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.	:	**Re: Docket No. 6499** **Obj. Deadline: January 13, 2011 at 4:00 p.m.** **Hearing Date: January 20, 2011 at 2:00 p.m.**

DEBTORS' OBJECTION TO MOTION OF DANIEL HOFFMAN TO RECONSIDER ORDER DATED DECEMBER 17, 2010 DENYING HIS REQUEST TO UNSEAL DOCUMENTS

Washington Mutual, Inc. ("WMI") and WMI Investment Corp. ("WMI Investment," and together with WMI, the "Debtors"), as debtors and debtors in possession, hereby oppose Daniel Hoffman's ("Hoffman") Motion to Reconsider Order Dated December 17, 2010 Denying His Request to Unseal Documents (the "Motion") [Docket No. 6499], and respectfully represent as follows:

PRELIMINARY STATEMENT

1. A motion to alter or amend a judgment seeks an extraordinary remedy implemented by courts only in rare circumstances. In support of his Motion, Hoffman offers no newly discovered evidence nor does he point to any change in controlling law. Therefore, Hoffman's only remaining argument is the implausible claim that his Motion should be granted because it is necessary to correct a clear error of law or fact or to prevent manifest injustice. That is not the case. Rather, Hoffman seeks to submit new argument and point to "evidence"

that was undeniably available to Hoffman the first time around. The Third Circuit is clear that these are insufficient grounds on which to rest a motion to alter or amend judgment. Any "error" is Hoffman's, not the Court's – as he would have it. For this reason alone, the Motion should be denied.

2. Because Hoffman fails to satisfy any of the grounds for reconsideration, the Court should not reach Hoffman's new arguments. However, even if the Court were to do so, the outcome would remain the same. Hoffman asserts that any common interest shared between the Debtors and the Equity Committee has been vitiated as a result of the parties acting adverse to each other. Hoffman's argument is irrelevant. He ignores that the Sealed Filings were made pursuant to two Protective Orders entered by this Court, both of which expressly protect the Debtors' privilege. In view of the unchallenged status of those Protective Orders, Hoffman's (errant) arguments concerning common interest privilege get him nowhere.

3. Finally, Hoffman asserts that disclosure to third parties such as the FDIC or JPMC operates as a waiver of the Debtors' privilege. Again, Hoffman's argument is irrelevant. There has been no such disclosure. Thus, Hoffman's proposition has absolutely no application here.

4. For all of the foregoing reasons, Hoffman's Motion should be denied.

PERTINENT FACTUAL BACKGROUND

5. On September 26, 2008 (the "Petition Date"), the Debtors filed petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"). WMI and WMI Investment are debtors in these jointly-administered chapter 11 Cases

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[1] The Debtors in these chapter 11 cases (the "Chapter 11 Cases") and the last four digits of each Debtor's federal tax identification numbers are: (i) Washington Mutual, Inc. (3725) and (ii) WMI Investment Corp. (5395).

and are operating as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. On October 15, 2008, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed the Official Committee of Unsecured Creditors.

7. On January 11, 2010, the U.S. Trustee appointed the Official Committee of Equity Security Holders (the "Equity Committee").

8. On July 22, 2010, the Court entered the Agreed Order Directing the Appointment of an Examiner [Docket No. 5120]. On July 26, 2010, the U.S. Trustee appointed Joshua R. Hochberg (the "Examiner") as Examiner in these chapter 11 cases.

9. Pursuant to this Court's Interim Order Pursuant to Federal Rule of Evidence 502(d), dated June 16, 2010 (the "Interim Order") [Docket No. 4740], and Order Governing the Production and Use of Discovery Materials in Connection with Plan Confirmation (the "Confidentiality Order," and together with the Interim Order, the "Protective Orders") [Docket No. 4863], the Debtors voluntarily produced attorney client communications and core attorney work product to the Equity Committee.

10. On November 3, 2010, Hoffman filed his Request to Unseal and Post Documents for Public Viewing (the "Request") [Docket No. 5753]. By the Request, Hoffman sought to have certain Equity Committee sealed filings (the "Sealed Filings") that contain the Debtors' privileged attorney client communications and core attorney work product (the "Privileged Content") unsealed.

11. On November 16, 2010, the Debtors filed an objection to the Request (the "Objection") [Docket No. 5951].

12. On November 22, 2010, Hoffman filed a reply to the Objection [D.I. 6063]. Additionally, on December 15, 2010, Hoffman filed a Supplemental Memorandum to the Request (the "Supplemental Reply") [Docket No. 6349].

13. On December 17, 2010, the Court held a hearing on the Request (the "Dec. 17 Hearing"). The Court denied the Request and entered the Order Denying Daniel Hoffman's Request to Unseal and Post Documents for Public Viewing (the "Order") [Docket No. 6370].

OBJECTION[2]

A. The Motion Fails to Provide Grounds Justifying Reconsideration

14. The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). This Court has stated:

> A motion for reconsideration ... is an extraordinary means of relief in which the movant must do more than simply reargue the facts of the case or legal underpinnings.

