IN THE 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
	:	**Requested Hearing date: January 20, 2011 at 2:00 p.m.**
	:	**Requested Objection deadline: At the hearing**
	:	**Related D.I. Nos. 6528 and 6529**

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

The Official Committee of Equity Security Holders (the "Equity Committee") respectfully requests (the "Certification Request"), pursuant to section 105(a) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532, et seq. (the "Bankruptcy Code"), 28 U.S.C. § 158(d)(2), and Rule 8001(f) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the entry of an order certifying the portion of this Court's *Order Denying Plan Confirmation* and related *Opinion* that held that the global settlement was fair and reasonable, entered on January 7, 2010 [D.I. 6528 and 6529] (the "Opinion and Order"),[2] for direct appeal to the United States Court of Appeals for the Third Circuit (the "Third Circuit"), and in support thereof, respectfully states as follows:

---

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's 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] A copy of the Opinion and Order is attached hereto as **Exhibit A**.

PRELIMINARY STATEMENT

1. Approval of the Global Settlement is the watershed event in these cases. Under the Global Settlement, the billions of dollars in assets owned by the Debtors' estates are apportioned and the competing claims to those assets compromised. The Global Settlement fixes the recoveries of creditors (100% plus interest for all but the junior most class (Op. 12)) and equity holders (up to 1% for most preferred stock, nothing on account of common stock (Op. 71; DS 33-34)). Significantly, the conclusion that the Global Settlement is fair and reasonable means that the structure, value allocations and other elements of the Global Settlement are approved. Although the Bankruptcy Court denied confirmation of the Plan in its Order, none of the deficiencies with the Plan as identified by the Bankruptcy Court have to do with the Global Settlement. (See Op. 2).[3] Accordingly, the Plan deficiencies that the Plan Supporters must correct *will not require the Plan Supporters to modify or amend the Global Settlement.* Thus, the conclusion that the Global Settlement passes the test is, for all practical purposes, final.[4] See In re Armstrong World Indus., Inc., 432 F.3d 507 (3d Cir. 2005). Moreover, in the event the Equity Committee is forced to await entry of an order confirming a plan before it can appeal the approval of the Global Settlement, it will face the likely prospect that the Plan Supporters will assert that any appeal of the approval of the Global Settlement is time barred and/or equitably moot.

---

[3] In the Opinion, the only change to the Global Settlement that the Court found necessary is that the release provisions in the Plan and Confirmation Order must control over the terms of the Global Settlement. (Op. 79).

[4] The fact that the Bankruptcy Court did not set forth its approval of the Global Settlement in the Order or in a separate order does not preclude appellate review. In re Marvel Entm't Group, Inc., 209 B.R. 832, 836-37 (D. Del. 1997) (citing Schrob v. Catterson, 948 F.2d 1402, 1407 (3d Cir. 1991)). The Opinion contains more than sufficient information to review the Bankruptcy Court's decision. See, e.g., Marvel, 209 B.R. at 836-37 (concluding that transcript of hearing on motions for temporary restraining order provided sufficient information to review the bankruptcy court's decision).

2. Appeal is necessary to address a fundamental legal issue that underlies the Court's determination that the GSA is fair and reasonable: can such a determination be made when the record contains no evidence of any legal analysis of the merits of the claims being settled? As the Court acknowledges in its Opinion and Order, the record here is devoid of any such evidence. The Plan Proponents declined to waive the attorney client privilege protecting their own counsel's legal evaluations and they also failed to submit any expert testimony on the subject. Instead of drawing on evidence in the record, the Court determined the settlement was reasonable based on its own legal analysis of the claims as presented in the pleadings in the underlying litigation. This effort by the Court to fill evidentiary gaps in the Plan Proponents case deprives the Objectors of their right to test the evidence used to support the plan. Approval of a settlement on this limited record is also inconsistent with—or at the very least in tension with—the decision in the Spansion case, which found a record lacking in legal analysis insufficient to justify a finding of reasonableness. Because the question of the character and quantity of evidence necessary to support a reasonableness determination is both significant and recurring for bankruptcy courts, guidance from the Third Circuit Court of Appeals would be beneficial and this Court should certify this issue for immediate appellate review.

