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)**
	:	**Re: Docket No. 9388**

DEBTORS' AND WEIL, GOTSHAL & MANGES LLP'S OPPOSITION TO THE TRUST PREFERRED GROUP'S MOTION TO COMPEL DISCOVERY, OR IN THE ALTERNATIVE, FOR AN ORDER OF PRECLUSION

Washington Mutual, Inc. ("WMI") and WMI Investment Corp., as debtors and debtors in possession (collectively, the "Debtors"), and Weil, Gotshal & Manges LLP ("Weil"), counsel for the Debtors, hereby submit this opposition to the TPS Group's Motion to Compel Discovery or, in the Alternative, for an Order of Preclusion, dated January 10, 2012 (the "Motion") [Docket No. 9388] and respectfully represent as follows:

PRELIMINARY STATEMENT

In a not so thinly-veiled attempt to further delay the confirmation of the Modified Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, filed on December 12, 2011 [D.I. 9178] (as amended, modified or supplemented from time to time and hereinafter referred to as, the "Seventh Amended Plan"), the Trust Preferred Securities Group (the "TPS Group") has propounded discovery in the form of Requests for the Production of Documents to the Debtors and a Subpoena for the Production of

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Suite 2500, Seattle, Washington 98104.

Documents to Weil, both dated December 27, 2011 (together, "the Requests"). These Requests are duplicative and substantively improper given the extensive discovery that the Debtors and Weil have already provided in these chapter 11 cases, the relevant settlement standard at issue, the confidential nature of the October 2011 court-ordered mediation (the "Mediation") and the timing of the upcoming confirmation hearing. For the reasons set forth below, the Court should quash the TPS Group's efforts to undermine and defeat the goals of the mediation and resulting resolution, now embodied in a chapter 11 plan that addresses the prior opinions of the Court, as well as the concerns of each of the Estates' fiduciaries (the "Seventh Amended Plan Settlement").

The TPS Group is not entitled to additional discovery related to the Mediation, including, *inter alia*, the requested documents and/or communications exchanged during, or resulting from, the Mediation. As an initial matter, the Requests related to Mediation purport to seek materials protected from disclosure by the Order Appointing Mediator issued by this Court on October 10, 2011 [Docket No. 8780] (the "Mediation Order"), Local Bankruptcy Rule 9019-5(d) and Rule 408 of the Federal Rules of Evidence ("FRE").

Moreover, even assuming that such protections did not apply (which they do), the Debtors do not rely on the Mediation itself to prove that the Seventh Amended Plan as well as the Seventh Amended Plan Settlement is fair and equitable. Rather, the Court can evaluate the fairness of the Seventh Amended Plan, which reflects, among other things, the settlement of the insider trading claims asserted against the Settlement Noteholders, under the reasonableness standard set forth in Bankruptcy Rule 9019. In fact, at the January 11, 2012 disclosure statement hearing, this Court rejected the TPS Group's plea for additional disclosure related to the fairness

of the Seventh Amended Plan Settlement and acknowledged that the settlement standard under Bankruptcy Rule 9019 is the applicable metric:

> THE COURT: Well on that point I am not going to require any further disclosure [in the Disclosure Statement]. I think the standard is the settlement standard and quite frankly we did have a lot disclosed at the prior confirmation hearing. I think the issues, both the claims and the defenses raised, were described in detail.

1/11/2012 Hr'g Tr. 144:11-16. Accordingly, materials disclosed during, or as a result of, the Mediation, including, but not limited to, documents related to the negotiation of the Seventh Amended Plan are irrelevant and remain confidential and protected from disclosure. Similarly, the Debtors can prove, and have twice proven, the reasonableness of a settlement without putting the advice of counsel at issue.[2] The Court need not examine privileged communications in deciding whether the Seventh Amended Plan Settlement is fair and equitable, and therefore any documents related to advice of counsel remain protected from discovery.

Second, contrary to the TPS Group's assertion, neither the Debtors nor Weil has waived any privilege with respect to their disclosures pursuant to the confidentiality agreements with the Settlement Noteholders. The Debtors' references to the mere fact that they have received legal advice from counsel do not waive the attorney-client privilege as to the underlying advice. *See* 9/24/2010 Hr'g Tr. 30:9-15. Moreover, the Debtors have not used the advice of counsel as a sword and a shield with respect to any claims. Therefore, there is no basis for the TPS Group to

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[2] In its January 7, 2011 Opinion with respect to the Sixth Amended Plan [D.I. 6528] (the "January 7, 2011 Opinion"), the Court found, among other things, that the Initial Global Settlement Agreement on which the Sixth Amended Plan was premised, and the transactions completed therein, are "fair, reasonable," and in the best interests of the Debtors' creditors, and the Debtors' chapter 11 estates. January 2011 Opinion at 2, 60. The Court affirmed its prior holding in its September 13, 2011 opinion. (*See* September 2011 Opinion at 26-32.) Further, pursuant to the Court's January 20, 2011 ruling, "any items that [the Court] did decide [are] not going to be relitigated. . . . It's the law of the case." (*See* January 20, 2011 Tr. at 51:23-52:2; *See also* September 2011 Opinion at 27 ("[the Court's ruling on the reasonableness of the GSA rendered as part of the January 7 Opinion is law of the case . . .").)

seek to compel discovery of clearly privileged attorney-client communications. Accordingly, the Court should deny the Motion in its entirety.[3]

RELEVANT FACTUAL BACKGROUND

1. On October 6, 2010, the Debtors filed the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (as amended, the "Sixth Amended Plan").