HHCA Texas Health Servs., L.P. v. LHS Holdings, Inc. (In re Home Health Corp. of Am., Inc.), 268 B.R. 74, 76 (Bankr. D. Del. 2001) (Walrath, J.). The moving party must show: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999).

15. Hoffman does not argue an intervening change in law. Nor does he seek to submit previously unavailable evidence. Rather, he argues that *the Court's* supposed failure to consider evidence that *Hoffman did not raise* and which was not in the record before the Court, but that

the Court "was aware of" constitutes clear error or manifest injustice.[3] (Mot. ¶12.) Hoffman's argument fails. It cannot constitute error to consider only what is in the record before the Court. *See Johnson v. Diamond State Port Corp.*, 50 Fed. App'x 554, 555, 560 (3d Cir. 2002) (unpublished opinion) (rejecting the "implausible claim" that the district court should have taken into account plaintiff's untimely filed affidavit to prevent a manifest injustice where "counsel's carelessness was solely responsible for the failure to [timely] submit the affidavit"); *In re Prince*, 85 F.3d 314, 324 (7th Cir. 1996) ("A court may grant a Rule 59(e) motion to alter or amend the judgment if the movant ... points to *evidence in the record* that clearly establishes a manifest error of law or fact.") (emphasis added.)

16. In reality, Hoffman seeks to submit additional evidence/argument that he failed to raise at the Dec. 17 Hearing. Courts have universally held, however, that a party may not offer new argument or submit evidence that was available when the order to be altered was entered. *See Harsco*, 779 F.2d at 909 (affirming denial of reconsideration motion where movant asked the court to consider evidence available prior to underlying decision.); *In re Trinity Innovative Enters., LLC*, 2009 Bankr. LEXIS 4672 (Bankr. E.D. Pa. Nov. 23, 2009) ("a motion for reconsideration may not be used to advance new arguments, issues, or facts not previously presented to the court.")

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2 Capitalized terms not defined in the Preliminary Statement shall have the meanings ascribed to them below.

3 Hoffman does not articulate any distinct argument for manifest injustice. "In the context of a motion to reconsider, the term 'manifest injustice' generally means that the Court overlooked some dispositive factual or legal matter that was presented to it, making the definition an overlap with the prime basis for reconsideration articulated in *Harsco*, that is, the need to correct manifest errors of law or fact upon which the judgment was based." *In re Telfair*, 2010 U.S. Dist. LEXIS 110681, *69-70 (D.N.J. Oct. 15, 2010) (internal quotation and citation omitted.)

17. Specifically, Hoffman argues that the Court's purported failure to consider (i) language in a *proposed* order attached to one of the Equity Committee's Sealed Filings and (ii) JPMC and/or the FDIC's purported attendance at a July 8, 2010 chambers conference constitutes clear error because the foregoing are indicia of a theoretical privilege waiver. Hoffman was required, however, to have raised these assertions – whether or not true – prior to the Dec. 17 Hearing. *See Trinity Innovative,* 2009 Bankr. LEXIS 4672, at *6 ("To warrant a new trial the evidence must not have been known to the movant at the time of trial; and, moreover, the movant must have been excusably ignorant of the facts, *i.e.*, the evidence must be such that it was not discoverable by diligent search.") Hoffman's attempt to pin responsibility on the Court for purportedly failing to consider "evidence" available to Hoffman that he did not raise but could have should be rejected.

18. Thus, Hoffman asserts insufficient grounds to grant reconsideration under the controlling Third Circuit standard. The Motion should be denied.[4]

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[4] Hoffman also halfheartedly argues that reconsideration is appropriate because (i) *In re Fibermark, Inc.*, 330 B.R. 480 (Bankr. D. Vt. 2005) is not *stare decisis* and (ii) the Court erred in finding that the a common interest privilege was applicable between the Debtors and the Equity Committee. Both arguments should be rejected.

The Debtors raised *Fibermark* at the Dec. 17 Hearing in response to Hoffman's argument articulated in the Supplemental Reply that section 107 of the Bankruptcy Code somehow overrides common law privilege protections. (Supp. Reply ¶5.) Importantly, in his Motion, Hoffman does not contest that *Fibermark* holds exactly what the Debtors cited it for: that "attorney client privilege or attorney work product protection 'are entitled to deference, independent of [Section] 107'...." (Mot. ¶14.) The Court did not enter the Order because it viewed *Fibermark* as controlling authority. Hoffman's assertion that *Fibermark* is not *stare decisis* is irrelevant and cannot constitute grounds for reconsideration of the Order.