BACKGROUND[5]

3. Debtor Washington Mutual, Inc. ("WMI") is a bank holding company that formerly owned Washington Mutual Bank ("WMB"). Before its seizure by the Office of Thrift Supervision (the "OTC") on September 25, 2008, WMB had over 2,200 branches and held over $188.3 billion in deposits, making it the largest savings and loan association in the country. Immediately upon seizing WMB, the OTC appointed the FDIC as receiver. The FDIC's seizure

[5] The facts reflected in this Background section are taken from the Bankruptcy Court's findings of fact in the Opinion.

of WMB marked the largest bank failure in this country's history. On that very day, the FDIC sold substantially all of WMB's assets to JPMorgan Chase Bank, N.A. ("JPMC") pursuant to a Purchase and Assumption Agreement (the "Purchase Agreement") for $1.88 billion plus the assumption of more than $145 billion in deposit and other liabilities of WMB. WMI and its affiliate, WMI Investment Corp., filed chapter 11 petitions the very next day – September 26, 2008 (the "Petition Date"). (Op. 2-3).

3. Disputes among the Debtors, JPMC and the FDIC with respect to ownership of the Debtors' assets arose very shortly after the Petition Date. These disputes included:

- Ownership of approximately $3.8 billion in funds on deposit at WMB at the time of seizure (the "Deposit Accounts") (Op. 4-6, 23-26);
- Ownership of tax refunds in the approximate amount of $5.5 to $5.8 billion (Op. 4, 26-30);
- Ownership of certain Trust Preferred Securities with a value of $4 billion (Op. 4, 8);
- Intellectual property consisting largely of trademarks registered in WMI's name (Op. 4, 33-35);
- Various employee related assets and liabilities (Op. 4, 35-42)[6];
- Approximately 3.15 million Class B shares in Visa, Inc. (worth approximately $150 million, subject to reduction due to certain liabilities) (Op. 4, 42-45);
- The right to the proceeds of the Anchor Litigation (in which judgment was entered in an amount up to $419 million) and the American Savings Litigation (in which judgment was entered in the amount of $55 million) (Op. 8-9, 46-48; DS 55-56);

[6] These assets are described at pages 35 through 42 of the Opinion and include: WMI Pension Plan (with a total of $1.7 billion and over-funded by roughly $39 million); twelve (12) "Rabbi trusts" (with a value of at least $300 million); deferred compensation plans; employee medical plans; and certain BOLI/COLI insurance policies on the lives of employees of WMI and WMB (with a cash surrender value of $5.2 billion).

- Claims against JPMC to recover $6.5 billion in capital contributions as fraudulent conveyances and preferences (Op. 51-53);
- Business Tort Claims held by the estates against JPMC and the FDIC based upon alleged misconduct of JPMC in connection with the seizure and Purchase Agreement, damages for which could reach into the multi-billions of dollars (Op. 53-56); and
- Various other claims (Op. 56-57).

4. Litigation among the parties with respect to these disputes was commenced in the Bankruptcy Court and the District Court for the District of Columbia. (See generally Op. 3-6). These litigations included: (a) the JPMC Adversary commenced by JPMC on March 24, 2009 seeking a declaration that JPMC owned, by virtue of its acquisition of WMB, the Deposit Accounts, the Tax Refunds and most of the other disputed assets; (b) the Debtors' answer and counterclaims in the JPMC Adversary filed on May 29, 2009, seeking, among other things, to avoid as preferences and fraudulent conveyances various pre-petition capital contributions by the Debtors to WMB; (c) the Turnover Action commenced by the Debtors on April 27, 2009 in which the Debtors sought turnover of the $3.8 billion in Deposit Accounts in the Debtors' name at WMB; (d) JPMC's answer, counterclaims and a crossclaim against the FDIC Receiver in the Turnover Action; and (e) the FDIC's Motion for relief from the automatic stay to enable it to have JPMC transfer the Deposit Accounts back to the FDIC so that they could be setoff against the FDIC's claims against the Debtors. (Op. 4-6).

