IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

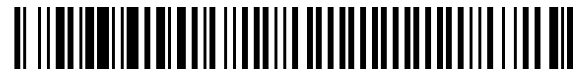
In re:	Chapter 11
Washington Mutual, Inc., *et al.*,	Case No. 08-12229 (MFW)
Debtors.	**RE: Document Index No. ("D.I."). 6370**

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, and 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 and bank seizure by the Office of Thrift Supervision working in concert with the Federal Deposit Insurance Corporation ("FDIC"), and which resulted in JP Morgan Chase ("JPMC"), purchasing the banking assets of Washington Mutual, Inc. ("WMI" or the "Debtors") for $1.88 billion, an amount well below what Hoffman and many shareholders believe was the actual value of the banking assets seized by the FDIC.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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 was 11 U.S.C. § 107 ("Section 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 JPMC, the 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, Section 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***, the third parties present at the July 8, 2010 chambers conference (the "Third Parties"). 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, and the Third Parties. 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 Federal Rule of Evidence 502(d) ("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. This court had previously entered an 'Interim Order Pursuant to Federal Rule of Evidence 502(d)' on June 16, 2010 (the "502(d) Order) [D.I. 4740] which provided, among other things: (a) "the provision of the Confidential Production to the Equity Committee . . . does not constitute, and shall not be deemed to constitute, a waiver by the Debtors of any applicable privilege or any work product protection"; (b) "the submission of any portion of the Confidential production to this Court shall be done only pursuant to sealing"; and (c) "no copies of any portion of the Confidential Production submitted to this Court pursuant to Paragraph 8 of this Order shall be provided to any other person or entity, other than the Debtors." *See* 502(d) Order, ¶¶ 2, 8-9. A copy of the 502(d) Order is attached as Exhibit C. As Hoffman maintains Section 107 is the only provision governing sealing of documents in bankruptcy cases,

this Court, the Equity Committee, and the Debtors understood they were invoking the jurisdiction of Section 107, and Paragraph 8 of the 502(d) Order reflects that understanding.

6. On December 17, 2010 a hearing was held on the Hoffman Request. At this hearing the Debtors' heavily relied upon a case that they had not cited in their brief, *In re Fibermark, Inc.*, 330 B.R. 480 (Bankr. D. Vt. 2005). The Court opined that it had authority to seal documents *independent* of Section 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 Confidential Production[1] materials were protected by the common interest privilege and denied the Hoffman Request.

SUMMARY OF ARGUMENT

BASIS FOR MOTION FOR RECONSIDERATION

7. Federal Rule of Civil Procedure 60(b)(1) allows a movant to file a motion for reconsideration.

8. In *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999), the Third Circuit observed that motions for reconsideration are appropriate where necessary "to correct errors of law or fact or to present newly discovered evidence". *See also In re 15375 Memorial Corp.*, 386 B.R. 548, 550 (Bankr. D. Del. 2008) ("The moving party must . . . raise controlling decisions or facts that the court overlooked and 'that might reasonably be expected to alter the conclusion reached by the court'" (citing *Key Mech. Inc. v. BDC 56 LLC* (In re BDC 56 LLC), 330 F.3d 111, 123 (2d Cir.2003)).

9. Having stated the policy behind motions for reconsideration the Third Circuit then set the legal criteria for granting one, holding that "a judgment may be altered or amended if the

party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to [a] correct a clear error of [i] law or [ii] fact ***or*** [b] to prevent manifest injustice." *Max's Seafood Café*, at 677. (Emphasis added.)

10. In the instant case, all three standards of the third prong of *Max's Seafood Café* apply because if a court is in possession of a fact material to a legal issue but does not take that fact into consideration in making its ruling on that legal issue, a motion for reconsideration is proper to allow the court to consider that fact (i.e., remedy a clear error of fact by applying a fact previously known to the court, but not judicially acknowledged in its ruling) and, if necessary, reverse its initial ruling in light of that fact's application to the legal issue (i.e., remedy a legal error), and to prevent manifest injustice that would result from permitting such factual and/or legal errors to stand.