2. On January 7, 2011, the Court entered an opinion [D.I. 6528] (the "January 2011 Opinion") and related order [D.I. 6529] denying confirmation of the Sixth Amended Plan, but noting certain modifications to the Sixth Amended Plan that, if made, would permit confirmation thereof. Furthermore, in its January 2011 Opinion, the Court determined that the compromise and settlement embodied in the Initial Global Settlement Agreement,[4] upon which the Sixth Amended Plan was premised, and the transactions contemplated therein, are fair, reasonable, and

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[3] The TPS Group has indicated that it does not seek to compel production of documents responsive to Requests 1-6, 9 and 12. Motion at 19 n.8. However, the TPS Group should not be permitted to engage in any further discovery on issues related to the GSA and/or insider trading allegations. Specifically, Requests Nos. 1-12 purport to seek documents related to, *inter alia*, the reasonableness of the GSA and the negotiation of its terms, as well as the insider trading allegations. These Requests constitute a plainly inappropriate attempt to relitigate issues on which the TPS Group and others have conducted extensive discovery during the TPS adversary proceeding, prior to the hearing to consider confirmation of the Sixth Amended Plan (the "December 2010 Confirmation Hearing") and the hearing to consider, among other things confirmation of the Modified Sixth Amended Plan (the "July 2011 Confirmation Hearing"). Indeed, the Debtors and Weil have already produced well over 88,000 pages of settlement communications alone and provided several depositions on issues related to the GSA and the insider trading allegations. In addition, the TPS Group has been granted access to the depository containing productions made by, among others, the Debtors and Weil (the "Depository"). The Debtors and Weil also have agreed to allow the TPS Group to obtain from counsel for the TPS Consortium all documents previously produced by the Debtors and Weil to the TPS Consortium in connection with the prior two confirmation hearings and the adversary proceeding. Furthermore, this Court has held two confirmation hearings, including one week of testimony dedicated to the insider trading allegations that are the main subject of these Requests. Thus, additional discovery on the heavily litigated topics of these most recent Requests is patently improper and unnecessary and the TPS Group should not be given any leeway to conduct yet another round of discovery on issues related to the GSA and the insider trading allegations.

[4] Amended and Restated Settlement Agreement, dated as of October 6, 2010, by and among WMI and WMI Investment Corp., JPMC, the FDIC Receiver, FDIC Corporate, the Creditors' Committee and certain other creditor constituencies (the "Initial Global Settlement Agreement").

in the best interests of the Debtors and their estates. The Court also re-affirmed its prior rulings[5] that the advice of counsel has not been placed at issue by the Debtors in connection with the Global Settlement Agreement (the "GSA") and/or plan confirmation. Specifically, in its January 2011 Opinion, the Court stated that "[i]t is not necessary for the Debtors to waive the attorney/client privilege by presenting testimony regarding what counsel felt was the likelihood they would win on the claims being settled [. . .] It is sufficient to present the Court with the legal positions asserted by each side and the facts relevant to those issues. The Court itself can then evaluate the likelihood of the parties' prevailing in that litigation to determine whether the settlement is reasonable. [. . .] The Court finds that sufficient evidence of this kind has been presented by the Plan Supporters in this case to determine whether the Global Settlement is reasonable." January 2011 Opinion at 21-23.

3. In accordance with the January Opinion, the Debtors revised the Sixth Amended Plan and, on February 8, 2011, filed the Modified Sixth Amended Plan.[6]

4. Prior to the hearing to confirm the Sixth Amended Plan, the Debtors and Weil, among others, provided the Consortium of Trust Preferred Securities Holders (the "TPS

[5] In their May 17, 2010 Motion to Compel Debtors to Produce Documents [D.I. 3757] ("May 2010 Motion"), their (A) Second Supplemental Submission of Furtherance of Its Motion to Compel Debtors to Produce Documents; and (B) Request to Strike or Modify Confidentiality Order [D.I. 4891; filed 7/7/2010], and their Statement Regarding the Document Depository and Request for Further Relief [D.I. 5330; filed 8/23/10], the TPS Holders argued that they were entitled to privileged documents in order to demonstrate the alleged deficiencies of the GSA. (May 2010 Motion at 10.) The Court denied the May 2010 Motion, holding that the advice of counsel had not been placed at issue by the Debtors. *See* transcript of proceedings before the Hon. Mary F. Walrath on September 7, 2010 at 83:17-21 ((the "September 2010 ruling") ("And I think that they can establish . . . the settlement is appropriate without relying on attorney-client privilege and I am going to hold them to that. So I won't allow discovery on that point.").). Furthermore, in denying the TPS Consortium's subsequent Motion In Limine to Strike and Preclude Evidence of Analysis That Was Withheld from Discovery on the Basis of the Attorney-Client Privilege [D.I. 6132], the Court held that the Debtors have "walked the fine line sufficiently to permit that testimony to be presented." 12/7/2010 Hr'g Tr. 68:19-21.

[6] Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of Bankruptcy Code, dated February 7, 2011 [D.I. 6696], as modified by (a) the first plan modification, dated March 16, 2011 [D.I. 6964], (b) the second plan modification, dated March 25, 2011 [D.I. 7040], and (c) the third plan modification, dated August 10, 2011 [D.I. 8423] (collectively, the "Modified Sixth Amended Plan").

Consortium"), with extensive discovery related to the Sixth Amended Plan. For instance, the TPS Consortium was granted access to all of the documents available in the Depository which includes non-privileged communications between the Debtors and other parties, including, among others, AAOC and their respective advisors and provided with a September 1, 2010 production containing TIFF (image) files and metadata for the Debtors' documents previously provided in the Depository. At its request, the TPS Group was granted similar access to the Depository on January 12, 2012, and the Debtors agreed that the TPS Group could obtain the Debtors' prior productions from the TPS Consortium.

5. In addition, on June 30, 2011, both the TPS Consortium and TPS Group participated in a Rule 30(b)(6) deposition of the Debtors with respect to the following topics, among others:

- "[t]he negotiation and terms of any Confidentiality Agreement entered into between the Debtors and any interested party in these proceedings, including the Settlement Noteholders";
- "[a]ll information relating to the Debtors shared with Settlement Noteholders during periods in which a Confidentiality Agreement was in force";
- the Debtors' "knowledge of the compliance or non-compliance with the provisions of any Confidentiality Agreements by signatories to those agreements";
- "[a]ll information shared with Settlement Noteholders during periods in which no Confidentiality Agreement was in force";
- the Debtors' "determination of what information to make public after the expiration of Confidential Agreements"; and
- the Debtors' "knowledge of any trading in WMI or WMI Investment debt or equity by creditor constituencies that was, or may have been, informed or affected by any confidential information relating to Debtors in their possession."

