IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Washington Mutual, Inc., *et al.,*	Case No. 08-12229 (MFW)
Debtors.	**RE D.I. 6370**

MOTION OF DANIEL HOFFMAN TO RECONSIDER ORDER DATED DECEMBER 17, 2010 DENYING HIS REQUEST TO UNSEAL DOCUMENTS [RE D.I. 6370]

NOW COMES, Daniel Hoffman ("Hoffman"), by and through his undersigned counsel and in support of his Motion to Reconsider this Court's Order Dated December 17, 2010 Denying His request That Certain Documents Filed Under Seal in Connection with the Examiner Motion be Unsealed states as follows:

BACKGROUND

1. By letter dated November 1, 2010 [D.I. 5753], Hoffman requested that certain documents that had been filed under seal in connection with the examiner motion be unsealed (the "Hoffman Request"). Hoffman is an equity holder and has objected to the Debtors' plan and has a clear pecuniary interest in the outcome of this case. Hoffman, as a member of the public, also has an interest in this case as it involves the largest bank failure in the history of the United States which occurred during the biggest economic collapse since the Great Depression and resulted in JP Morgan Chase bank, the anointed golden child of the United States Treasury Department and Federal Reserve purchasing the assets of Washington Mutual Bank for an amount well below the market value of that bank.

2. On July 7, 2010 [D.I. 4893], the Official Committee of Equity Security Holders (the "Equity Committee") filed the Motion for Order Authorizing the Official Committee of

Equity Security Holders to File Supplemental Filing Regarding the Examiner Motion and the Scope of Production Under Seal (the "Equity Committee's First Motion to Seal"). The legal basis under which this motion was filed 11 U.S.C. § 107. A hearing was scheduled for July 8, 2010. A transcript of that hearing is docketed as D.I. No. 4945 and reflects that the only thing that happened that day was that a conference was held in chambers. Upon information and belief the chambers conference was for the purpose of addressing the examiner motion and the Equity Committee's First Motion to Seal. Upon information and belief, participants in that chambers conference included not only the Equity Committee and the Debtors but also JP Morgan Chase ("JPMC"), the Federal Deposit Insurance Corporation ("FDIC") and the Office of the United States Trustee ("UST").

3. On July 19, 2010 [D.I. 5091], the Equity Committee filed the Motion for Order Authorizing the Official Committee of Equity Security Holders to File Supplemental Statement in Support for Motion to Appoint an Examiner and on Timing for Resolution of Shareholders Meeting Under Seal (the "Equity Committee's Second Motion to Seal"). The basis that the Equity Committee provided for filing the Equity Committee's Second Motion to Seal was again 11 U.S.C. § 107. Notably, the proposed order granting the Second Motion to Seal allowed the sealed material to be viewed by the Debtors as well the UST, the FDIC and JPMC. A copy of the Proposed Form of Order granting the Equity Committee's Second Motion to Seal is attached hereto as Exhibit A.

4. On July 20, 2010, a hearing was held and the Equity Committee requested that orders be entered on the Equity Committee's First Motion to Seal and the Equity Committee's Second Motion to Seal. Debtors' counsel stated that he did not object to these motions and the Court stated from the bench that orders granting both those motions would be granted. No

written orders granting those motions have been docketed but the transcript of the July 20, 2010 hearing indicates that neither the Court nor any other party had any concerns with the proposed form of orders that the Equity Committee had prepared granting its two sealing motions including the provision in the order granting the Equity Committee's Second Motion to Seal which allowed those materials be viewed by the Debtors, the UST, the FDIC and JPMC. A copy of this portion of the July 20, 2010 transcript is attached hereto as Exhibit B.

5. On November 16, 2010, the Debtors' filed an Objection to the Hoffman Request to Unseal Certain Documents (the "Objection"), in which the Debtors' argued that the Federal Common Law protections afforded attorney client or work product privilege and FRE 502(d) should protect what the Debtors contended was "core attorney work product" which, according to the Debtors' is "afforded near absolute protection from discovery." See Objection ¶ 4.

