") and any issues that remain an impediment to confirmation of a plan of reorganization. On October 10, 2011 [D.I. 8780], the Bankruptcy Court appointed the Honorable Raymond Lyons, United States Bankruptcy Judge, as mediator (the "Mediator"), and ordered the following parties to participate in the Mediation: (i) the Debtors, (ii) the Official Committee of Equity Security Holders (the "Equity Committee"), (iii)

the Official Committee of Unsecured Creditors (the "Creditors' Committee"), (iv) AAOC,[2] (v) the WMB Noteholders,[3] (vi) Normandy Hill Capital L.P. ("Normandy Hill"), (vii) Wells Fargo Bank, National Association ("Wells Fargo"), (viii) the TPS Consortium and the TPS Group, (ix) The Bank of New York Mellon Trust Company, N.A., ("BNY Mellon"), in its capacity as Indenture Trustee for the Senior Notes, and (x) the WMI Noteholders Group (as such term is used in the September Opinion) (collectively, the "Mediation Parties"), but permitted Normandy Hill and BNY Mellon not to attend.

9. The Mediation commenced on October 19, 2011. At status conferences held on November 7, 2011 and on December 8, 2011, the Bankruptcy Court granted the Mediator's request for additional time to continue the Mediation. As a result of the Mediation, and with the assistance of the Mediator, extensive arm's-length discussions among the Debtors, the Creditors' Committee, the Equity Committee, AAOC, and other Creditor constituencies culminated in the Settlement and the modifications to the Modified Plan, which are embodied in

[2] "AAOC" means each of (a) Appaloosa Management L.P., Appaloosa Investment L.P.I, Palomino Fund Ltd., Thoroughbred Fund, L.P., and Thoroughbred Master Ltd. (collectively, "Appaloosa"), (b) Aurelius Capital Management, LP, Aurelius Capital Partners, LP, Aurelius Convergence Master, Ltd., ACP Master, Ltd., Aurelius Capital Master, Ltd., and Aurelius Investment, LLC (collectively, "Aurelius"), (c) Owl Creek Asset Management, L.P., Owl Creek I, L.P., Owl Creek II, L.P., Owl Creek Overseas Fund, Ltd., Owl Creek Socially Responsible Investment Fund, Ltd., Owl Creek Asia I, L.P., Owl Creek Asia II, L.P., and Owl Creek Asia Master Fund, Ltd. (collectively, "Owl Creek"), and (d) Centerbridge Partners, L.P., Centerbridge Special Credit Partners, L.P., Centerbridge Credit Partners, L.P., and Centerbridge Credit Partners Master, L.P. (collectively, "Centerbridge") and any other Affiliates of the funds listed in (a) through (d) above that own or, during the Chapter 11 cases, owned securities issued by and/or have direct or indirect claims against WMI.

[3] The WMB Noteholders include Thrivent Financial for Lutherans, AEGON USA Investment Management, LLC (AEGON Life Insurance (Taiwan) and Transamerica Financial Life Insurance Company), PPM America, Inc. (The Prudential Assurance Company, Ltd., JNL VA High Yield Bond Fund, Jackson National Life Insurance Company of New York, and Jackson National Life Insurance Company), New York Life Investment Management LLC, Legal & General Investment Management (Legal & General Investment Management America), The Northwestern Mutual Life Insurance Co. (Northwestern Mutual Life Insurance Co., Northwestern Long Term Care Insurance Company, Northwestern Mutual Series Fund, Inc., and its Select Bond Portfolio, and Northwestern Mutual Series Fund, Inc., and its Balanced Portfolio), ING Direct NV, Sucursal en España, and their affiliates, who are the legal or beneficial holders of, or have control or discretionary investment authority with respect to, in excess of $600 million in aggregate principal amount outstanding of Senior Notes and Subordinated Notes issued by Washington Mutual Bank.

the Seventh Amended Plan. The Settlement resolves, among other things, certain plan-related issues and objections, including the causes of action asserted in the Equity Committee's Standing Motion, provides for the Reorganized Common Stock of Reorganized WMI to be distributed to holders of Equity Interests, involves a contribution to Reorganized WMI of $75 million by holders of Allowed Senior Notes Claims and Allowed Senior Subordinated Notes Claims in consideration for the granting of releases, and provides for a $125 million credit facility to be made available to Reorganized WMI.

10. Although the TPS Consortium was designated as a "Mediation Party," it did not join in the Settlement ultimately reached by the other Mediation Parties. Nonetheless, the TPS Consortium's class will receive a substantial recovery under the Seventh Amended Plan. Unsatisfied with that recovery and committed to pursuing litigation at all costs, the TPS Consortium opposes the Settlement and the Seventh Amended Plan, and it has even turned on the Equity Committee, its former ally during the confirmation hearing on the Modified Plan.

11. On December 12, 2011, the Debtors filed the Seventh Amended Plan and a related disclosure statement [D.I. 9179] (the "Disclosure Statement"). A hearing to consider approval of the Disclosure Statement is scheduled to commence on January 11, 2012.