Similarly, the Court's ruling did not rely on a finding of common interest. Rather, the Court's ruling was directly predicated upon the Protective Orders. *See* 12/17/10 Tr. at 40:13-17 ("You may disagree that I had the authority to [permit the Debtors and the Equity Committee to present their controversy to me, under seal, that would prevent the waiver of the attorney-client privilege as to those documents and generally], but I find that I had the authority to do that and that it should not be unsealed at this point....") It was not clear error for this Court to find that its own

(footnote continued)

B. Hoffman's New Arguments Have No Merit

19. Even if Hoffman's "new" arguments were appropriate for the Court to consider on a motion for reconsideration – and they clearly are not – they have absolutely no merit.

(i) Hoffman's Argument Concerning Common Interest Ignores this Court's Orders' Protecting the Debtors' Privilege and Is Wrong In Any Event

20. Hoffman argues that any common interest privilege shared between the Debtors and the Equity Committee vis-à-vis third parties has been destroyed because the parties have acted adverse to each other subsequent to the Debtors' voluntary production of privileged materials. Hoffman's argument is wrong for several reasons.

21. First, Hoffman's argument ignores that the materials were produced pursuant to, and under the protections afforded by, this Court's Protective Orders. The Protective Orders both expressly protect the Debtors' privilege and guard against waiver while contemplating the Sealed Filings.

22. The Interim Order provides that "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 ...." (Interim Order ¶2.) Similarly, the Confidentially Order provides that "any attorney-client privilege, work product protection or other immunity or protection from disclosure applicable to any material that has been disclosed in accordance with the terms of the Agreement shall not be waived (in this or any federal or state proceeding) by virtue of disclosure." (Confidentiality Order ¶5.) The Interim Order further provides that "the provision of the Confidential Production to the Equity Committee ... shall not confer on any person or entity ... the right to obtain such materials..." (Interim Order ¶5.)

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previous orders authorized the Sealed Filings. By the Motion, Hoffman does not seek reconsideration of the Protective Orders. For this reason, his argument is misplaced and fails.

23. Thus, even if Hoffman's new argument (*i.e.*, that a common interest privilege shared between the Debtors and the Equity Committee has been vitiated) were correct, this Court's Protective Orders are still valid, effective, and enforceable.[5] And those orders expressly protect the Debtors' privilege and contemplate sealed filings. The Motion provides no basis for the Court to disregard its Protective Orders.

24. Second, as Hoffman's own Motion makes clear, to the extent subsequent adverse proceedings affect a common interest privilege, they do so "as between" the clients who agreed to exchange information (*i.e.*, the Debtors and the Equity Committee). (Mot. ¶22 *citing* The Restatement Third of the Law Governing Lawyers.) Hoffman cites no authority providing that the simple occurrence of a subsequent adverse proceeding between two parties who agreed to exchange information under common interest privilege operates as a waiver as to third parties such as Hoffman.[6] Such a holding would "so further erode the privilege's protection as to reduce [such arrangements] to an improbable alternative." *In re Grand Jury Subpoena Duces Tecum etc.*, 406 F. Supp. 381, 394 (S.D.N.Y. 1975) (discussing the "subsequent adverse proceeding" exception as "a logical incident of [the parties'] later posture" but that "[t]here is no similar justification for requiring the disclosure of a former co-defendant's confidences for use in a third-party proceeding.")

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[5] The same is true with respect to Hoffman's "old" argument: that the "unforgiving character of Section 107" vitiates privilege protections. (Mot. ¶18.) In addition to having been rejected at the Dec. 17 Hearing, *see* 12/17/10 Tr. at 38:10-12 ("No, they aren't. No. 107 is not the only basis for filing sealed documents. It can't be. The attorney- client privilege cannot be waived by filing them under seal."); *see also Fibermark, Inc.*, 330 B.R. at 494 (stating "the public interest in preserving the attorney client privilege ordinarily outweighs the presumption of access to judicial documents, and [the Court] finds no statutory basis for forcing this inquiry into the narrow parameters of § 107"), the argument simply ignores the effect of the Protective Orders.

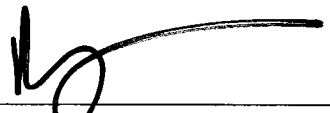
[6] Hoffman's discussion concerning joint-client privilege is entirely inapposite. As *In re Teleglobe Communications Corp.*, 493 F.3d 345, 366 (3d Cir. 2007) makes clear, "the concepts are not the
(footnote continued)

(ii) The Debtors Have Not Shared Privileged Materials With JPMC, the FDIC, or the U.S. Trustee

25. Hoffman's final argument is desperate speculation. To be clear, the Privileged Content was not provided to, or discussed with, JPMC, the FDIC, the U.S. Trustee or any party other than the Equity Committee. Throughout the pendency of these chapter 11 cases, the Debtors have exerted great efforts to protect the privilege. Language in the Equity Committee's *proposed* order cannot change these facts. No waiver could possibly have occurred at the July 8, 2010 chambers conference or otherwise because the materials were not disclosed to any third party. This argument is utterly baseless and should be rejected swiftly.

Dated: January 13, 2011
Wilmington, Delaware

ELLIOTT GREENLEAF



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same." The joint-client privilege is operable only where two clients share the same attorney. *See id.* at 362-63.

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