See *Official Committee of Equity Security Holders Second Amended Deposition Notice to Washington Mutual, Inc. and WMI Investment Corp.*, dated June 22, 2011 [D.I. 7958]. The TPS

Group also received a copy of the deposition transcript and any associated exhibits of this deposition.

6. On July 12, 2011, the Equity Committee filed, under seal, a motion seeking authority to prosecute, on the Debtors' behalf, an action to equitably disallow or, in the alternative, to equitably subordinate certain Claims [D.I. 8179] (the "Standing Motion").

7. Commencing on July 13, 2011, the Court held a hearing to consider, among other things, confirmation of the Modified Sixth Amended Plan (the "July 2011 Confirmation Hearing").

8. On September 13, 2011, the Court entered an Opinion [D.I. 8612] (the "September 2011 Opinion") and related order [D.I. 8613] (the "September 2011 Order") that, *inter alia*,: (i) found that the Court has jurisdiction to approve the GSA (September Opinion at 16, 22-23); (ii) reaffirmed its conclusion that the GSA and all the transactions contemplated therein, are fair and reasonable (id. at 26, 35, 101); (iii) ordered that its ruling with respect to the GSA constitutes the "law of the case" (id. at 27); (iv) overruled objections that the Modified Sixth Amended Plan was not proposed in good faith (id. at 73); (v) denied confirmation of the Modified Sixth Amended Plan, but identified certain modifications that, if incorporated, would permit confirmation thereof; and (vi) directed certain parties to mediation (id. at 138).

9. Pursuant to the September 2011 Opinion and related order, the Court directed certain parties to participate in mediation to explore a possible settlement of the Standing Motion and any issues that remain an impediment to confirmation of a plan of reorganization (the "Mediation"). On October 10, 2011 [D.I. 8780], the Court appointed the Honorable Raymond Lyons as mediator (the "Mediator") and ordered the following parties to participate in the Mediation: (i) the Debtors, (ii) the Creditors' Committee, (iii) the Equity Committee,

(iv) Aurelius, (v) Appaloosa, (vi) Centerbridge, (vii) Owl Creek, (viii) the TPS Consortium and the TPS Group, (ix) the WMB Noteholders, (x) Normandy Hill, (xi) The Bank of New York Mellon Trust Company, N.A., ("BNY Mellon"), in its capacity as Indenture Trustee for the Senior Notes, and (xii) the WMI Noteholders Group (as such term is used in the September Opinion) (collectively, the "Mediation Parties").

10. The Mediation commenced on October 19, 2011. As a result of the Mediation, discussions among the Debtors, the Creditors' Committee, the Equity Committee, AAOC, and certain other creditor constituencies culminated in certain modifications to the Modified Sixth Amended Plan, which modifications are embodied in the Seventh Amended Plan and resolve, among other things, certain plan-related issues and objections, as well as the Standing Motion.

11. The Seventh Amended Plan is premised upon the Modified Sixth Amended Plan, and incorporates modifications thereto made as a result of discussions during the Mediation.

ARGUMENT

I. THE TPS GROUP IS NOT ENTITLED TO DISCOVERY OF MATERIALS RELATED TO THE CONFIDENTIAL MEDIATION

A. The Court-Issued Mediation Order Explicitly Protects Against the Disclosure of Materials Related to the Mediation

The Court made clear in the Mediation Order that:

> all (a) discussions among any of the Mediation Parties relating to the Mediation, including discussions with or in the presence of the Mediator, (b) Mediation Statements and any other documents or information provided to the Mediator or the Mediation Parties in the course of the Mediation, and (c) correspondence, draft resolutions, offers and counteroffers ***produced for or as a result of the Mediation*** shall be strictly confidential and shall not be admissible for any purpose in any judicial or administrative proceeding. . . .

Mediation Order ¶ 6 (emphasis added). Requests 13 through 16 seek documents "produced for or as a result of the Mediation," and are therefore clearly improper. Allowing discovery on the

Mediation would defeat the purpose of both the Mediation and the Seventh Amended Plan Settlement.

B. The TPS Group Is Not Entitled To Mediation Materials Under Local Bankruptcy Rule 9019-5(d) Because There Is A Clear Nexus Between The Materials Sought And The Mediation Process

Local Bankruptcy Rule 9019-5(d) protects materials related to a mediation from discovery. Specifically, it prohibits the mediator and the participants in mediation "from divulging, outside of the mediation, any oral or written information disclosed by the parties or by witnesses in the course of the mediation." Del. Bankr. L.R. 9019-5(d). Furthermore, under the rule, "[n]o person may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence ***pertaining to any aspect of the mediation effort.***" *Id.* (emphasis added).[7]

Because "compromises are favored in bankruptcy,"[8] and are viewed as a means of minimizing litigation, expediting the administration of the bankruptcy estates, and providing for the efficient resolution of bankruptcy cases,[9] courts protect materials related to mediations and settlement discussions. Under Delaware case law and the Local Rules, materials related to a mediation are confidential. *In re Tribune Co.*, --- B.R. ---, No. 08-13141, 2011 WL 5142420, at *63 n.44 (Bankr. D. Del. Oct. 31, 2011) ("Mediations are confidential by custom and under local rule.") (citing Del. Bankr. L.R. 9019-5(d)). Where there is a nexus between the mediation process and the documents and writing, such documents and writing are protected from discovery. *U.S. Fid. & Guar. Co. v. Dick Co.*, 215 F.R.D. 503, 507 (W.D. Pa. 2003)

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[7] Moreover, under Rule 408 of the Federal Rules of Evidence, "conduct or a statement made during compromise negotiations about the claim" is not admissible "to prove or disprove the validity or amount of a disputed claim." Fed. R. Evid. 408(a)(2).

[8] *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996) (quoting 9 COLLIER ON BANKRUPTCY P 9019.03[1] (15th ed. 1993)).

[9] *See In re Martin*, 91 F.3d at 393; *Guippone v. BH S & B Holdings*, LLC, 2011 WL 5148650 (S.D.N.Y. 2011); *In re Auto Tower, Inc.*, 2006 WL 2583624 (Bankr. S.D.N.Y. June 28, 2006); *In re Del Grosso*, 106 B.R. 165, 167 (Bankr. N.D. Ill. 1989).