ARGUMENT

I. THE COURT HAS JURISDICTION TO IMPLEMENT THE TPS SUMMARY JUDGMENT OPINION AND RELATED ORDER.

12. As the Court already determined in the September Opinion, the TPS Consortium's creative spin on the Divestiture Rule is overly broad, and the "correct statement of the Divestiture Rule is that so long as the lower court is not altering the appealed order, the lower court retains jurisdiction to enforce it." September Opinion at 20. Applying the correct statement of the rule, the Court properly found that there was no impediment to considering and

confirming a plan that affected the TPS Consortium in precisely the same manner as would the Seventh Amended Plan that is currently before the Court. See id. at 22-23. The Motion provides no new argument, no new law, and no new facts to alter the Court's analysis, and the TPS Consortium's belated request for reconsideration therefore should be denied.[4]

13. In the bankruptcy context, an appeal does not divest a bankruptcy court of its jurisdiction to adjudicate *all* matters that may relate to such appeal. Bankruptcy Rule 8005 explicitly recognizes a court's power to continue proceedings pending an appeal. It provides, in pertinent part, that "the bankruptcy judge may suspend *or order the continuation of other proceedings in the case under the Code* or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." Fed. R. Bankr. P. 8005 (emphasis added); see also id. advisory committee's note ("The second sentence of the rule is derived from § 39(c) of the Bankruptcy Act [former § 67(c) of this title] and confers on the bankruptcy judge discretion respecting the stay or continuation of other proceedings in the case while an appeal is pending."); Hagel v. Drummond (In re Hagel), 184 B.R. 793, 798-99 (B.A.P. 9th Cir. 1995) (observing that Bankruptcy Rule 8005 "does not provide that the bankruptcy court *must* stay all other proceedings" and holding that the court had discretion to stay the proceedings) (superseded on other grounds).

14. An appellant cannot halt all proceedings, therefore, merely by filing a notice of appeal. Instead, to achieve that goal, Bankruptcy Rule 7062(d) contemplates that "[i]f an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." Here, the TPS

[4] The TPS Consortium argues that law of the case only applies to final orders. This is incorrect, as this court itself has recognized. Hr'g Tr. 1/20/2011 at 51:22-52:1. (THE COURT: "[W]ith respect to those items that I did decide, they're not going to be relitigated. . . . Okay. It's law of the case, basically."); see In re PCH Associates, 949 F.2d 585, 592 (2d Cir. 1991) ("Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment..")

Consortium's attempt to broaden the Divestiture Rule would effectively render Bankruptcy Rules 8005 and 7062 superfluous. Under the TPS Consortium's theory of divestiture, the prevailing party in an adversary proceeding that establishes its right of ownership over property would essentially have to sit on its hands while the non-prevailing party retained the benefit of an unconditional and unbonded indefinite stay. That is not the law.

15. Absent a stay affirmatively granted, courts have routinely recognized, as did the Court here, that an appeal does not tie the hands of a lower court in the absolute manner erroneously advocated, yet again, by the TPS Consortium. Instead, the court that originally issued an un-stayed order has continuing jurisdiction to implement that order notwithstanding a pending appeal.

> Courts have held that absent a stay pending appeal, they may retain jurisdiction to decide issues and proceedings different from and collateral to those involved in the appeal. . . . They may also enforce the order or judgment appealed [] because in implementing an appealed order, the court does not disrupt the appellate process so long as its decision remains intact for the appellate court to review.

In re VII Holdings Co., 362 B.R. 663, 666 n.3 (Bankr. D. Del. 2007) (internal quotations and citations omitted); see also In re Petition of the Bd. of Dir. of Hopewell Int'l Ins. Ltd., 258 B.R. 580, 583 (Bankr. S.D.N.Y. 2001) (noting that matters that continued before the bankruptcy court were collateral to the issues on appeal and that, in the absence of a stay, the bankruptcy court may continue to administer the contested matter that is on appeal).[5] The TPS Consortium

[5] Accord Dardashti v. Golden (In re Dardashti), No. CC-07-1311-PaDMo, 2008 Bankr. LEXIS 4678, at *16 (B.A.P. 9th Cir. Feb. 12, 2008) (noting that "[w]hile an appeal of an order is pending, the trial court retains jurisdiction to implement or enforce the order" and that "courts have recognized a distinction between *acts undertaken to enforce the judgment, which are permissible*, and acts which expand upon or alter it, which are prohibited) (emphasis added) (citations omitted); see also Hagel, 184 B.R. at 798 (holding that the bankruptcy court retained jurisdiction to dismiss a chapter 13 case pending an appeal of an order denying confirmation of a plan).

ignores this fundamental exception to the Divestiture Rule, an omission that is fatal to its request. See Motion at 16.

16. In fact, "[o]nce a bankruptcy court order, judgment or decree has been entered, and subject to the 'automatic stay' of Bankruptcy Rule 7062, the prevailing party is free to execute upon or otherwise seek to enforce it." 10 Collier on Bankruptcy P. 8005.01 (16th ed. 2011); see also Hope v. Gen. Fin. Corp. of Ga. (In re Kahihikolo), 807 F.2d 1540, 1542 (11th Cir. 1987) (absent a stay, litigants may treat an order as final). If the losing party wishes to maintain the status quo pending appeal, it can attempt to stay the judgment pending appeal. 10 Collier on Bankruptcy P. 8005.01. "*However, if no stay is in effect, the prevailing party may treat the judgment of the bankruptcy court as final, notwithstanding that an appeal is pending.*" Id. (emphasis added).[6]

17. The TPS Consortium leads with the argument that it should not have to seek a stay and that the Court is powerless to proceed with confirmation simply because it has appealed the Court's summary judgment ruling that its members do not own one of the assets claimed by the Debtors for the estates. Although the Motion attempts to put new gloss on previous arguments about property and appellate rights, the TPS Consortium's complaint remains, at its core, the same, and it fails for all the same reasons the Court rejected it in the September Opinion.