6. On December 17, 2010 a hearing was held on the Hoffman Request. At this hearing the Debtors' referred to a case that they had not cited in their brief, *In re Fibermark, Inc.,* 330 B.R. 480 (Bankr.Vt., 2005). The Court opined that it had authority to seal documents independent of § 107 and under this independent authority it could seal material otherwise subject to the protection of the attorney client privilege. The Court further indicated that sealed materials were protected by the common interest privilege and denied the Hoffman Request.

SUMMARY OF ARGUMENT

7. "[M]otions for reconsideration are appropriate where necessary to correct errors of law or fact or to present newly discovered evidence. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3rd Cir. 1986). *Accord, Official Comm. Of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2nd Cir. 2003)." *In re 15375 Memorial Corp.*, 386 B.R. 548, 550 (Bankr.Del., 2008). Reconsideration is appropriate under these circumstance

because: (1) the *Fibermark* case upon which the Debtors relied at the hearing but which was not included in the Objection is factually distinguishable from the matter at bar; (2) the common interest privilege was not mentioned in the Objection and for the reasons explained below does not apply when parties that share the common interest privilege have a dispute amongst themselves; and (3) the fact that to the extent that there was an extant privilege, notwithstanding the dispute amongst the parties to the common interest privilege, disclosure to the UST, the FDIC and JPMC waived it.

IN RE FIBERMARK, INC., 330 B.R. 480 (BANKR. VT., 2005)

8. While Hoffman does not concede that *Fibermark* was properly decided, the *Fibermark* case involved an examiner's report that was filed under seal because it contained material protected by the attorney client privilege and the court ultimately ordered a redacted version of the examiner's report to be unsealed. The *Fibermark* court did hold that privileged material did not fall within the confines of § 107 but held nonetheless that the examiner's report presented to it and containing privileged information could be at least partially sealed and that the attorney client privilege could be preserved under the circumstances of that case. The *Fibermark* examiner was appointed to investigate the conduct of the Official Committee of Unsecured Creditors and the Fibermark committee argued that the report should remain under seal to preserve privileged and work product material that the committee and its professionals produced to the examiner. The court did not discuss in detail why the disclosure of the material to an examiner investigating the Committee did not operate as a waiver of the privilege but at least one court has held that under the unique set of facts presented to it, an examiner should be viewed similar to a trustee and a successor to the Debtor's privilege. *See In re Boileau*, 736 F.2d 503 (9th Cir. 1984).

9. The matter before the Court does not involve materials that are in the hands of an examiner but rather material that a party who may have shared a common interest with the Debtor but then presented the material to the Court in connection with its adversarial dispute with the Debtor. As well be discussed below, it is highly significant that the *Fibermark* examiner, while critical of the committee was not engaged in an adverse proceeding with the committee. Because the material in *Fibermark* was presented to the court in an examiner's report while the examiner may have been viewed as controlling the privilege and was not engaged in an adverse proceeding with the *Fibermark* committee that it was charged with investigating, it provides no basis for keeping sealed any material that the Equity Committee presented to the Court in this case.

THE COMMON INTEREST PRIVILEGE DOES NOT APPLY WHEN OFFERED IN A DISPUTE AMONG THE HOLDERS OF THE PRIVILEGE

10. At the December 17, 2010 hearing the Court indicated that materials had been produced to the Equity Committee because it held a common interest with the Debtors and the common interest privilege continued to protect the material notwithstanding the fact that Equity Committee and the Debtors were engaged in a disputed matter and the purportedly protected material was presented to the Court in connection with that dispute. While Hoffman disputes that the sealed materials are truly protected by any kind of joint or common interest privilege, to the extent that documents were ordered to be produced on the basis of a common interest privilege or were produced with the belief that they were protected by a common interest privilege, the privilege was vitiated by virtue of the fact that parties that jointly held that privilege, became engaged in a dispute and submitted that dispute to the Court for adjudication.[1]