("[I]ncluded in the 'core' of these materials are documents such as mediation position papers and specific information prepared for mediation sessions. Also included are other documents created by, and communications between parties in preparation for the mediation sessions. We believe that documents created subsequent to the mediation process may be protected by the privilege to the extent that they have a clear nexus to the mediation.").

Third Circuit courts have consistently applied the same rationale for protecting mediation materials from discovery—to facilitate settlement and promote the effectiveness of mediations.[10] *See Sheldone v. Pa. Tpk. Comm'n*, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000) (explaining that that the mediation privilege established in local rules was "'rooted in the imperative need for confidence and trust'", and that disclosure of communications uttered in mediation would violate such trust.). Indeed, one court has explained that,

> [i]f participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tightlipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. ***This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements . . . , thereby expediting cases at a time when . . . judicial resources . . . are sorely taxed.***

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[10] Courts in other jurisdictions have also recognized a federal mediation privilege. *See, e.g., In re RDM Sports Group, Inc.*, 277 B.R. 415, 430 (Bankr. N.D. Ga. 2002) ("This Court agrees with the reasoning and analysis put forth by these district courts [in adopting a federal mediation privilege]."); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1179-80 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082, 2000 WL 420636 (9th Cir. Apr. 18, 2000) ("[T]his Court finds it is appropriate, in light of reason and experience, to adopt a federal mediation privilege applicable to all communications made in conjunction with a formal mediation."); *see also U.S. v. Union Pac. R.R. Co.*, No. CIV 06-1740, 2007 WL 1500551, at *5 (E.D. Cal. May 23, 2007) (applying federal mediation privilege); *Microsoft Corp. v. Suncrest Enter.*, No. 03-5424, 2006 WL 929257, at *2 (N.D. Cal. Jan. 6, 2006) (same); *EEOC v. Northlake Foods, Inc.*, 411 F. Supp. 2d 1366, 1369 (M.D. Fla. 2005) (relying on local rule regarding confidentiality of mediation proceedings to preclude party from disclosing amount of settlement with a third party); *Nielsen-Allen v. Indus. Maint. Corp.*, No. Civ.2001/70, 2004 WL 502567, at *1 (D. V.I. Jan. 28, 2004) (noting that "[a] majority of jurisdictions recognize and enforce [a federal mediation] privilege," but relying on mediation privilege set forth in local rule); *U.S. Fid. & Guar. Co. v. Dick Corp.*, 215 F.R.D. 503, 506 (W.D. Pa. 2003) (applying Pennsylvania privilege law, but turning "to federal case law construing the federal mediation privilege for guidance.").

U.S. Fid. & Guar. Co. v. Bilt-Rite Contractors, Inc., No. Civ.A.04-1505, 2005 WL 1168374, at *5 n.10 (E.D. Pa. May 16, 2005) (alteration and omissions in original) (emphasis added) (quoting *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979)).[11]

Here, where there is a clear nexus between the mediation process and the documents requested by the TPS Group, confidentiality must be maintained in order to uphold the integrity of the mediation process. *See U.S. Fid. & Guar. Co.*, 2005 WL 1168374, at *6-7. (excluding an affidavit concerning "mediation communications or mediation documents," a document prepared at the request of the mediator which evaluated the claims at issue, and a letter between counsel containing information on "mediation offers and mediation communications" because there was a clear nexus between the mediation process and the documents).[12]

The nexus between the mediation process and the materials sought is clear. As stated in the bolded heading on page 6 of the Disclosure Statement to the Modified Seventh Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated December 12, 2011 (the "Disclosure Statement"), the Seventh Amended Plan incorporates

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[11] *See also Nielsen-Allen*, No. Civ.2001/70 FR, 2004 WL 502567, at *1 ("Mediation is a process designed to facilitate settlement and is not a trial in itself. Indeed, the purpose of confidentiality in mediation is to promote 'a candid and informal exchange regarding events in the past. . . . ***This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.***' Thus, there is a strong preference for confidentiality within the mediation context.") (citation omitted) (emphasis added)

[12] The TPS Group's assertion that "documents prepared (or communications made) outside the context of the mediation, even if shared during the mediation...should be produced" (Motion, ¶ 44) runs afoul of Third Circuit jurisprudence. Specifically, Third Circuit Courts have held that "documents created subsequent to the mediation process may be protected by the privilege to the extent that they have a clear nexus to the mediation. These would include drafts of settlement proposals agreed upon at mediation." *U.S. Fid. & Guar. Co. v. Dick Corp.*, 215 F.R.D. at 507; *see also U.S. Fid. & Guar. Co.*, 2005 WL 1168374, at *6 (recognizing a nexus between the mediation and the documents requested). Here, the modifications made to the Seventh Amended Plan as a result of compromises reached during the Mediation exhibit a clear nexus to the Mediation. Accordingly, documents related to those modifications are protected from discovery.

modifications *resulting from* the Mediation.[13] Furthermore, "[a]s a result of the Mediation, and with the assistance of the Mediator, discussions among the Debtors, the Creditors' Committee, the Equity Committee, AAOC, and certain other creditor constituencies culminated in certain modifications . . . ." (Disclosure Statement at 5-6.). Indeed, the Disclosure Statement explains the results of discussions at the Mediation. For example:

> ***the Seventh Amended Plan is the result of extensive arms' length negotiations between the Debtors, the Creditors' Committee, the Equity Committee, AAOC and other Creditor constituencies. Such parties believe that the Seventh Amended Plan and the terms embodied therein are in the best interests of all parties in interest and represent the most expeditious means for the Debtors to successfully emerge from the Chapter 11 Cases.*** Among other things, unlike the Modified Sixth Amended Plan, the Seventh Amended Plan resolves the Standing Motion and has the support of the Equity Committee. In contrast, ***an attempt to confirm a plan without the underlying agreements embodied in the Seventh Amended Plan would have invited significant confirmation objections by the Equity Committee, among others,*** including with respect to issues related to the Standing Motion and the effect that such disputes would have with respect to distributions pursuant to any such plan.