18. The TPS Consortium relies primarily on the same cases cited in its previous briefing that were inapposite when the Court ruled against the Consortium in the September Order and September Opinion and that remain inapposite now. To the extent the Motion includes new cases, they too are inapposite and afford no new arguments in support of

[6] The risk of mootness because the TPS Consortium has not satisfied the requirements of a stay, as explained in more detail infra, rests squarely on the TPS Consortium. See 10 Collier on Bankruptcy P. 8005.02.

divestiture. For example, the TPS Consortium cites Petrol Stops Northwest v. Continental Oil Company, 647 F.2d 1005 (9th Cir. 1981) and Sea Star Line, LLC v Emerald Equipment Leasing, Inc., No. 05-245-JJF, 2009 WL 3805569 (D. Del. Nov. 12, 2009), but each of these cases deals with Rule 60 of the Federal Rules of Civil Procedure rather than the myriad situations in which a bankruptcy court retains jurisdiction over other matters in the case following conclusion of an adversary proceeding. Other cases involve scenarios in which trial-court action would impermissibly modify or potentially conflict with the order on appeal, and therefore have no relevance here. See Tex. Comptroller of Public Accounts v. Transtexas Gas Corp. (In re Transtexas Gas Corp.), 303 F.3d 571, 580 n.2 (5th Cir. 2002); Bennett v. Gemmill (In re Combined Metals Reduction Co.), 557 F.2d 179, 200 (9th Cir. 1977); In re Hardy, 30 B.R. 109, 111 (Bankr. S.D. Ohio 1983).[7]

19. In other instances, the TPS Consortium cites cases that actually contradict its argument or that reach a conclusion opposite from that suggested by the TPS Consortium in its Motion. See, e.g. In re Allen-Main Assocs., L.P., 243 B.R. 606 (Bankr. D. Conn. 1998) (determining that jurisdiction existed to determine costs and attorneys fees while order on the underlying claim was on appeal); In re Strawberry Square Assocs., 152 B.R. 699, 701-02 (Bankr. E.D.N.Y. 1993) (recognizing that a stay pending appeal is meant to prevent the appellants position from eroding, but "such a stay should not operate to give an appellant a tactical

[7] The TPS Consortium's tortured attempts to distinguish In re Dardashti and In re Hagel, on which the Court relied in the September Opinion, further underscore the weakness of its position. See Motion at 20-23. Both of those cases squarely support this Court's authority to proceed with confirmation proceedings notwithstanding the TPS Consortium's appeal of the summary-judgment decision. See Dardashti, 2008 Bankr. LEXIS 4678, at *16 (determining that jurisdiction existed to enforce an unappealed Turnover Order that was closely related to an appealed Dismissal Order, even though it involved the same subject matter as the appeal); In re Hagel, 184 B.R. at 798 (noting, in affirming dismissal of case that would moot pending appeal from denial of confirmation, that "the bankruptcy court was not expanding upon or altering the order denying plan confirmation. Rather the court was, at most, enforcing the [previous] order."). The court further noted that not dismissing the case would effectively give the Debtor the benefit of a stay of the proceedings while not meeting the requirements of Bankruptcy Rule 8005. In re Hagel, 184 B.R. at 798.

advantage it would not have enjoyed had it been successful in the lower court").[8] Indeed, of further detriment to the TPS Consortium's argument is the court's observation in Strawberry Square that "[t]he fact that confirmation of the creditor's plan might moot the appeal is not controlling," and that "an appeal does not . . . deprive the bankruptcy court of jurisdiction over other aspects of the case. Doing so would freeze the case at the procedural posture reached when the appeal was filed, and would inure unjustly to the benefit of any party whose interest were furthered by the delay." Id. at 702. And, at times, the Motion does not even accurately represent what a cited case says. The most egregious example involves Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (In re Karaha Bodas Co., LLC), No. 02-20GMS, 2002 WL 1401693 (D. Del. June 27, 2002), in which the TPS Consortium attributes to Chief Judge Sleet quotations concerning divestiture that appear nowhere in the opinion or are taken out of context. See Motion at 14-15. Specifically, although Chief Judge Sleet in Karaha at *1 cites to Venen v. Sweet, 758 F.2d 117 (3d Cir. 1985), he does not refer to or quote the sentence from Venen that "divest means what it says --the power to act, in all but a limited number of circumstances, has been taken away and placed elsewhere," which the TPS Consortium claims he does. Motion at 14-15. And, although Chief Judge Sleet does note the "well established [principle] that the filing of a notice of appeal divests the district court of jurisdiction to rule on the merits of the *issues underlying the appeal*," Motion at 15 (replacement and emphasis in Motion) (citation omitted), the TPS Consortium omits the very next sentence of the opinion, which states that "this principle is not absolute. In appropriate circumstances, district courts retain jurisdiction to protect and enforce previously issued orders and to rule on

[8] Similarly, as the Court noted in its September Opinion at 20, the Bankruptcy Appellate Panel in Whispering Pines Estates, Inc. v. Flash Island, Inc. (In re Whispering Pines Estates), 369 B.R. 752, 758 (B.A.P. 1st Cir. 2007), a case cited by the TPS Consortium, explained that the application of a broad construction of the Divesture Rule would "severely hamper a bankruptcy court's ability to administer its cases in a timely manner."

matters left open by those rulings, so long as the court does not disturb those issues on appeal." Karaha, 2002 WL 1401693, at *1. In Karaha, Judge Sleet found that the appeal did not preclude him from addressing the issues before him.

20. The TPS Consortium's misleading arguments expose their belated request for reconsideration of the Court's holding regarding the Divestiture Rule as a litigation tactic devoid of underlying merit. However spun, the Motion falls squarely within the long line of authority holding that a bankruptcy court may implement its own judgments absent a stay pending appeal. Entry of an order confirming the Seventh Amended Plan will do nothing more than implement the Court's original decision regarding the TPS and will not expand or alter it. Specifically, the Court previously determined that the TPS are not the property of the TPS Consortium[9] and that "the certificates held by the TPS holders are no longer TPS but are deemed to be Depositary Shares tied to WMI Preferred Shares." TPS Summary Judgment Opinion at 13. Confirmation of the Plan does not require the Court to now revisit these issues.