11. Applying this reasoning to the Court's December 17, 2010 ruling, in considering the Hoffman Request this Court knew that the Third Parties were present at the chambers meeting on July 8, 2010. Moreover this Court would know if the Third Parties -- all of whom were third parties under the Paragraph 9 of the FRE 502(d) Order[2] -- were provided with the sealed Confidential Production during that meeting ***as was envisioned by the proposed order granting the Second Motion to Seal.*** This Court also knew that if the Third Parties knew the

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[1] As defined in the 502(d) Order.

[2] Paragraph 9 of the 502(d) Order provides that "no copies of any portion of the Confidential Production submitted to this Court pursuant to Paragraph 8 of this Order shall be provided to any other person or entity, other than the Debtors . . . .". The Third Parties (i.e., JPMC, the FDIC, and the UST) are all "other" persons or entities, and despite the fact that the 502(d) Order is silent on the issue of oral dissemination of the Confidential Production is of no moment, as orally disclosing the information in the Confidential Production would also vitiate any privilege.

contents of the sealed Confidential Production then Hoffman could successfully argue that any attorney client privilege or attorney work product protection was vitiated by their exposure to the contents of the sealed Confidential Production. Furthermore, to permit the sealed Confidential Production to remain under seal when the Court knows the attorney client privilege or attorney work product protection was vitiated would constitute a manifest injustice to Hoffman.

12. Hoffman asserts that this Court was aware of whether the contents of the sealed Confidential Production were disseminated to or discussed in the presence of the Third Parties during the chambers hearing on July 8, 2010. (Indeed, unless there is a transcript of that hearing the court is the *only* disinterested witness present at that hearing who could testify as to what transpired. As cited in the Hoffman Request, *Publicker Industries v. Cohen,* 733 F.2d 1059, 1072 (3^d Cir. 1984), the Third Circuit ***requires*** that *in camera* proceedings be conducted "on the record" so an appellate court can have an official record of what transpired.) Hoffman further asserts that if the Court is aware that such dissemination was made, the Court, knowing that the Third Parties are third parties within the meaning of Paragraph 9 of the FRE 502(d) Order, knew that dissemination to any of them vitiated any alleged privilege or attorney work product protection when it made its ruling denying the Hoffman Request. Due process requires that this motion for reconsideration be granted so that the Court can state on the record whether or not the Third Parties were exposed to (either orally or by viewing) the contents of the sealed Confidential Production at the July 8, 2010 chambers hearing, because if the privilege was vitiated and the Court is so aware, it would be legal error and manifest injustice to allow the December 17, 2010 ruling denying the Hoffman Request to stand.

13. Additionally, reconsideration is appropriate in the instant case because: (1) the *Fibermark* case upon which the Debtors relied at the hearing but which was not included in the

Objection is not *stare decisis* and is irrelevant as a matter of law; and (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 therefore was incorrectly applied as a matter of law.

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

14. The *Fibermark* court determined that while Section 107 does not include material subject to attorney client privilege or attorney work product protection among the types of information that can be sealed or protected from exposure once sealed, attorney client privilege or attorney work product protection "are entitled to deference, independent of [Section] 107" and therefore can still protect information falling into those categories from unsealing. *Fibermark*, at 494. To reach this conclusion, the *Fibermark* court avoids the plain reading of Section 107[3] and, in desperation, relies solely on (a) a treatise, (b) legal tradition dating from Elizabethan times (i.e., Anglo-American common law), and (c) *Rapkin v. Rocque*, 87 F.Supp.2d 140, 143 (D. Conn. 2000), a wholly inapposite Second Circuit District Court opinion about a non-bankruptcy case[4] that, therefore, does not deal with the rigidly mechanical nature of Section 107, but was decided, of course, on federal common law, which this court expressly said in I*n re Alterra Healthcare Corp.*, 353 B.R. 66, 75 (Bankr. D. Del. 2006) was inapplicable to sealing in bankruptcy cases.[5]

[3] Indeed, the court said that "[t]he plain language [of Section 107] does not refer to confidential communications between an attorney and client or to the work product of an attorney. Moreover the Court finds no reason to strain the language of the statute to include either of these evidentiary principles when they are entitled to deference, independent of [Section] 107." *Fibermark*, at 494.