Id. at 10 (emphasis added). Accordingly, and consistent with the Court's statements at the January 11, 2012 Hearing,[14] no further discovery should be required with respect to the negotiations surrounding the modifications to the Seventh Amended Plan because the terms of the Seventh Amended Plan Settlement are embodied in the Seventh Amended Plan and "[t]he salient aspects of the modifications made after the Mediation are summarized" in the Disclosure Statement. ***Id.* at 6-11.** Allowing discovery of materials disclosed during, or as a result of, the Mediation would defeat the purpose of both the Court-ordered mediation and the Seventh Amended Plan Settlement.

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[13] Disclosure Statement at 6 ("**The Seventh Amended Plan Incorporates Modifications Resulting From The Mediation Among The Debtors, The Creditors' Committee, The Equity Committee, AAOC, And Certain Other Creditor Constituencies**").

[14] 1/11/2012 Hr'g Tr. at 144:11-16.

Indeed, the TPS Consortium, certain of whose members overlap with the TPS Group, has recognized its duty to respect the confidentiality restrictions imposed by the Mediation Order in their Motion to Determine Classification:

> The latest version of the Plan follows on the heels of a mediation process initiated by this Court's October 10, 2011 Order Appointing Mediator [Docket No. 8780]. ***The TPS Consortium will obviously respect the confidentiality restrictions imposed by that Order.***

(Motion at 2 [D.I. 9257] (emphasis added).) Despite this acknowledgement, the TPS Group and the TPS Consortium now seek to continue their ongoing efforts to delay confirmation by serving improper discovery requests seeking the production of protected materials related to the Mediation.[15] Unfortunately, as the Disclosure Statement explains:

> The detrimental effects of further delay in confirmation and consummation of a plan in the Chapter 11 Cases—now over three years old—should not be underestimated. Each day of delay is accompanied by a continued accrual of interest and fees and the attendant depletion of estate assets and increase in total Claims, all of which results in eroded recoveries for the Debtors' junior-most Creditors and stakeholders.

Disclosure Statement at 10.

C. Materials Related to the Mediation Remain Confidential Because the Debtors And Weil Have Not Waived the Mediation Privilege

Contrary to the TPS Group's unsubstantiated assertion, the Debtors and Weil are not required to produce any documents sent or received during the mediation on the basis of "waiver." (Motion ¶¶ 39-45.) First, the TPS Group's reliance on *Westinghouse* in support of the proposition that the Debtors have somehow waived the mediation privilege if they point to the participation in the Mediation as proof that the Seventh Amended Plan Settlement is fair and reasonable, is misplaced. As discussed in Section I(D) *infra*, the Debtors do not intend to rely on the Mediation in order to show that the Seventh Amended Plan Settlement with respect to the

[15] Specifically, Request Nos. 13-16 purport to seek documents related to the Mediation.

insider trading claims is fair, and therefore have not waived the mediation privilege. Furthermore, the *Westinghouse* decision discusses privileges associated with government investigations, not mediations. *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1426 (3d Cir. 1991).[16]

Similarly, the TPS Group mistakenly relies on *In re Tribune Co.* because, aside from the decision not being binding authority, the facts of that case are inapposite. Specifically, in *Tribune*, the noteholders argued that the plan proponents put mediation documents "'in issue' by arguing that the proposed settlement is fair because it is the product of a mediation conducted by a judge." *In re Tribune Co.*, No. 08-01341 (KJC), 2011 WL 386827, at *7 (Bankr. D. Del. Feb. 3, 2011). The plan proponents there *offered to waive* part of the protections afforded by the court's Mediation Order, and the court accepted such waiver with slight modifications. *Id.* at *8 (emphasis added) (protecting written or oral communication between mediation parties concerning the mediation exchanged on any mediation day, except as to parties who were not participating in the mediation day).

In contrast, neither the Debtors nor any other party has waived, or agreed to waive, any protections afforded by the Court's Mediation Order or Local Rule 9019-5. Thus, *Tribune* was a fact-specific decision, involving consensual waiver, that contained no rule of general applicability to support of the TPS Group's motion.[17] Notably, the TPS Group ignores the fact that *Tribune* also clearly recognized the "strong policy in promoting full and frank discussions

[16] The *Westinghouse* Court ultimately held that "[t]he courts and commentators disagree about whether there is anything unfair about selective disclosure. Here it is unnecessary to decide the question." *Id.* (internal footnote omitted).

[17] The Debtors note that the TPS Group received all parties' mediation statements and a draft term sheet for the Seventh Amended Plan Settlement when they were part of the Mediation.

during a mediation" and that "confidentiality is essential to the mediation process." *Id.* at *8; *see also In re Tribune Co.*, --- B.R. ---, 2011 WL 5142420, at *63 n.44.

Thus, because the Debtors and Weil have not waived the mediation privilege either by relying on the Mediation to prove the fairness of the Seventh Amended Plan Settlement or by voluntarily putting the Mediation itself or its confidentiality at issue, the TPS Group is not entitled to any documents related to the Mediation.

D. The Parties Can Prove Reasonableness of the Seventh Amended Plan Settlement Without Relying on the Mediation or the Advice of Counsel

In determining whether the Seventh Amended Plan Settlement is fair and equitable, the Court will need to determine whether it satisfies the reasonableness standard required under Rule 9019[18]. *In re Sea Containers Ltd.*, No. 06-11156, 2008 WL 4296562, at *5 (Bankr. D. Del. Sept. 19, 2008) (explaining that "the court must assess whether [a settlement] is fair and equitable, [it] need not be convinced that the settlement is the best possible compromise. The court need only conclude that the settlement falls within the reasonable range of litigation possibilities somewhere above the lowest point in the range of reasonableness.). Thus, the Court need not assess the quality of the mediation in order to find that the Seventh Amended Plan Settlement was fair and reasonable. *In re Tribune Co.*, --- B.R. ---, 2011 WL 5142420, at *63 n.44 (recognizing that "[m]ediations are confidential by custom and under local rule. Later assessment of the quality of the mediation, by whomever conducted—absent some identifiable impropriety (and the record here reflects none)—is antithetical to the purpose and atmosphere intended to be created to enable parties to engage in such discussions") (citing Del. Bankr. L.R. 9019–5(d)). The *Tribune* court further noted:

> Parties, subject to the rules of mediation and the mediator, must be positioned to participate in settlement discussions uninhibited by the possibility that evidentiary

[18] The Court has already twice held that the settlement is fair and reasonable. *See* n.2 *supra.*

> consequences may ensue, whether mediation is wholly or partially successful, or fails to result in any settlement. In other words, ***the proposed settlement must stand or fall on its own merits***...