21. The TPS Consortium also erroneously argues that certain record-keeping steps that have been agreed between the Debtors and JPMC in the Global Settlement Agreement would somehow alter the Court's prior summary judgment ruling, but precisely the same steps were contemplated in the Modified Plan that the Court previously determined would merely implement the summary-judgment ruling. The Seventh Amended Plan pertains only to the

[9] The TPS Consortium once again urges the Court to somehow ring fence the TPS pending the outcome of their appeal. But, as before, the Global Settlement Agreement is not subject to renegotiation by the parties and has been twice found by this Court to be fair and reasonable. The relief sought in the Motion is therefore not only unwarranted but unworkable for three fundamental reasons: first, the Global Settlement Agreement is conditioned on the transfer of the Trust Preferred Securities, and such an escrow would defeat the purpose of the agreement. Global Settlement Agreement § 7.2. Second, the TPS Consortium lost on summary judgment, and escrowing the Trust Preferred Securities would allow them to obtain a stay pending appeal without following the proper procedures of Bankruptcy Rules 7062 and 8005, which, as will be discussed, they cannot satisfy. Third, if the Trust Preferred Securities are escrowed, a condition precedent to the Effective Date of the Seventh Amended Plan will fail. Seventh Amended Plan § 39.1. The entire case potentially could be halted if this approach is taken, which would jeopardize the entire plan and over $7 billion in value for stakeholders. It is pure fantasy to believe that theses cases could proceed without the transfer of the TPS as contemplated by the Global Settlement Agreement.

distribution and treatment of the assets, liabilities, and equity interests of the Debtors, and it does not in any way address, much less modify, ownership of the TPS, which is the essential issue pending in the TPS Consortium's appeal. The Court has already ruled in its summary judgment decision that the automatic exchange of TPS instruments into WMI Preferred Stock previously occurred and that the additional steps to record the exchange are not conditions precedent to its effectiveness.[10] TPS Summary Judgment Opinion at 9-13. The Global Settlement Agreement and Seventh Amended Plan merely implement the Court's ruling that the TPS have been automatically exchanged for preferred shares and that the Debtors can transfer the TPS to JPMC. As the Court noted at closing arguments on the Modified Plan, this Court, as well as others, routinely makes decisions with respect to ownership of property in the context of bankruptcy proceedings and subsequently allows the transfer of such property while the ownership controversy is appealed. See Hr'g Tr., Aug. 24, 2011 at 256:10-12. Approval of the Seventh Amended Plan, which provides treatment for the Preferred Equity Interests of the TPS Consortium, does not alter the TPS Summary Judgment Opinion. Further, the provisions of the Global Settlement Agreement that document the transfer of the securities to JPMC likewise do not alter the TPS Summary Judgment Opinion. Accordingly, the Court is not divested of jurisdiction and confirmation proceedings on the Seventh Amended Plan should proceed.

[10] The TPS Consortium cites certain cases in which implementation of an appealed order involved steps that were modified by a subsequent order, Motion at 14 (see, e.g., Whispering Pines Estates, 369 B.R. 752), but no such scenario is presented here. The Court's order on summary judgment that is now pending on appeal does not specify any implementation steps. Instead, it determines the rights of the parties with respect to the TPS and simply states: "ORDERED that the Motions of the Defendants for partial summary judgment on Counts I through VI are GRANTED." Order, dated Jan. 7, 2011 [TPS Litigation, D.I. 180]. As such, the Debtors, as owners of the TPS pursuant to the order, may transfer those securities.

II. THE TPS CONSORTIUM HAS NOT ESTABLISHED THE NECESSITY OF A STAY, AN EXTRAORDINARY REMEDY THAT IS NOT WARRANTED HERE.

A. The TPS Consortium Fails to Satisfy the Requirements of Rule 8005.

22. The Court has previously declined "to exercise its discretion under Rule 8005" to stay confirmation proceedings pending resolution of the TPS Consortium's appeal. September Opinion at 22. The Motion does not provide any basis for the Court to alter its decision. The TPS Consortium has not demonstrated that it can satisfy the requirements for a stay pending appeal pursuant to Bankruptcy Rule 8005. The TPS Consortium has not demonstrated that it can satisfy the requirements for a stay pending appeal Bankruptcy Rule 8005. Specifically, the TPS Consortium has: (i) failed to make a strong showing that it is likely to succeed on the merits of its appeal; (ii) failed to show its members will suffer irreparable injury if the stay is not granted; (iii) failed to show the stay will not substantially harm other parties in the litigation; and (iv) failed to show that a stay is in the public interest. Fed. R. Bankr. P. 8005; Republic of the Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 658 (3d Cir. 1991); VFB LLC v. Money's Trust (In re VF Brands, Inc.), 282 B.R. 134, 137 (Bankr. D. Del 2002). Although none of the factors is determinative, a stay typically will be denied when the movant fails to demonstrate, in particular, either irreparable harm or a likelihood of success on the merits.[11] Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.), Nos. 07-10416, 08-546-SLR, 2009 WL 1833875, at *2 (D. Del. June 26, 2009); In re Touch Am. Holdings, Inc., Nos. 03-11915-KJC, 09-084-SLR, 2009 WL 453107, at *1 (D. Del. Feb. 24, 2009); Bepco, L.P. v. 15375 Mem'l Corp. (In re 15375 Mem'l Corp.), Nos. 06-10859-KG, 08-313-SLR, 08-314, 08-318 - 19, 08-321 - 22, 08-325 - 26, 2009 WL 393948, at *1 (D.

[11] As noted *infra*, at page 22, likelihood of success requires a "'*substantial case*, or a strong case on appeal.'" Morgan v. Polaroid Corp. (In re Polaroid Corp.), Nos. Civ. A. 02-1353 JFF, 01-10864 PJW, 2004 WL 253477, at *1 (D. Del. Feb. 9, 2004) (citations and internal quotations omitted) (emphasis added).