[1] The Court did have authority to require that the Debtors produce documents to the Equity Committee in accordance with the dictates of *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) but it appears that the sealed materials were produced either inadvertently or pursuant to direction from the Court that based upon

11. Judge Ambro in the case of *In re Teleglobe Communications Corp*, 493 F. 3d 345, 366 (3rd Cir. 2007) wrote a detailed opinion on attorney client privilege and the waiver thereof in matters of joint representation or common interest and observed: "The great caveat of the joint-client privilege is that it only protects communications from compelled disclosure to parties outside the joint representation. **When former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable.**" (Emphasis added.) Judge Ambro referenced both the Delaware Rules of Evidence and the Restatement Third on the Laws Governing Lawyers. Delaware Rule of Evidence 502(d)(6) provides that no privilege exists, not that the privilege was waived but that it does not exist, "[a]s to a communication relevant to a matter of common interest between or among 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, **when offered in an action between or among any of the clients**." (Emphasis added.)

12. Delaware law on this issue is hardly unique as § 75 of *The Restatement Third of the Law Governing Lawyers* with respect to the privilege of co-clients similarly provides:

> The Privilege of Co-Clients
>
> (1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.
>
> (2) Unless the co-clients have agreed otherwise, **a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.** [Emphasis added.]

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the belief that there was a common interest privilege as opposed to a showing of need. Regardless of the basis upon which the sealed material was produced, the fact that it was submitted to the Court for the purposes of resolving an adverse proceeding between the Debtors and the Equity Committee eliminated any privilege that might have existed.

13. The comments to § 75 provides: "Disclosure of a co-client communication in the course of a subsequent adverse proceeding between co-clients operates as a waiver by subsequent disclosure under § 79 with respect to third persons." *Id.* at p. 582. Section 76 of *The Restatement Third of the Law Governing Lawyers* sets forth the common-interest arrangement privilege as opposed to the co-client privilege with the same essential guidelines and provides:

> The Privilege in Common-Interest Arrangements
>
> (1) If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.
>
> (2) Unless the clients have agreed otherwise, **a communication described in Section (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.** [Emphasis added.]

14. To the extent that one might argue that because the Restatement suggests that parties can agree in advance of making their confidential communications to keep such communication confidential even in a subsequent adverse proceeding, Judge Ambro observed that the Restate provides no authority to support this and the one case were it was offered as a defense to a waiver, it was rejected. *In re Teleglobe*, 493 F.3d at 366 n.23. Moreover, there has been no suggestion that there was any agreement in place prior to the privileged communication occurring.

EVEN IF THE ADVERSE PROCEEDING BETWEEN THE DEBTORS AND THE EQUITY COMMITTEE DID NOT VITIATE ANY COMMON PRIVILEGE THAT THEY SHARED, THE DISCLOSURES TO JPMC, THE FDIC AND THE UST OPERATES AS A WAIVER TO THE PRIVILEGE

15. It is black letter law that disclosure of privileged communications to third parties waives the privilege. Citing 8 *Wright & Miller* §§2016 and 2024 as well as *United States v.*

Rockwell International, 897 F.2d 1255 (3d Cir.1990), the Court in *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1424 (3rd Cir. 1991) rejected the notion of that there could be a limited or selective waiver of the attorney client privilege writing: "it is well-settled that when a client voluntarily discloses privileged communications to a third party, the privilege is waived."