Id. Moreover, it "'is not necessary for a bankruptcy court to conclusively determine claims subject to a compromise, nor must the court have all of the information necessary to resolve the factual dispute, for by so doing, there would be no need of settlement.'" *Key3Media Group*, 336 B.R. 87, 92 (Bankr. D. Del. 2005) (citing *In re Martin*, 212 B.R. 316, 319 (B.A.P. 8th Cir. 1997)) (emphasis added); *see In re Integrated Health Servs.*, No. 00-389 (MFW), 2001 Bankr. LEXIS 100, at *7 (Bankr. D. Del. Jan. 3, 2001) ("'The responsibility of the bankruptcy judge . . . is not to decide the numerous questions of law and fact raised . . . but rather to canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'").[19] Indeed, as this Court has recognized, "[t]he glue that often holds the bankruptcy process together is the ability of parties to resolve disputes by settlement instead of litigation. If bankruptcy judges had to try a much larger percentage of matters than they currently do, the system would surely bog down. Thus, the sanctity of settlements can hardly be overemphasized." *In re Washington Mut., Inc.*, No. 08-12229 (MFW), 2011 Bankr. LEXIS 3361, at *14 (Bankr. D. Del. Sept. 13, 2011) (citing Reynaldo Anaya Valencia, THE SANCTITY OF SETTLEMENTS AND THE SIGNIFICANCE OF COURT APPROVAL: DISCERNING CLARITY FROM BANKRUPTCY RULE 9019, 78 OR. L. REV. 425, 431-32 (1999)).

Accordingly, the Court need not delve into the circumstances of the Mediation in order to evaluate the reasonableness of the settlement. As the Court acknowledged during the January

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[19] *In re Smithey*, No. 10-30310, 2011 Bankr. LEXIS 2869, at *21 (Bankr. N.D. Ohio July 25, 2011) (providing that in assessing reasonableness of settlement, "actual merits of the claim do not need to be actually decided."); *In re Best Prods.* Co., 168 B.R. 35, 51 (Bankr. S.D.N.Y. 1994) ("**These** standards concerning approval of settlements reflect the considered judgment that little would be saved by the settlement process if bankruptcy courts could approve settlements only after an exhaustive investigation and determination of the underlying claims.").

11, 2012 hearing, "the standard is the settlement standard." 1/11/12 Hr'g Tr. at 144:12-13. In fact, this Court's jurisprudence cautions against disturbing the confidentiality of mediations. Because, as in *Tribune*, the record reflects no identifiable impropriety in the Mediation, the TPS Group cannot invite the Court to compel discovery of documents related to the Mediation.[20]

The TPS Group also recycles its meritless argument that advice of counsel is relevant to plan confirmation and proving the reasonableness of a settlement. (Motion at 19-21.) This Court, however, has previously rejected that argument at each stage of these chapter 11 proceedings, finding that the advice of Debtors' counsel was not at issue and was not necessary to determine the reasonableness of a settlement under Bankruptcy Rule 9019. *See* 9/24/2010 Hr'g Tr. 30:9-15; January 2011 Opinion at 21-23 [D.I. 6528]; 9/7/2010 Hr'g Tr. 83:17-21.

As with the fact of a Mediation, the advice of counsel is not placed at issue simply because the court must determine the reasonableness of a settlement. For instance, in *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1327 (9th Cir. 1995), the Ninth Circuit stated that "so long as the reasonableness of the settlement amount was defended at trial on objective terms apart from the advice of counsel, the attorney-client privilege would be protected." The court found that the plaintiff:

> did not impliedly waive its attorney-client privilege because [it] did not put into issue its privileged communications. ***There was sufficient objective evidence of the***

[20] The Debtors and Weil have already provided the TPS Group all non-privileged documents and testimony that were provided to the TPS Consortium. With respect to Request Nos. 1 through 12, which are duplicative of previous discovery in these chapter 11 cases, the extensive and voluminous productions made to the TPS Consortium to date, to which Arkin Kaplan has been granted complete access, contains, for instance, non-privileged documents (if any) responsive to these Requests and is based on the search terms (including, *inter alia*, @friedfrank.com, @amlp.com, @centerbridge.com, @owlcreeklp.com and @aurelius-cm.com) previously circulated to all parties in 2010, and, along with all the depositions, hearing testimony, and any other prior discovery in these chapter 11 cases, represent the productions and discovery that the Debtors and Weil agreed to provide (and have already provided) in response to Request Nos. 1 through 12. Any further requests or discovery on these topics is clearly improper and unnecessary, and the discovery and hearing testimony to date is more than sufficient for a determination of the fairness of the settlement pursuant to Bankruptcy Rule 9019.

reasonableness of the settlement amount for [plaintiff] to prove reasonableness to the jury without resort to its attorneys' communications.

Id. (emphasis added); *see also First Sec. Bank of Wash. v. Eriksen*, No. CV 06-1004 (RSL), 2007 WL 188881, at *3 (W. D. Wash. Jan. 22, 2007) ("Though the reasonableness of the settlement may become an issue in determining the amount of damages, as long as plaintiff seeks to justify the settlement amount on objective terms apart from the advice of counsel, the attorney-client privilege should remain protected.").

This Court clearly has the authority under Bankruptcy Rule 9019(a) to approve a compromise settlement on objective terms without putting the advice of counsel at issue. Fed. R. Bankr. P. 9019(a). "In exercising this discretion, the bankruptcy court must determine whether the compromise is fair, reasonable, and in the best interest of the estate." *See In re Northwestern Corp.*, No. 03-12872 (KJC), 2008 WL 2704341, at *6 (Bankr. D. Del. July 10, 2008) (internal citation omitted). Bankruptcy courts routinely assess and approve settlements as part of plan confirmation without considering advice of counsel. *See, e.g., In re Key3Media Group, Inc.*, 336 B.R. 87, 93-96 (Bankr. D. Del. 2005) (discussing the "probability of success in litigation" without considering advice of counsel), *aff'd*, No. 03-10323 (MFW), 2006 WL 2842462 (D. Del. Oct. 2, 2006); *In re Northwestern Corp.*, No., 2008 WL 2704341, at *6-7 (same).