Del. Feb. 18, 2009); cf. Family Kingdom, Inc. v. EMIF N.J. Ltd. P'ship (In re Family Kingdom, Inc.), 225 B.R. 65, 69 n.6 (D.N.J. 1998) (noting that Third Circuit does not permit a relaxing of the merits factor even upon a strong showing of the other factors); In re G-1 Holdings, Inc., 420 B.R. 216, 283 (Bankr. D.N.J. 2009) (requiring all four factors to be satisfied). Importantly, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." Ind. State Police Pension Trust v. Chrysler LLC, 129 S.Ct. 2275, 2276 (2009) (quoting Nken v. Holder, 129 S.Ct. 1749, 1760 (2009) (citation omitted)). Rather, the movants "bear[ ] the burden of showing that the circumstances justify an exercise of that discretion." Id. No such circumstances exist here.

(a) A Stay of All Confirmation Proceedings Would Substantially Harm the Debtors, Their Estates, Creditors and Equity Holders.

23. When, as here, "the substantial harm that will befall the Debtors and the creditors of this estate if a stay is granted" is so tremendous, it "makes the consideration of the other factors involved in granting a stay unnecessary." Fla. Wildlife Fed'n v. Collier Cnty. (In re Section 20 Land Grp., Ltd.), 252 B.R. 819, 821 (Bankr. M.D. Fla. 2000). A stay of the confirmation process would imperil the GSA and threaten recoveries across the entire spectrum of the Debtors' creditors and equity holders, with no potential for recoupment of costs to the estate. The TPS Consortium concedes this point, admitting that a stay of the confirmation process "would likely preclude near-term consummation of the current version of the Settlement . . . ." Motion at 26. Because the GSA becomes terminable on January 31, 2012, these parties would have the authority to abandon the GSA if a stay were granted, and litigation would once again ensue. The outcome of any renewed litigation of the various claims, counterclaims and defenses that would be resolved pursuant to the GSA is uncertain and likely would require years to complete. Decl. of William C. Kosturos in Supp. of Entry of an Order Confirming the Sixth Am. Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy

Code, dated Nov. 23, 2010, at ¶ 30 [D.I. 6083]. If terminated, the entire foundation of the Seventh Amended Plan will be destroyed, and the Debtors will once again have to engage in highly contested litigation with no assurances that they could replicate the recoveries of the GSA, which the Court has twice found to be a reasonable compromise.

24. Further, any stay would be extremely costly to the estate, resulting in the continued accrual of postpetition interest and expenses, as well as additional costs attendant to litigating any protracted appeal. The detrimental effects of further delay in the Chapter 11 Cases—now over three years old—should not be underestimated and will significantly erode recoveries for the Debtors' junior-most Creditors and stakeholders, who face a decline in the value of their recoveries ranging from $18 million to $30 million each month. Indeed, prolonged litigation could wipe out junior creditors' (and most assuredly equity holders') recoveries in their entirety. This "material adverse harm to [the debtor's] diverse creditor constituencies and loss of enterprise value" merits denial of the stay. In re Trans World Airlines, Inc., No. 01-00056(PJW), 2001 WL 1820326, at *14 (Bankr. D. Del. Apr. 2, 2001). Any delay in the confirmation process ensures significant litigation-related expenses as well as delays in distribution relating to these settled claims, which strongly militates against a stay. In re Trans World Airlines, Inc., No. 01-0056, 2001 WL 1820019, at *4-5 (Bankr. D. Del. Mar. 16, 2001) (holding that a stay would cause the debtor substantial harm when debtor faced expenses of $3 million per day).

25. Because the TPS Consortium cannot meet its burden of showing that a stay will not inflict substantial harm on other interested parties, In re Del. & Hudson Ry. & Co., 90 B.R. 90, 91 (Bankr. D. Del. 1988), the Bankruptcy Court should deny the stay. A stay should not be granted when, as here, it could "seriously jeopardize the agreements that were reached to make [the Debtors'] reorganization feasible." G-1 Holdings, 420 B.R. at 283 (denying stay of

confirmation order and shortening the ten-day automatic stay period previously provided by Bankruptcy Rules 3020(e)); In re Charter Co., 72 B.R. 70, 72 (Bankr. M.D. Fla. 1987) (finding substantial harm where a stay would prevent consummation of a settlement agreement and "may impede consummation of the Debtors' joint plan of reorganization").

(b) The TPS Consortium Has Not Shown That It Will Suffer Irreparable Harm Absent a Stay.

26. In contrast to the significant harm that would befall the Debtors and the creditors of their estates as a result of a stay pending appeal, the TPS Consortium has failed to establish that its members would suffer *any* harm, much less irreparable harm, if they do not receive a stay. This failure is fatal to their motion because irreparable harm to the TPS Consortium is the "'principal prerequisite for the issuance' of a stay under Bankruptcy Rule 8005." In re Calpine Corp., No. 05-60200 (BRL), 2008 WL 207841, at *4 (Bankr. S.D.N.Y. Jan. 24, 2008) (citing ACC Bondholder Grp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.), 361 B.R. 337, 347 (S.D.N.Y. 2007) and Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66-67 (2d Cir. 2007) ("[I]rreparable harm is the single most important prerequisite" for the issuance of a stay: "accordingly, 'the moving party must first demonstrate that such injury is likely before the other requirements . . . will be considered.'") (citations omitted)).

27. To show irreparable harm, the TPS Consortium must establish a resulting injury "that 'cannot be redressed by a legal or equitable remedy.'" DCNC North Carolina I, LLC v. Wachovia Bank, N.A., Nos. 09-3775 - 76, 2009 WL 3209728, at *8 (E.D. Pa. Oct. 5, 2009) (applying standard for preliminary injunction from Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989)). Irreparable harm cannot be "remote or speculative," but

must be "actual and imminent and for which monetary damages cannot adequately compensate." Id. (quoting Tillery v. Leonard & Sciolla, LLP, 437 F. Supp. 2d 312, 329 (E.D. Pa. 2006)).