16. In the instant case, the record is not entirely clear as to who participated in the July 8, 2010 chambers conference but Hoffman was informed that in addition to the Debtors and the Equity Committee, JPMC and the FDIC participated in that conference. The Equity Committee's proposed from of order granting the Equity Committee's Second Motion to Seal confirms Hoffman's understanding that JPMC and the FDIC were present at the July 8, 2010 chambers conference and the fact that there were no objections raised to the order further confirms that fact. Even if they were not present, the fact remains that order granting the Equity Committee's Second Motion to Seal authorized purportedly privilege material to be shared with the UST, the FDCI and JPMC, who are all third parties who clearly did not share any common interest that might have existed between the Equity Committee and the Debtors.

17. In the *Westinghouse* case, the disclosure was made to a governmental agency, the SEC, pursuant to a confidentiality agreement but the Court still found a waiver of the attorney client privilege. When FRE 502 was amended one proposed change included a new 502(c), which provided:

> (c) Selective waiver. – In a federal or states proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection – when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority – does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state

> law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.

502(c) was never enacted, indicating an approval of *Westinghouse* and a rejection of the concept of selective waivers. While some courts outside of the Third Circuit have been somewhat sympathetic to a party's attempt to only selectively waive the privilege in connection with a disclosure to a governmental agency, the inclusion of JPMC in the chambers conference and with access to the material in the Equity Committee's Second Motion to Seal does not pass muster before any court in an effort to preserve the privilege after a disclosure to a party such as JPMC.

WHEREFORE, Daniel Hoffman requests that the Court reconsider its Order of December 17, 2010 and unseal those documents that the Equity Committee filed under seal in connection with the examiner motion and grant Hoffman such other relief as is just and equitable.

ARCHER & GREINER PC

Dated: December 27, 2010

/s/ Charles J. Brown, III

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Washington Mutual, Inc., *et al.,* Debtors.	Chapter 11 Case No. 08-12229 (MFW) **Hearing Date: January 20, 2011 @ 2:00 pm** **Objection Deadline: January 13, 2011**

NOTICE OF HEARING ON MOTION OF DANIEL HOFFMAN TO RECONSIDER ORDER DATED DECEMBER 17, 2010 DENYING HIS REQUEST TO UNSEAL DOCUMENTS [RE D.I. 6370]

TO: ALL PARTIES-IN-INTEREST, DEBTOR, UNITED STATES TRUSTEE AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS

PLEASE TAKE NOTICE that DANIEL HOFFMAN, hereby presents the *Motion of Daniel Hoffman to Reconsider Order Dated December 17, 2010 Denying His Request to Unseal Documents* (the "Motion").

If you oppose the Motion or if you want the court to consider your views regarding the Motion, you must file a written response with the Bankruptcy Court detailing your objection or response by the hearing on **January 13, 2011** You must also serve a copy of your response upon the following:

Charles C. Brown, III (#3368)
ARCHER & GREINER, P.C.
300 Delaware Avenue, Suite 1370
Wilmington, DE 19801
Phone: (302) 777-4350/Fax: (302) 777-4352
(cbrown@archerlaw.com)

THE HEARING IS SCHEDULED FOR JANUARY 20, 2011 AT 2:00 p.m. ON THE 5TH FLOOR OF THE UNITED STATES BANKRUPTCY COURT, 824 MARKET STREET, WILMINGTON, DELAWARE 19801.

IF YOU DO NOT TAKE THESE STEPS BY THE DEADLINE, THE COURT MAY DECIDE THAT YOU DO NOT OPPOSE THE RELIEF SOUGHT IN THE MOTION AND MAY GRANT OR OTHERWISE DISPOSE OF THE MOTION BEFORE THE SCHEDULED HEARING DATE.