5. The Global Settlement was announced on the record at the hearing on March 12, 2010 (Op. 6-7), before any meaningful discovery in any of these litigations had occurred. Prior to this announcement, the Debtors filed a motion pursuant to Bankruptcy Rule 2004 seeking the examination of JPMC to purportedly investigate potential claims based on JPMC's alleged

misconduct leading up to its purchase of WMB's assets. [Docket No. 974]. The Debtors also filed a 2004 motion against certain parties, including but not limited to the FDIC and OTS, in connection with their purported investigation of certain pre-petition conduct that may reveal the existence of estate claims. [Docket No. 1997]. However, the Debtors' "investigations" were superficial and insufficient – the 2004 requests produced limited documents, and the Debtors failed to take a single deposition.

6. Although the Equity Committee was appointed by the Office of the United States Trustee on January 11, 2010, it had no input into the terms of the Global Settlement. Rather, the Global Settlement was negotiated exclusively among the Debtors, JPMC, FDIC, Official Committee of Unsecured Creditors (the "Creditors Committee") and Settlement Note Holders. The Settlement Note Holders are investment funds and their affiliates that hold claims in various classes under the Plan, including the Senior Notes, Senior Subordinated Notes and PIERS.[7] The holders of Senior Notes and Subordinated Notes will receive a recovery of 100% plus interest. The holders of PIERS will receive a recovery of approximately 74% *plus* the right to participate in a rights offering for the shares of the Reorganized Debtor under the Plan, whose primary asset will be WMMRC, a captive insurance company in run-off with NOLs in the amount of up to $5 billion. (Op. 12, 97).

7. Under the Global Settlement, the Debtors will receive the Deposit Accounts. The Tax Refunds will be split $2.195 billion to the estates and $2.36 billion to JPMC. The $4 billion

[7] The following Settlement Note Holders hold the following securities in the following amounts: (i) Appaloosa Management L.P. holds $290,502,000 in Allowed Senior Notes Claims, $584,695,000 in Allowed Senior Subordinated Notes Claims, $371,014,450 in Allowed PIERS Claims and 848,571 shares of REIT Series; (ii) Centerbridge Partners, L.P. holds $275,000,000 in Allowed Senior Subordinated Notes Claims and $69,047,900 in Allowed PIERS Claims; (iii) Owl Creek Asset Management, L.P. holds $2,208,700 in Allowed Senior Notes Claims, $269,525,000 in Allowed Senior Subordinated Notes Claims, $250,378,750 in Allowed PIERS Claims and 90,015 shares of REIT Series; and (iv) Aurelius Capital Management, LP holds $78,049,000 in Allowed Senior Notes Claims, $210,604,000 in Allowed Senior Subordinated Notes Claims and $128,639,900 in Allowed PIERS Claims

in Trust Preferred Securities will be owned by JPMC under the Global Settlement. JPMC will receive the bulk of the Intellectual Property, take over the WMI Pension Plan and receive all but one of the rabbi trusts. JPMC will also assume responsibility for all claims made under WMI's employee medical plan, pay $25 million for the shares of Visa owned by WMI and control and have the right to the proceeds of the Anchor Litigation. Additionally, under the Global Settlement, the Debtors waive the approximately $6.5 billion in fraudulent conveyance and preference claims against JPMC and potential Business Tort Claims against JPMC and the FDIC. (Op. 53, 55). In the Opinion, the Court determined the likelihood of success on the merits of each of these claims as follows:

- Deposit Accounts – The Debtors have a strong likelihood of success on the merits. However, the Debtors could not do any better by continuing to litigate since they will receive the entire Deposit Accounts totaling $4 billion under the Global Settlement. (Op. 26).
- Tax Refunds – The Debtors have a fair likelihood of prevailing. However, assuming the Tax Refunds are property of the estate, JPMC (or the FDIC Receiver) would have a claim against the estate for the vast majority of the Tax Refunds. Therefore, the likelihood that the Debtors would succeed in obtaining a net result better for the estate than the Global Settlement is not strong. (Op. 29-30).
- Trust Preferred Securities – There are difficult legal issues, including a legitimate disagreement among the parties and various defenses raised by JPMC. Even if the Debtors were successful in avoiding the transfer of the Trust Preferred Securities, JPMC and/or the FDIC would have a claim against the estate for the value of the Trust Preferred

Securities in the amount of $4 billion. Accordingly, it is unlikely that the Debtors could achieve a result that is superior to the Global Settlement. (Op. 33).