28. The TPS Consortium alleges that it may not be able to continue its appeal from the summary judgment decision because the Seventh Amended Plan will be confirmed and assets distributed, potentially making its appeal equitably moot. Motion at 33. Although the TPS Consortium attempts to elevate equitable mootness to a constitutional deprivation of property rights, it cites no authority to support its position.[12] That hole in the Motion is unsurprising, as it is well-established, as a matter of law, that the possibility that an appeal may become moot does not constitute irreparable harm for purposes of obtaining a stay. See Calpine Corp., 2008 WL 207841, at *4 (explaining that equitable mootness is "a risk that is present in *any* post-confirmation appeal of a chapter 11 plan," and so "is not sufficient to demonstrate irreparable harm") (emphasis added); Regal Ware, Inc. v. Global Home Prods., LLC (In re Global Home Prods., LLC), Nos. 06-10340-KG, Civ. A. 06-508-UNA, 2006 WL 2381918, at *1 (D. Del. Aug. 17, 2006) ("[T]he fact that [the movant's] appeal could be rendered moot . . . does not in and of itself constitute irreparable harm"); Official Comm. of Unsecured Creditors of Motor Coach Indus. Int'l, Inc. v. Motor Coach Indus. Int'l, Inc. (In re Motor Coach Indus. Int'l, Inc.), Nos. 08-12136-BLS, 09-078-SLR, 2009 WL 330993, at *1 (D. Del. Feb. 10, 2009) (same);

[12] No support exists for the TPS Consortium's absurd suggestion that this Court lacks constitutional authority to determine, in an adversary proceeding, ownership of property claimed by the Debtors' estates absent Article III appellate review. See Motion at 33, n.16. The TPS Consortium quotes from United States v. Security Industrial Bank, 459 U.S. 70, 75 (1982), but that case considered limitations on Congress's constitutional power to enact legislation retroactively permitting debtors to avoid liens on certain property, not a bankruptcy court's well-established authority to adjudicate a dispute over ownership of property claimed by a debtor's estate. Nor does the Due Process Clause require an unconditional and indefinite stay to preserve the TPS Consortium's appellate rights. See Motion at 33 n.16, 37 (citing cases evaluating due-process requirements when litigants were denied an opportunity to be heard on the merits of claims alleging unconstitutional deprivation of property). The TPS Consortium already had an opportunity to argue the merits of its claims in this Court, and it lost. If the TPS Consortium wishes to halt confirmation proceedings pending appellate review of this Court's decision, its sole recourse is to satisfy the requirements for a stay, which it cannot do.

15375 Mem'l Corp., 2009 WL 393948, at *1 (same); In re Trans World Airlines, Inc., No. 01-0056(PJW), 2001 WL 1820325, at *10 (Bankr. D. Del. Mar. 27, 2001) (same).

29. Moreover, to the extent the TPS Consortium believes it is running out of time to pursue its appeal, the TPS Consortium itself is at fault. It waited almost two years after September 2008—when WMI announced that the TPS instruments had been automatically exchanged into preferred stock and the Debtors filed their chapter 11 petitions—before initiating the TPS Litigation. The TPS Consortium bears responsibility for whatever harm befalls it from the eleventh-hour litigation tactics it has consistently pursued throughout these cases. For example, it sought the inclusion of the report entitled Wall Street and the Financial Crisis: Anatomy of a Financial Collapse, raised for the first time during the confirmation of the Modified Plan. See 7/21/11 Hearing Tr. 233:5-234:13.

(c) The TPS Consortium Cannot Demonstrate a Likelihood of Success on the Merits of the Appeal.

30. The TPS Consortium also has failed to carry its burden of establishing that it is "likely to prevail" on appeal. Republic of the Philippines, 949 F.2d at 662. To establish a "[l]ikelihood of success on the merits," movants must have a "'*substantial case*, or a strong case on appeal.'" Polaroid Corp., 2004 WL 253477, at *1 (internal quotations omitted) (emphasis added). No strong case can be made here.

31. In its Motion, the TPS Consortium has not provided a single reason why its appeal presents a substantial question, much less shown that the Court's legal analysis is likely to be reversed.[13] Instead, the TPS Consortium perfunctorily states that it has raised important and significant issues in its appeal and argues that this alone is enough to meet this

[13] The Court considered and squarely rejected in its summary-judgment ruling every purportedly "substantial" argument raised in the Motion. Indeed, the fact that the TPS Consortium lost at the trial-court level is itself a strong indication that it is unlikely to succeed on the merits of its appeal. In re Del. & Hudson Ry. Co., 90 B.R. at 91.

prong of the stay test. As an initial matter, the TPS Consortium's Divestiture Rule arguments are not on appeal before any court. As to the issues that have been appealed by the TPS Consortium, these are frivolous claims brought by TPS purchasers who bought into these bankruptcy cases at discount prices and present no legally significant issue; and, regardless, this factor is not determinative of the need for a stay. See, e.g., In re Countrywide Home Loans, Inc., 387 B.R. 467, 474 (Bankr. W.D. Pa. 2008). If it were, then stays in bankruptcy cases would be the rule, instead of the exception. See, e.g., Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1426-27 (3d Cir. 1994).