Dated: December 27, 2010

ARCHER & GREINER

By: */s/ Charles J. Brown, III*
Charles J. Brown, III (ID#3368)
300 Delaware Avenue, Suite 1370
Wilmington, Delaware 19801
Telephone: (302) 356-6621
Facsimile: (302) 777-4352

Counsel to Daniel Hoffman

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
	)	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., et al.,[1]	)	
	)	(Jointly Administered)
Debtors.	)	
	)	**Related Docket No.** ____

ORDER GRANTING THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS AUTHORITY TO FILE SUPPLEMENTAL STATEMENT IN SUPPORT OF MOTION FOR EXAMINER AND ON TIMING FOR RESOLUTION OF SHAREHOLDER MEETING UNDER SEAL

Upon consideration of the *Motion For Order Authorizing the Official Committee of Equity Security Holders to File Supplemental Statement in Support of Motion for Examiner and on Timing for Resolution of Shareholder Meeting* (the "Seal Motion")[2] filed by the Official Committee of Equity Security Holders (the "Equity Committee"), the Court finds that it has jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 1334; this is a core proceeding pursuant to 28 U.S.C. § 157(b); venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; the relief requested in the Seal Motion is in the best interests of the Debtors, their estates and creditors; proper and adequate notice has been given and no other or further notice is necessary; after due deliberation and sufficient cause appearing thereof, it is hereby:

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Seal Motion is **GRANTED** as described herein.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Washington Mutual, Inc. (3725) and WMI Investment Corp. (5396). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

[2] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Seal Motion.

2. The Equity Committee is authorized to file the Supplemental Statement under seal.

3. The Supplemental Statement shall remain under seal, and not made available to anyone except for this Court, counsel for the Debtors, the Office of the United States Trustee, counsel to JPMorgan Chase, and counsel to the FDIC or others upon further Court order.

4. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: Wilmington, Delaware
July _____, 2010

THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229-MFW; Adv. Proc. No. 10-50911-MFW

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- -x

BROADBILL INVESTMENT CORP.,

Plaintiff,

-against-

WASHINGTON MUTUAL, INC.,

Defendant.

- -x

U.S. Bankruptcy Court

824 North Market Street

Wilmington, Delaware

July 20, 2010

9:31 AM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

the Court, but just to make the record clear; what I've suggested is that if there are allegations purely for the purpose of the stay relief motion that are contested, that I make the Wrigleys or one of them available for a deposition and that we would meet that at trial as a trial deposition rather than trying to figure out how to fly them out here. I believe that while that is not a usual request, given their health and everything and given the fact that the authority says that that can apply even to a non -- a party rather than a witness, that's a suggestion that I would make to deal with that.

Again, I don't know that we need to deal with that right now but I just wanted to put that on the record.

Thank you, Your Honor.

THE COURT: Okay.

MR. ROSEN: Your Honor, we have no problem. We will try to work with counsel to, if necessary; take the deposition of his clients.

THE COURT: Okay. Anything else set off for today?

MR. TAYLOR: Good afternoon, Your Honor. Greg Taylor from Ashby & Geddes on behalf of the equity committee.

Just one or two clean up items, Your Honor. I think agenda item 26 is a seal motion by the equity committee but I don't believe we've seen an order one. It's one that was filed several weeks ago.

THE COURT: Item 26?

MR. TAYLOR: And there's also a related motion to shorten notice on that. I have copies of those orders with me.

THE COURT: I'll enter that unless anybody opposes it?

(No response)

THE COURT: All right. I'll enter that order.

MR. TAYLOR: The second item, Your Honor, is what we filed last night. It was similarly a seal motion and a motion to shorten notice, given that it was filed just yesterday I'm happy to carry that to the next hearing or if there's no objection we can deal with that today.

THE COURT: I think the debtors don't object to that.

MR. ROSEN: Your Honor, that can be filed under seal.

THE COURT: All right. I'll grant both motions to seal.

MR. TAYLOR: If I may approach, Your Honor.

(Pause)

THE COURT: Thank you. All right. I'll enter those orders.

MR. MCMAHON: Your Honor, good afternoon, Joseph McMahon. I rise to come back to the mechanics of the examiner order, if I may for a moment. Given the timeframe that the Court has mapped out, obviously time is of the essence for our office, given that these processes typically take seven to ten days to work themselves out.

First, the parties in interest who have participated