[4] *Rapkin* was a suit brought under 42 U.S.C. § 1983, the Civil Rights Act of 1871, to protect newly freed Black slaves from the Ku Klux Klan by providing a civil remedy for abuses then being perpetrated principally in the southern U.S.

[5] Specifically, this court held that because "Section 107(a) is 'a codification of the common law general right to inspect judicial records and documents" and "[b]ecause Congress has provided a specific provision which deals

The moral behind the *Fibermark* court's reasoning is: 'When a statute requires a court to make a decision it doesn't want to make, the court should ignore it'. As Hoffman asserted in the Hoffman request, by his counsel at the December 17, 2010 hearing, and again here, there is *no* statutory legal authority for sealing documents in bankruptcy cases independent of Section 107, so the *Fibermark* court committed legal error by using common law to avoid the unredacted unsealing required by Section 107.

15. *Fibermark* is a case from a different Federal circuit with no *stare decisis* authority that Hoffman contends was wrongly decided because the *Fibermark* court held that ***common law*** (i.e., privilege and/or attorney work product protection) can serve as a basis to avoid unsealing a document whose contents do not come within the categories protected by Section 107. As Hoffman asserted (a) in the Hoffman Request, (b) by his counsel at the December 17, 2010 hearing, and (c) again, here, there is ***no*** legal authority for sealing documents in bankruptcy cases independent of Section 107 because common law does not limit Section 107 per *In re Alterra Healthcare Corp.*, 353 B.R. 66, 75 (Bankr. D. Del. 2006) (citing *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) ("[f]ederal common law . . . is resorted to in the ***absence*** of an applicable Act of Congress" (emphasis added)), and Congress placed no statutory limit(s) on Section 107's application.

16. Accordingly, there is *no* controlling legal authority (i.e., the District Court of the District of Delaware, the Third Circuit, or the U.S. Supreme Court) holding that documents in bankruptcy cases may be sealed (or unsealed) independently of Section 107. As a corollary, there is no controlling legal authority that holds that any privilege or attorney work product protection

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with the right to access public records in bankruptcy proceedings, the Court should not encroach upon the province of Congress." *Alterra*, at 75.

can keep a document sealed if its contents fall outside those protected under Section 107. Therefore, under *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999), this Court should avail itself of the opportunity to correct the legal error made by denying the Hoffman Request by granting Hoffman's motion for reconsideration and unsealing the sealed Confidential Production materials.

THE 502(d) ORDER WAS INADEQUATE TO PROTECT THE CONFIDENTIAL PRODUCTION DOCUMENT ONCE SEALED

17. Although the 502(d) Order provides that neither attorney client privilege nor attorney work product protection would be waived, the Debtors undid themselves by expressly invoking Section 107 (*see* 502(d) Order, ¶ 8) in the 502(d) Order without providing that if a Confidential Production contained information that was not protected under Section 107 the Equity Committee could not submit such Confidential Production to the court for sealing. If the Debtors had inserted such a provision the Equity Committee would have been forced to analyze any Confidential Production it wanted to seal under Section 107, and would have been precluded by Section 107 from filing any Confidential Production that was not protected from unsealing by Section 107.