Moreover, the privileged communications the TPS Group seeks in Request Nos. 7, 8, 10 and 11,[21] related to the Debtors' disclosure obligations after the Confidentiality Periods, have nothing to do with the fairness of the Seventh Amended Plan Settlement. Indeed, this Court has already found that further disclosure on the insider trading issues is not necessary in order to

[21] Requests Nos. 7 and 8 concern the Debtors' disclosure obligations after the Confidentiality Periods (as defined in the requests). Requests 10 and 11 concern the Debtors' analysis and deliberations regarding what, if anything, the Debtors were required to disclose following the Confidentiality Periods.

litigate and determine the reasonableness of the Seventh Amended Plan Settlement.[22] This approach is consistent with the Court's January 2011 Opinion, which held that it was sufficient to present the Court with the legal positions of each side and the facts relevant to those issues to determine whether a settlement is reasonable. *See supra,* at 4. The TPS Group is thus not entitled to receive any documents related to either the Mediation or the advice of counsel.

II. THE TPS GROUP IS NOT ENTITLED TO DISCOVERY OF PRIVILEGED MATERIALS BECAUSE THE DEBTORS AND WEIL HAVE NOT WAIVED THE ATTORNEY-CLIENT PRIVILEGE

In the Motion and Request Nos. 7, 8, 10 and 11, the TPS Group baselessly seeks to compel production of "documents concerning disclosures the Debtors made pursuant to their confidentiality agreements with the Settlement Noteholders, including deliberations as to the Debtors' disclosure obligations there under" on the purported basis that the Debtors "waiv[ed] the attorney-client privilege by asserting reliance on counsel as a defense." (Motion ¶¶ 39, 40.) The argument has no basis in law, as testifying to the *fact* of consulting an attorney or seeking legal advice does not "waive" privilege. This Court has previously rejected such baseless requests for privileged information.[23] As always, the Debtors and Weil have been careful to guard privileged information and throughout two years of litigation and discovery in these chapter 11 cases, have continuously protected privileged communications—yet this motion

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[22] 1/11/2012 Hr'g. Tr. 144:11-16 ("Well on that point I am not going to require any further disclosure. I think the standard is the settlement standard and quite frankly we did have a lot disclosed at the prior confirmation hearing. I think the issues, both the claims and defenses raised, were described in detail.").

[23] Per the Court's September 2010 ruling, the Debtors did not place the advice of counsel placed at issue in connection with the GSA and/or the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code filed on October 6, 2010 (the "Sixth Amended Plan"). Furthermore, as the Court confirmed in its January 2011 Opinion, "[i]t is not necessary for the Debtors to waive the attorney/client privilege by presenting testimony regarding what counsel felt was the likelihood they would win on the claims being settled. . . It is sufficient to present the Court with the legal positions asserted by each side and the facts relevant to those issues. The Court itself can then evaluate the likelihood of the parties' prevailing in that litigation to determine whether the settlement is reasonable. . .The Court finds that sufficient evidence of this kind has been presented by the Plan Supporters in this case to determine whether the Global Settlement is reasonable." January 2011 Opinion at 22-23.

marks the third time that members of the TPS Group, alone, have falsely asserted that the have Debtors placed advice of counsel at issue. The Court rejected this meritless argument the first two times it was raised and should reject this argument again.

A. Disclosure of Fact that Legal Advice was Provided is Not a Waiver of the Attorney-Client Privilege as to the Underlying Advice

The TPS Group's argument that the Debtors waived the attorney-client privilege is completely baseless. (*See* Motion ¶¶ 39 -45.) A party may disclose *the fact* that it sought advice from counsel without waiving privilege as to the underlying substance of the argument. *See Refuse & Envtl. Sys., Inc. v. Indus. Serv. of Am.*, 120 F.R.D. 8, 11 (D. Mass. 1988) ("It is the contents of the communications themselves which are protected, not the surrounding circumstances or the fact of consultation itself.") The court in *Refuse & Envtl. Sys., Inc.*, found no waiver where the party offered testimony of the "mere fact" that a complaint was filed after consultation with an attorney. *Id.* at 11. In *Metro. Life Ins. Co. v. AETNA Cas. & Sur. Co.*, 730 A.2d 51 (Conn. 1999), the court considered the consequences of a broad waiver rule, which this Court has already rejected in these chapter 11 cases but the TPS Group once again proposes:

> If admitting that one relied on legal advice in making a legal decision put the communications relating to the advice at issue, such advice would be at issue whenever the legal decision was litigated. If that were true, the at issue doctrine would severely *erode* the attorney-client privilege and *undermine* the public policy considerations upon which it is based.

Id. at 54 (emphasis added).

The TPS Group completely ignores this all-important distinction. For instance, the quotations cited by the TPS Group at pp. 20-21 of their Motion merely reveal the fact Debtors "consulted counsel" and made determinations "in connection" with such consultations.[24] The

[24] In addition, the TPS Group's waiver argument is untimely and therefore has been waived. The TPS Group attended the hearing at which they claim that the waiver occurred, but did not raise this issue at the hearing or before the Court ruled on the issues in the September 13, 2011 Opinion.

fact of consultation, however, is clearly not privileged. The cited testimony does not describe, refer to, or even imply the *substance* of the communication. Because this testimony does not reveal privileged information, it does not—and cannot—waive the attorney-client client privilege.

Importantly, in *In re Teleglobe Commc'ns Corp.*, 392 B.R. 561 (Bankr. D. Del. 2008) (Walrath, J.), this Court articulated the rule of waiver as follows:

> Because of the importance of the attorney-client privilege, "at issue" waiver is narrowly construed and applies only "where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication." Simply because the information is relevant to the testimony does not mean the privilege has been waived.

Id. at 586 (internal citations omitted). In *Teleglobe*, plaintiffs claimed that the testimony of defendant's Chief Legal Officer put privileged documents at issue by implicating legal advice from both herself and other counsel. However, this Court rejected any waiver of privilege because the testimony described "[the witness'] actions and her beliefs and did not refer specifically to the *contents* of any of the alleged privileged documents." *Id.* at 586 (emphasis added).