- Intellectual Property – The Debtors are likely to succeed. However, the intrinsic value of the Intellectual Property is not high since the marks were historically used by WMB (rather than WMI) and therefore closely associated with WMB's failure. Moreover, the marks have insignificant value since WMI has virtually no remaining business operations. (Op. 34-35).
- WMI Pension Plan – The Debtors have a high likelihood of success. However, the Debtors' options for realizing value associated with the WMI Pension Plan are not likely to realize more than the Global Settlement. (Op. 37).
- Rabbi trusts – Based on the manner in which the rabbi trusts are reflected on the parties' books and records, the Debtors do not have a strong likelihood of getting a better result on these assets than their recovery under the Global Settlement. (Op. 40).
- WMI's employee medical plan – Because the medical plans constitute only liabilities and not assets, the Debtors do not have a strong likelihood of getting a better result on these plans than they are getting under the Global Settlement. (Op. 41).
- Visa shares – JPMC has a plausible claim that WMB (rather than WMI) is the equitable owner of the shares. Although the shares may currently be worth $150 million, the liability associated with the escrow could diminish that value. The Debtors do not have a strong likelihood of getting a significantly better result on this claim than is reflected in the Global Settlement. (Op. 44-45).
- Fraudulent transfers and preferences – It is far from certain that the Debtors would be able to recover the pre-petition payments to WMB. The defenses raised by JPMC raise

some factual issues. Moreover, the avoidance actions require the Debtors to prove insolvency at the time of the transfers, which is a significant hurdle to prove and, if successful, would eliminate the Debtors' ability to claim any damages under their Business Tort Claims. (Op. 53).

- Business Tort Claims – The Debtors' likelihood of success is not high. The ANICO suit has already been dismissed. There is a question as to whether the Business Tort Claims were included in the claim the Debtors originally filed in the FDIC receivership action. Moreover, any claim for damages would require the Debtors to prove that they were solvent at the time of the seizure of WMB, a position diametrically opposed to assertions they would need to prove in the preference and fraudulent conveyance claims. (Op. 55-56).

8. The Bankruptcy Court ultimately found the Global Settlement to be fair and reasonable under its application of the standard enunciated by the Supreme Court in Protective Committee For Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968), and the Third Circuit's opinions in In re Nutraquest, Inc., 434 F.3d at 645, and In re Martin, 91 F.3d at 393. The Court concluded, however, that the Plan's release and exculpation provisions were contrary to applicable law. (Op. 67-87). The Court also found that there was not sufficient evidence to determine if the PIERS claims should be treated as debt (as contended by the Plan Supporters) or equity (as contended by the Equity Committee and other Plan Objectors), and that the Plan's treatment of the PIERS claims is discriminatory in that the Plan proposed to allow only certain holders of the PIERS to subscribe to the rights offering. (Id. 96-101). The Court additionally found that the Plan was discriminatory in its treatment of the LTW

Holders, which were not, as were general unsecured creditors, offered the opportunity to take stock (rather than cash) in the Reorganized Debtor. (Id. 101-02).

9. On January 7, 2011, WMI issued a press release stating:[8]

> [It] is pleased that the Bankruptcy Court found that the Global Settlement Agreement is fair and reasonable and that WMI performed a reasonable evaluation of the merits of the underlying litigation. WMI is also pleased that the Court suggested that the Plan of Reorganization is confirmable subject to limited modifications. WMI believes that the expeditious distribution of funds to holders of allowed claims is of paramount importance and intends to modify the Plan consistent with the Court's suggestions and will seek confirmation as soon as practicable.