18. In any event, the Debtors would have known that the plain reading of Section 107 would have dissolved whatever protections were afforded in Paragraph 2 of the 502(b) Order, and the onus was on the Court as gatekeeper to perform an analysis of whether the Confidential Production was eligible for sealing under Section 107 and, if it was not, to reject the sealing request pursuant to Local Bankruptcy Rule 9018-1(b). Indeed, with or without a provision in the 502(d) Order limiting sealing to Confidential Production containing information protected under Section 107, the Court was the Debtor's last line of defense from the unforgiving character of

Section 107 because, as the Hoffman Request expressly states, sealing is not automatic: a court 'orders' a sealing pursuant to Bankruptcy Rule 9018 and Local Bankruptcy Rule 9018-1(b), presumably after a Section 107 analysis.

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

19. At the December 17, 2010 hearing the Court indicated that the Confidential Production 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 the 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. Common interest is not mentioned in the recitals to the 502(d) Order, and Hoffman disputes that the sealed Confidential Production materials are protected from Section 107 by any kind of joint or common interest privilege.[6] Moreover, 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

[6] Indeed, the Debtors have repeatedly and vociferously denied that the equity interests are their clients and accordingly have disavowed any fiduciary duty to WMI shareholders. Any belief this Court may have had that WMI and its counsel were working on behalf of equity could not have survived the sometimes heated interchange between this Court and one of WMI's attorneys, David Elsberg, Esq. of Quinn Emmanuel Urquhart & Sullivan LLP on June 3, 2010, during which Mr. Elsberg made it abundantly clear to this Court that the equity constituency is not his client. Accordingly, it cannot be credibly asserted that in the 13 days after the hearing, when this Court entered the 502(d) Order, Mr. Elsberg and WMI's other counsel had achieved comity with equity such that on June 16, 2010 a common interest privilege was created between WMI and the interests represented by the Equity Committee.

fact that parties that jointly held that privilege became engaged in a dispute and submitted that dispute to the Court for adjudication.[7]

20. 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.)

21. 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.

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[7] 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 the sealed materials were produced based upon the belief that there was a common interest privilege as opposed to a showing of need, and the fact that they were 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.

> (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.]

22. 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.]

23. 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 Restatement provides no authority to support this and the one case where 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 such agreement in place prior to the allegedly privileged communication.

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

24. 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: "[I]t is well-settled that when a client voluntarily discloses privileged communications to a third party, the privilege is waived."

25. In the instant case, the public record is not entirely clear as to who participated in the July 8, 2010 chambers conference (the Court, however, was present as a disinterested witness and, in the interests of justice, and to prevent manifest injustice to Hoffman, must reveal who participated in the conference, and, specifically, whether any portion of the Confidential Production was disseminated to the Third Parties) but Hoffman was informed that in addition to the Debtors and the Equity Committee, the Third Parties 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 the Third Parties 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 the Third Parties were not present, the fact remains that the order granting the Equity Committee's Second Motion to Seal authorized purportedly privileged material to be shared with the Third Parties, who are all third parties who clearly did not share any common interest that might have existed between the Equity Committee and the Debtors.

26. 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 FRE 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.

FRE 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 such as the UST, inclusion of JPMC and the FDIC in the chambers conference and exposing them to the Confidential Production material in the Equity Committee's Second Motion to Seal cannot pass muster, and therefore disclosure to parties such as JPMC and the FDIC would vitiate any claimed privilege and nullify any attorney work product protection.

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 31, 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 31, 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

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused true and correct copies of the foregoing document to be served via CM/ECF and/or U.S. First Class Mail upon all of those parties listed below:

Rafael Xavier Zahralddin-Aravena
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Peter E. Calamari, Esq.
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New York, NY 10010

Dated: December 31, 2010

/s/ Charles J. Brown, III
Charles J. Brown, III (No. 3368)

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.