Time and again, this Court has reiterated that the Debtors have not placed the advice of counsel "at issue" merely by disclosing the fact that determinations were made in connection with counsel:

- "General statements in the plan of reorganization, disclosure statement and settlement agreement that simply says the debtor relied on advice of counsel . . . *I don't think that's sufficient to waive the privileges* nor is it sufficient to show that the attorney/client advice was relevant or goes to the heart of the case." 9/24/2010 Hr'g Tr. 30:9-15 (emphasis added);
- "Well, I am going to deny this motion. I think that the request for admissions specifically seek attorney-client privilege and really aren't appropriate . . . And I think that they can establish . . . the settlement is appropriate without relying on attorney-client privilege and I am going to

hold them to that. So I won't allow discovery on that point." 9/7/2010 Hr'g Tr. 83:11-21.

- "So even though the witness cannot erase attorney-client privilege from it's mind, I think that where the witness has testified to the financial analysis they did, where they testified to the review of pleadings or the positions the parties took in the negotiations, that may all be presented even though attorneys were present or even though they'd later discussed those positions with counsel. I think they've walked the fine line sufficiently to permit that testimony to be presented." 12/7/2010 Hr'g Tr. **76:13-25**;

- "It is not necessary for the Debtors to waive the attorney/client privilege by presenting testimony regarding what counsel felt was the likelihood they would win on the claims being settled [. . .] It is sufficient to present the Court with the legal positions asserted by each side and the facts relevant to those issues." **January 2011 Opinion at 22** [D.I. 6528].

The record already before the Court is sufficient to determine the reasonableness of the Seventh Amended Plan Settlement and to confirm the Seventh Amended Plan. As discussed above in Section I(B), *supra,* the Disclosure Statement explains the terms of the Seventh Amended Plan Settlement and its incorporation into the Seventh Amended Plan at pages 6-11, and the Court ruled that no further disclosure was required in the Disclosure Statement with respect to the settled claims or defenses. *See* 1/11/2012 Hr'g Tr. 144:11-16. The TPS Group also argues that the advice of Debtors' counsel is "particularly important here, because each of the Settlement Noteholders argues that they relied on the Debtors' counsel." (Motion ¶ 42). However, this argument belied by the record, which shows that the Settlement Noteholders "did [their] *own* analysis." 7/18/2011 Hr'g Tr. 82:1-6 (Gropper Direct) (emphasis added); 7/19/2011 Hr'g Tr. 137:1-7 (Krueger Cross); 7/20/2011 Hr'g Tr. 53:6-8 (Bolin Direct), 233:10-13 (Melwani Direct). Moreover, whether the advice of counsel is "important" is irrelevant to waiver analysis: "[o]bviously, the relevant, or even crucial, quality of testimony or evidence regarding attorney/client communications cannot overcome the privilege. If this were so, the

privilege would be useless precisely at those points where it was *most* important." *Refuse & Evntl., Sys, Inc.* 120 F.R.D. at 11 (emphasis added).

Moreover, the cases cited by the TPS Group do not, in fact, support its claim that the Debtors have put communications with counsel "at issue." The cited cases do not determine whether advice of counsel has been put "at issue," but merely discuss the *scope* of a previously determined waiver. *See LML Patent Corp. v. Telecheck Servs., Inc. Elec. Clearing House, Inc.*, No. Civ. No. 04-858 (SLR), 2006 U.S. Dist. LEXIS 13498, at *2 (D. Del. March 28, 2006) (explaining that "[d]efendants misunderstood the scope of waiver," but offering no discussion of the basis for the waiver); *RCA Corp. v. Data Gen. Corp.*, No. Civ. 84-270 (JJF), 1986 WL 15693, at * 1 (D. Del. July 2, 1986) (discussing the scope of the waiver where a party *conceded* that it had waived the attorney-client privilege). Here, there has been no finding of or concession of any waiver. The failure of the TPS Group to offer any law in support of its claim that the Debtors' testimony placed advice of counsel at issue is telling, especially in light of the controlling case law which clearly states that a mere factual statement that a communication with counsel occurred does not waive the attorney-client privilege. *In re Teleglobe Commc'ns Corp.*, 392 B.R. at 586; *see also* 9/24/2010 Hr'g Tr. 30:9-15.

B. The Debtors and Weil Have Not Waived the Attorney-Client Privilege Because They Do Not Assert Advice of Counsel as a Defense to any Claim

The TPS Group's argument that the Debtors somehow waived the attorney-client privilege by asserting reliance on counsel as a defense (Motion ¶ 40) likewise fails because the Debtors have not asserted an advice of counsel "defense" in response to any claim and have not used privilege as both a sword and shield. As the Third Circuit explained in *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851 (3d Cir. 1994),

> Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.

Id. at 863.

The TPS Group cites cases holding that an assertion of reliance upon advice of counsel as an affirmative defense constitutes waiver,[25] but these cases are inapposite because there are no allegations against the Debtors in response to which they need to assert *any* defense, let alone an advice of counsel defense. Indeed, the TPS Group's Motion fails to state any claims that the Debtors purportedly "defend" by relying on advice of counsel. Indeed, at no time in the history of these chapter 11 cases have the Debtors or Weil offered privileged information in testimony, or asserted a claim or defense that relies on attorney-client communications. Accordingly, the Debtors and Weil have not explicitly or impliedly waived the attorney-client privilege, and any documents related to the advice of counsel remain privileged.

[25] *See e.g. Glenmed Trust Co., v. Thompson,* 56 F.3d 476 (3d Cir. 1995); *In re ML-Lee Acquisition Fund II, L.P.,* 859 F. Supp. 765 (D. Del. 1994).

CONCLUSION

The Debtors respectfully request that the Court deny the relief requested in the Motion in its entirety. The Debtors and Weil should not be compelled to produce any additional documents in response to Request Nos. 7, 8, 10, 11 and 13-16.

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

– and –

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

Attorneys for Debtors and Debtors in Possession and Weil, Gotshal & Manges, LLP