10. The import of the Global Settlement is that the billions of dollars in value of these estates is compromised in a way that ensures a complete or substantial recovery for all parties-in-interest, except for holders of WMI's preferred equity securities (who may receive, at most, a 1% recovery) and holders of WMI's common equity securities (who will receive no recovery).

JURISDICTION AND VENUE

11. This Court has jurisdiction to consider the Certification Request pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

12. The Equity Committee respectfully requests the entry of an order, pursuant to 11 U.S.C. § 105(a), 28 U.S.C. § 158(d)(2), and Bankruptcy Rule 8001(f), certifying its appeal of the Opinion and Order for direct appeal to the Third Circuit.

---

[8] A true and correct copy of the January 7, 2011 press release is attached hereto as **Exhibit B**.

BASIS FOR RELIEF REQUESTED

A. Certification Is Mandatory if Any Single Circumstance of Those Enumerated in 28 U.S.C. § 158(d)(2)(A) Exists

13. In 2005, Congress streamlined bankruptcy appeals to enable expedited access to the United States Circuit Courts of Appeal by enacting 28 U.S.C. § 158(d)(2)(A). Section 158(d)(2)(A) provides that if both parties consent or the bankruptcy or district court so certify, an appeal from a judgment or order may be taken directly to the governing United States Circuit Court of Appeals when any of the following three circumstances are met:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, 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 or proceeding in which the appeal is taken ...

28 U.S.C. § 158(d)(2)(A).[9]

14. Congress enacted this procedure to address problems related to the "time and cost factors attendant to the [prior] appellate system ..." H.R. Rep. No. 109-13, at 148 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 206. Particularly, Congress was concerned with the fact that "decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value." Id.

15. To that end, certification is mandatory in the presence of any *single* circumstance of the circumstances enumerated in section 158(d)(2)(A). See, e.g., 28 U.S.C. § 158(d)(2)(B)

---

[9] A certification motion under 28 U.S.C. § 158(d)(2) must be filed in the court where the matter is pending. Until an appeal is docketed in the district court, the matter remains pending in the bankruptcy court. Fed. R. Bankr. P. 8001(f)(2)-(3). A certification motion must be made not later than 60 days after entry of the order from which the appeal is taken. 28 U.S.C. § 158(d)(2)(E).

(providing that if a bankruptcy court "on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists ... then the *bankruptcy court ... shall* make the certification described") (emphasis added). A court "must issue a certification if it determines the order ... involves any of the following: (1) a question of law upon which there is no controlling decision of the Third Circuit or of the Supreme Court ...; (2) a matter of public importance; or (3) a question of law requiring resolution of conflicting decisions" or (4) it determines that a direct appeal will materially advance the case. Simon & Schuster, Inc. v. Advanced Mktg. Servs., Inc., 360 B.R. 429, 433 (Bankr. D. Del. 2007).

16. Here, all four points are satisfied when only one is required.

B. This Court's Ruling Resolved Issues of First Impression For Which There Are No Controlling Third Circuit or Supreme Court Decisions And Which Requires Resolution of Conflicting Decisions

17. In the Opinion and Order, this Court acknowledged the absence of any legal analysis of the claims in the evidentiary record. (Opinion at 22.) The Court found that it could perform its own legal analysis based on the legal positions set out in the pleadings and factual analysis presented by the Debtors' witnesses. (Id.) Essentially, the Court stepped into the role of the legal expert who was not called by the Debtors and, therefore, not available for examination by opposing parties, and made its own determination about the Debtors' likelihood of prevailing on the claims based on its own legal knowledge and experience.