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[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

1

2 UNITED STATES BANKRUPTCY COURT

3 DISTRICT OF DELAWARE

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

5 -x

6 In the Matter of:

7 WASHINGTON MUTUAL, INC., et al.,

8 Debtors.

9 -x

10 BROADBILL INVESTMENT CORP.,

11 Plaintiff,

12 -against-

13 WASHINGTON MUTUAL, INC.,

14 Defendant.

15 -x

16 U.S. Bankruptcy Court

17 824 North Market Street

18 Wilmington, Delaware

19

20 July 20, 2010

21 9:31 AM

22 B E F O R E:

23 HON. MARY F. WALRATH

24 U.S. BANKRUPTCY JUDGE

25 ECR OPERATOR: BRANDON MCCARTHY

1 the Court, but just to make the record clear; what I've
2 suggested is that if there are allegations purely for the
3 purpose of the stay relief motion that are contested, that I
4 make the Wrigleys or one of them available for a deposition and
5 that we would meet that at trial as a trial deposition rather
6 than trying to figure out how to fly them out here. I believe
7 that while that is not a usual request, given their health and
8 everything and given the fact that the authority says that that
9 can apply even to a non -- a party rather than a witness,
10 that's a suggestion that I would make to deal with that.
11 Again, I don't know that we need to deal with that
12 right now but I just wanted to put that on the record.
13 Thank you, Your Honor.
14 THE COURT: Okay.
15 MR. ROSEN: Your Honor, we have no problem. We will
16 try to work with counsel to, if necessary; take the deposition
17 of his clients.
18 THE COURT: Okay. Anything else set off for today?
19 MR. TAYLOR: Good afternoon, Your Honor. Greg Taylor
20 from Ashby & Geddes on behalf of the equity committee.
21 Just one or two clean up items, Your Honor. I think
22 agenda item 26 is a seal motion by the equity committee but I
23 don't believe we've seen an order one. It's one that was filed
24 several weeks ago.
25 THE COURT: Item 26?

1 MR. TAYLOR: And there's also a related motion to
2 shorten notice on that. I have copies of those orders with me.
3 THE COURT: I'll enter that unless anybody opposes it?
4 (No response)
5 THE COURT: All right. I'll enter that order.
6 MR. TAYLOR: The second item, Your Honor, is what we
7 filed last night. It was similarly a seal motion and a motion
8 to shorten notice, given that it was filed just yesterday I'm
9 happy to carry that to the next hearing or if there's no
10 objection we can deal with that today.
11 THE COURT: I think the debtors don't object to that.
12 MR. ROSEN: Your Honor, that can be filed under seal.
13 THE COURT: All right. I'll grant both motions to
14 seal.
15 MR. TAYLOR: If I may approach, Your Honor.
16 (Pause)
17 THE COURT: Thank you. All right. I'll enter those
18 orders.
19 MR. MCMAHON: Your Honor, good afternoon, Joseph
20 McMahon. I rise to come back to the mechanics of the examiner
21 order, if I may for a moment. Given the timeframe that the
22 Court has mapped out, obviously time is of the essence for our
23 office, given that these processes typically take seven to ten
24 days to work themselves out.
25 First, the parties in interest who have participated

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11 Cases
	)	
WASHINGTON MUTUAL, INC., *et al.*,[1]	)	Case No. 08-12229 (MFW)
	)	Jointly Administered
Debtors.	)	
	)	**Re: Docket No.** 4700

INTERIM ORDER PURSUANT TO FEDERAL RULE OF EVIDENCE 502(d)

WHEREAS following the Court's bench rulings at the omnibus hearing held June 3, 2010 in these cases, Washington Mutual, Inc. and WMI Investment Corp. (collectively, the "Debtors") have determined to produce additional materials and information (the "Confidential Production") to the Official Committee of Equity Security Holders (the "Equity Committee"), provided that the Debtors require certain protections to the extent that disclosures made or documents produced to the Equity Committee contain materials subject to any applicable privilege, including any attorney-client privilege and/or any attorney work-product; and

WHEREAS the Court believes it is desirable to expedite the provision of the Confidential Production to the Equity Committee without the Court, at this time, undertaking a document-by-document review as to whether individual items in the Confidential Production contain attorney-client privileged and/or attorney work product material; and

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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 Corporation (5395). The Debtors' principal offices are located at 1301 Second Avenue, Seattle, Washington 98101.