32. The cases cited by the TPS Consortium do not demand another result. In Countrywide, the court ultimately found that the movant "ha[d] not demonstrated a strong likelihood of success on appeal even though it has identified a serious and substantial question to present to the appellate court." 387 B.R. at 474 (observing that the presence of a substantial question is merely one factor and denying stay after considering the merits of the questions presented). Likewise, in Arnold v. Garlock, Inc., 278 F.3d 426 (5th Cir. 2001), it was not enough that the movant claimed to have a significant issue on appeal; rather, the movant was required to actually *present* a substantial case on the merits of the serious legal issue involved. Id. at 439-41 (denying stay after examining merits of the legal arguments raised on appeal). The remaining cases cited by the TPS Consortium are likewise inapplicable. While the TPS Consortium need not show definitively that this Court's ruling was wrong, it still bears the burden of demonstrating a likelihood of success on the merits. Because it has not met that burden, the Motion should be denied.[14]

[14] Nor does the decision in In re Adelphia Commc'ns Corp., 361 B.R. 337 (S.D.N.Y. 2007), offer any support for the TPS Consortium's request. In that case, the district court found that appellants had shown a substantial likelihood of success on appeal, but conditioned a stay on the posting of a $1.3 billion bond to protect "the threatened loss to the non-moving parties" during the stay and delay of distributions. Id. at 368. The TPS

(d) A Stay Is Not in the Public Interest

33. The public interest favors prompt and efficient resolution of bankruptcy cases, and the public interest would be harmed by the granting of a stay in this case indefinitely delaying confirmation proceedings. See, e.g., In re Cont'l Airlines, 91 F.3d 553, 561 (3d Cir. 1996) (en banc) (acknowledging the "strong public interest in the finality of bankruptcy reorganizations"); In re Del. & Hudson Ry., 90 B.R. at 91 (finding that where the debtors' ability to reorganize is threatened by a stay, "the public in general would be harmed"); Calabria v. CIT Consumer Grp. (In re Calabria), 407 B.R. 671, 683 (Bankr. W.D. Pa. 2009) (holding that where a stay "will only cause further delays . . . denying the request for stay is actually in the public interest"); Turner v. Frascella Enters., Inc. (In re Frascella Enters., Inc.), 388 B.R. 619, 629 (Bankr. E.D. Pa. 2008) (stating that the public interest "requires [the] prompt and fair resolution of bankruptcy cases"); ePlus, Inc. v. Katz (In re Metiom, Inc.), 318 B.R. 263, 272 (S.D.N.Y. 2004) (holding that "the public interest [is] in the expeditious administration of bankruptcy cases . . . rather than [the] litigation of claims lacking a substantial possibility of success"). Additionally, because the GSA and the Settlement are embodied in the Seventh Amended Plan, this Court should consider the strong judicial policy of encouraging settlements and favoring compromises. See, e.g., Will v. Nw. Univ. (In re Nutraquest, Inc.), 434 F.3d 639, 644 (3d Cir. 2006) ("Settlements are favored."); In re Coram Healthcare Corp., 315 B.R. 321, 329 (Bankr. D. Del. 2004) ("Compromises are generally favored in bankruptcy.").

34. In this case, in particular, the public interest strongly favors the denial of a stay. This case arose from the largest bank failure in United States history, and the Settlement occurred only after years of multi-party litigation, bankruptcy proceedings, negotiation, and

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Consortium, by contrast, has made no showing of a likelihood of success on its appeal and wishes to avoid the posting of a bond.

mediation. Instead of additional years of draining litigation in numerous forums, the Settlement and the GSA will bring nearly $6.5 billion into the estate for distribution to the Debtors' creditor and equity constituents. Absent this, the parties will be forced to proceed through costly, lengthy litigation that will reduce creditor and equity holder recoveries as litigation and administrative expenses increase. The public interest clearly would be better served by the resolution of this bankruptcy and the distribution of the estates' assets to creditors and equity holders who have waited over three years.

35. Finally, the TPS Consortium's desire to preserve an ability to appeal reflects pursuit of a private benefit, not any public interest. Cf. Kim v. Parklane, Inc., No. 10-CV-0041 (DMC), 2010 WL 715821, at *5 (D.N.J. Mar. 1, 2010) (denying a stay where the alleged public interest was "the opportunity to be heard before an appeal is rendered moot"). In particular, because the TPS Consortium has failed to demonstrate that it is likely to prevail on the merits, the public interest does not favor a stay pending appeal. DCNC North Carolina I, 2009 WL 3209728, at *9; see also Metiom, 318 B.R. at 272 (finding that where "there is no substantial possibility of success on the merits of the appeal," "[t]he public interest . . . is diminished"). After losing on summary judgment and wanting an additional opportunity to assert meritless claims and continue to hold up resolution of these chapter 11 cases does not amount to serving the public interest. If that were the case, a stay pending appeal would always be warranted, rather than being "an extraordinary remedy." Am. Tel. & Tel. Co., 42 F.3d at 1426-27.

B. A Bond Is Required for a Stay

36. For the foregoing reasons, the Court should deny the request for a stay outright. If, however, the Court were inclined to grant a stay, the TPS Consortium should be required to post a bond sufficient, at a minimum, to protect the Debtors and their estates from the substantial harm that will occur if confirmation proceedings concerning the Seventh Amended

Plan are stayed, the GSA (which represents 6.5 billion in value to be distributed to creditors and equity) is terminated, and the Settlement collapses.

37. The purpose of the bond is to "preserve the status quo while protecting the non-appealing party's rights pending appeal." In re Innovative Commc'ns, Bankr. No. 06-30008, 2007 Bankr. LEXIS 4654, at *17 (Bankr. D.V.I. 2007) (finding that a bond of $700 million, the amount of the claims against the debtors, would be necessary if it were to grant a stay pending appeal) (internal quotations omitted). Indeed, "the bond secures the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal." Culwell v. Tex. Equip. Co., Inc. (In re Tex. Equip. Co., Inc.), 283 B.R. 222, 229 (Bankr. N.D. Tex. 2002) (citation omitted). Accordingly, there is "a strong policy against granting stays without providing some security" to the non-movant, Gleasman v. Jones, Day, Reavis & Pogue (In re Gleasman), 111 B.R. 595, 602 (Bankr. W.D. Tex. 1990), and bankruptcy courts have therefore required bonds in a variety of factual circumstances. See, e.g., In re Weinhold, 389 B.R. 783 (Bank. M.D. Fla. 2008) (holding in chapter 7 appeal that bond is required to protect in part against delay in implementation of settlement agreement); In re Gen. Motors Corp., 409 B.R. 24, 34 (Bankr. S.D.N.Y. 2009) (requiring bond when deadline exists for section 363 sale financing); Adelphia Commc'ns Corp., 361 B.R. at 368 (requiring bond with respect to appeal from confirmation order). In a bankruptcy of this magnitude, with billions of dollars in creditors' recoveries at stake, it would be a drastic departure from accepted stay practice to relieve the TPS Consortium of the fundamental requirement that it secure the rights of the Debtors, as prevailing parties, and of all the other interested parties in this bankruptcy that stand to suffer substantial losses while the TPS Consortium pursues a meritless appeal.