18. The Equity Committee has been unable to identify any legal authority that would support the Debtors' reliance on the Court as a legal expert. As such, this appears to be the first decision where a settlement has been approved over the objections of interested parties and without the proponents having introduced any admissible evidence of legal analysis supporting the conclusion that the settlement was fair and reasonable. With all due respect, and without any

intent to disparage the Court's legal acumen, the Equity Committee maintains that no reasonableness finding can be made without evidence *in the record* setting forth the legal analysis supporting such a conclusion. In re Warwick Lumber & Supply Co., 153 B.R. 12, 13 (Bankr. D.R.I. 1993); see also In re Nat'l Health & Safety, 2000 WL 968778, at *3 (Bankr.E.D. Pa. July 5, 2000) ("However, the void in the record as to Debtor's business and legal justifications for the settlement provides little basis for conducting even this limited evaluation."). Without such evidence, the parties opposing the settlement have no means to test and verify this legal analysis, to challenge its reasoning, or to suggest alternatives. Here, this crucial element of the reasonableness determination was carried out in a black box, beyond the scope of any possible review.

19. This question of law – whether a settlement can be found to be reasonable based only on the pleadings describing the claims to be settled and some factual discussion but without any supporting legal analysis – is one of first impression for which there is concededly not a controlling Third Circuit or Supreme Court decision. A direct appeal to the Third Circuit would help resolve the legal question of the nature and quanta of evidence sufficient to hold that a settlement is fair and reasonable.

20. This Court's rendering a reasonableness decision based on its own legal analysis is also, at the very least, in severe tension with Judge Carey's decision in the Spansion case. 2009 WL 1531788 (Bankr. D. Del. June 2, 2009). In Spansion, the court was also provided with admissible evidence setting out the basic legal positions of the parties, and at least presumably had access to the pleadings, and yet it held that the reasonableness of the settlement could not be determined without a more thorough legal analysis in the record. Because of this conflict with Spansion, both the "first impression" and the "conflicting decision" prongs of 28 U.S.C. §

158(d)(2)(B) are satisfied.

21. The Equity Committee further asserts that certification of this question of law is especially appropriate where, as here, an appeal may be mooted should the Debtors proceed with confirmation of a revised plan that will undoubtedly be based upon the very same global settlement. See In re Cont'l Airlines, 91 F.3d 553 (3d Cir. 1996). It is far better to resolve this issue sooner rather than later.

22. In the absence of any authority from the U.S. Supreme Court or the Third Circuit, the certification for direct appeal is not only mandatory, but necessary and appropriate. See, e.g., Tidewater Fin. Co. v. Kenney, 2008 WL 2514194, at *2 (4th Cir. June 25, 2008) (accepting direct appeal of bankruptcy court order because there was no controlling decisions on issue of whether secured lender had a deficiency claim under chapter 13 provisions); Ad Hoc Group of Timber Noteholders v. The Pac. Lumber Co. (In re Scotia Pac. Co. LLC), 508 F.3d 214 (5th Cir. 2007) (accepting certification of bankruptcy court order in absence of controlling decisions interpreting 2005 BAPCPA amendments concerning single-asset real estate cases); Perlin v. Hitachi Capital Am. Corp., 497 F. 3d 364, 367 (3d Cir. 2007) (accepting certification of creditor's appeal of bankruptcy court order denying motion to dismiss chapter 7 case as bad faith filing; appeal examined 2005 BAPCPA's amendments' substantial modifications to Bankruptcy Code section 707(b)). Thus, the Equity Committee's appeal must be certified for direct appeal to the Third Circuit pursuant to 28 U.S.C. § 158(d)(2)(A)(i).

C. The Ruling Involves a Matter of "Public Importance" Concerning A Critical Aspect of Bankruptcy Code Protection

23. 28 U.S.C. § 158(d)(2) does not articulate the precise meaning of "public importance." Courts consider an issue of "public importance" if it affects debtors generally or creates the prospect of divergent authority. See, e.g., In re Ransom, 380 B.R. 809 (9th Cir. BAP

2007) (granting certification of issue because of number of debtors potentially affected); In re Nortel Networks Corp., 2010 WL 1172642, at *2 (Bankr. D. Del. Mar. 18, 2010) (matter is of public importance if the issue on appeal "transcend[s] the litigants and involve[s] a legal question, the resolution of which will advance the cause of jurisprudence to a degree that is usually not the case"); In re Virissimo, 332 B. R. 208, 209 (Bankr. D. Nev. 2005) (certifying appeal of order where issue it addressed was "one which will recur in Nevada as well as other districts ... and will impact the administration of bankruptcy estates until the issue is ultimately decided"). Here, the "public importance" prong is easily met.