WHEREAS the Court anticipates addressing further issues regarding the scope and logistics of document production at the next Omnibus hearing in these cases, presently scheduled for June 17, 2010, and at future hearings; it is hereby

1. **ORDERED** that individual items in the Confidential Production shall be presumed, without prejudice, to contain material that is subject to applicable privileges, including attorney-client privileged and/or attorney work product protection if labeled "Privileged," "Confidential," "Attorney Work Product," "Common Interest Material" or words of similar effect; and it is further

2. **ORDERED** that pursuant to Federal Rule of Evidence 502(d), the provision of the Confidential Production to the Equity Committee and to counsel and the retained financial advisors to the Equity Committee (the "Equity Committee Advisors"), in connection with the litigation and other matters pending before this Court does not constitute, and shall not be deemed to constitute, a waiver by the Debtors of any applicable privilege, including any attorney-client privilege or any work product protection, in this Court or in any other Federal or State proceeding (including any governmental investigation) as to any party, including the Equity Committee, with respect to either the Confidential Production or any other materials and information; and it is further

3. **ORDERED** that the Confidential Production, subject to the terms and provisions herein, shall be treated by the Equity Committee and the Equity Committee Advisors as confidential under the terms of the non-disclosure agreements they have previously signed; and it is further

4. **ORDERED** that pending further order of this Court, the Equity Committee and the Equity Committee Advisors shall keep confidential the Confidential Production and shall not disclose any portion of the Confidential Production to any person or entity; and it is further

5. **ORDERED** that the provision of the Confidential Production to the Equity Committee and the Equity Committee Advisors shall not confer on any person or entity, other than the Equity Committee and the Equity Committee Advisors, the right to obtain such materials; and it is further

6. **ORDERED** that the Equity Committee and/or the Equity Committee Advisors will not assert in any proceeding that the provision of the Confidential Production pursuant to this Order constitutes a waiver of any applicable privilege, including any attorney-client privilege or any work product protection and that the provision of the Confidential Production to the Equity Committee and the Equity Committee Advisors shall not be used as a basis to argue subject matter waiver or waiver based on "selective disclosure" or similar doctrines; provided, that this Order is without prejudice to the right of the Equity Committee and the Equity Committee Advisors to argue, on any other ground and based on any other acts or occurrences (including but not limted to any waiver that may have occurred before this production), that privileges asserted by the Debtors are invalid, have been waived, or should be disregarded; and it is further

7. **ORDERED** that the Debtors' provision of the Confidential Production pursuant to this Order is without prejudice to the right of the Equity Committee and the Equity Committee Advisors to argue that the Confidential Information is inadequate or insufficient and to insist upon the need for further investigation by the Equity Committee or by a bankruptcy examiner and without prejudice to the Debtors' right to oppose any such request on any grounds; and it is further

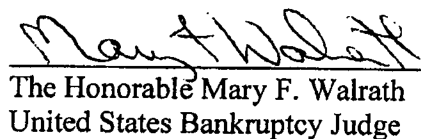
8. **ORDERED** that the submission of any portion of the Confidential Production to this Court shall be done only pursuant to sealing or similar procedures as agreed upon by counsel to the Debtors and the Equity Committee, which agreement shall not be unreasonably withheld; and it is further

9. **ORDERED** that no copies of any portion of the Confidential Production submitted to this Court pursuant to Paragraph 8 of this Order shall be provided to any other person or entity, other than the Debtors; and it is further

10. **ORDERED** that this Court shall retain exclusive jurisdiction to resolve any dispute arising from or related to this Order; and it is further

11. **ORDERED** that, notwithstanding the possible application of any Federal Rule of Bankruptcy Procedure, this Order shall become effective immediately upon its entry.

Dated: June 16, 2010
Wilmington, Delaware



The Honorable Mary F. Walrath
United States Bankruptcy Judge