38. Numerous bankruptcy courts have required substantial bonds in connection with appeals that jeopardized creditor recoveries, and the same requirement should apply here. See Adelphia Commc'ns Corp., 361 B.R. at 368 (ordering posting of a $1.3 billion bond as "commensurate with the threatened loss to the non-moving parties" during the stay and delay of distributions) (citing Burlington Indus., Inc. v. Edelman, 666 F. Supp. 799 (M.D.N.C. 1987) ($500,000,000 bond enjoining a tender offer)); see also Calpine Corp., 2008 WL 207841, at *7 (noting that, if the motion to stay were granted—which it was not—the court would require a bond "in the range of $900 million to $1 billion" to compensate for aggregate additional interest the debtors would incur if they were unable to close on their existing exit financing); NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.), 384 F.3d 108, 117 (3d Cir. 2004) (noting that bankruptcy court conditioned stay upon a bond equivalent to purchase price for assets to be sold in connection with confirmation). Likewise, multi-billion-dollar bonds also have been required in non-bankruptcy appeals. See Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250 (S.D.N.Y. 1986) (requiring one billion dollar appeal bond), rev'd on other grounds, 481 U.S. 1 (1987); Price v. Philip Morris Inc., No. 00-L-112, 2003 WL 22597608 (Ill. Cir. Ct. Mar. 21, 2003) (requiring $12 billion appeal bond), rev'd on other grounds, 848 N.E.2d 1 (Ill. 2005).

39. The TPS Consortium boldly requests a stay without a bond, but it has not carried its substantial burden of demonstrating why a bond should not be required under these circumstances. Adelphia Commc'ns Corp., 361 B.R. at 351 ("Because a supersedeas bond is designed to protect the appellee, the party seeking a stay without bond has the burden of providing specific reasons why the court should depart from the standard requirement of granting a stay only after posting of a supersedeas bond in the full amount of the judgment.") (citing de la

Fuente v. DCI Telecomm., Inc., 269 F.Supp.2d 237, 240 (S.D.N.Y.), aff'd, 82 Fed. Appx. 723, 2003 WL 22922353 (2d Cir. 2003) (unpublished)). An appellant's inability to afford the bond, without more, is not sufficient reason for a court to waive the bonding requirement. Triple Net Invs. IX, LP v. DJK Residential, LLC (In re DJK Residential, LLC), Nos. 08-10375 (JMP), M-47 (GEL), 2008 U.S. Dist. LEXIS 19801, at *14 (S.D.N.Y. Mar. 7, 2008) ("[Appellant] argues, with some force, that it cannot be expected to post a bond, because the cost of a bond would be prohibitive . . . . But this argument only serves to highlight the substantial risk of dramatic injury to Debtors and other creditors if the Bankruptcy Court's orders were erroneously stayed."); Gen. Motors Corp., 409 B.R. at 34 (same).

40. The TPS Consortium's assertion that a bond is unnecessary because a stay would not cause any harm is absurd. Motion at 38. As discussed above, the Settlement represents $6.5 billion of value to the Debtors' estates. Delay of confirmation costs junior creditors between $18 and $30 million per month; thus, a stay of even a few months could wipe out the recoveries of junior creditor classes. And, if the Settlement or GSA is scuttled, it would devastate the value of the Debtors' estates and preclude substantial recoveries for many creditors. Indeed, the TPS Consortium's stated purpose is to eviscerate the Settlement and the GSA, arguing that, during a stay, the parties could abandon the Settlement, consider a plan more favorable to the TPS Consortium, appoint a chapter 11 trustee, convert the cases to chapter 7, or restart costly, lengthy and uncertain litigation against JPMorgan and others. Id. at 27-28.

41. Pursuit of these courses of action would resort in the loss of $6.5 billion in value afforded by the GSA and the Settlement.[15] Accordingly, if the Court issues a stay—which

[15] Moreover, if the confirmation process is delayed at all, the Debtors will continue to suffer, at minimum, $18 to $30 million a month in litigation, administrative, and interest expenses. Yet a bond designed to cover only expenses would be insufficient. Adelphia Commc'ns Corp., 361 B.R. at 354 (noting that the bond is designed to compensate the appellee for the total substantial harm incurred during the stay).

it should not—the bond should be set in an amount to cover the harm of at least $6.5 billion that might befall the Debtors and their other creditors from the delay of the confirmation process. Adelphia Commc'ns Corp., 361 B.R. at 368. As the party seeking the stay, the TPS Consortium should protect against the risk of the collapse of the GSA rather than placing that risk on the Debtors, its creditors, and its equity holders.

CONCLUSION

42. For the foregoing reasons, the Bankruptcy Court should deny the TPS Consortium's Motion in its entirety.

Dated: Wilmington, Delaware
January 4, 2012

Mark D. Collins (No. 2981)
Michael J. Merchant (No. 3854)
Travis A. McRoberts (No. 5274)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

– and –

Brian S. Rosen, Esq.
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Debtors
and Debtors in Possession