24. *First*, as evidenced by the Spansion case, this issue arises with some degree of frequency in bankruptcy cases. However, appellate rights often are mooted before appellate review. Here, although the plan has not been confirmed, the Equity Committee and its constituents face the real possibility that the Debtors will propose a revised plan, which may be confirmed before the Equity Committee is able to obtain appellate review of the Opinion and Order. Once the Debtors obtain confirmation of a revised plan, they will surely argue that the Equity Committee's appeal of the Opinion and Order has been equitably mooted. In the event this issue is mooted by subsequent events, the legal issue raised here by the Equity Committee, and faced by many parties adversely affected by settlements in bankruptcy cases, will be shielded from appellate review.

25. *Second*, given the historic nature of this bankruptcy and the size of this settlement that pays off creditors virtually in full but leaves shareholders with nothing, it is vitally important in ensuring a fair and transparent process that the Equity Committee can preserve its appellate rights before any confirmation order.

D. Direct Appeal to the Third Circuit Will Materially Advance The Chapter 11 Cases

26. The Equity Committee's ability to pursue a direct appeal of the Opinion and Order will materially advance these chapter 11 cases. Any appeal that occurs will eventually wend its way to the Third Circuit. It is far better to have those issues resolved sooner rather than later. It is especially important here so that an appellate court can examine the issue before the Debtors seek to confirm a revised plan that is based upon the very same global settlement. Moreover, the Equity Committee intends to seek expedited consideration of this matter from the Third Circuit. Thus, a direct appeal would place this bankruptcy on the fast track to being resolved.

NOTICE

27. Notice of this Motion has been given via hand delivery or overnight mail to the (i) Office of the United States Trustee; (ii) counsel to the Debtors; (iii) counsel to the Official Committee of Unsecured Creditors; (iv) counsel to the Bank Bondholders; (v) counsel to JPMorgan Chase Bank, N.A.; (vii) counsel to Federal Deposit Insurance Corporation; and (viii) counsel to Washington Mutual Inc. Noteholders Group. In addition, notice of this Motion has been given to those parties filing requests for notices pursuant to Bankruptcy Rule 2002 via US Mail. The Equity Committee submits that no other or further notice is necessary.

CONCLUSION

WHEREFORE, the Equity Committee respectfully requests that the Court (i) enter an order granting the Certification Request substantially in the form of order attached hereto as **Exhibit C**, and (ii) grant such other and further relief that the Court deems necessary and appropriate.

Dated: January 19, 2011

ASHBY & GEDDES, P.A.

William P. Bowden (DE Bar No. 2553)
Gregory A. Taylor (DE Bar No. 4008)
Stacy L. Newman (DE Bar No. 5044)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899
Telephone: (302) 654-1888
Facsimile : (302) 654-2067
E-mail: wbowden@ashby-geddes.com
gtaylor@ashby-geddes.com
snewman@ashby-geddes.com

-and-

SUSMAN GODFREY, L.L.P.
Stephen D. Susman (NY Bar No. 3041712)
Seth D. Ard (NY Bar No. 4773982)
654 Madison Avenue, 5th Floor
New York, NY 10065
E-mail: ssusman@susmangodfrey.com
sard@susmangodfrey.com

Parker C. Folse, III (WA Bar No. 24895)
Edgar Sargent (WA Bar No. 28283)
Justin A. Nelson (WA Bar No. 31864)
1201 Third Ave., Suite 3800
Seattle, WA 98101
Telephone: (206) 516-3880
Facsimile: (206) 516-3883
E-mail: pfolse@susmangodfrey.com
esargent@susmangodfrey.com
jnelson@susmangodfrey.com

Counsel for the Official Committee of Equity Security Holders of Washington Mutual, Inc., et al.