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5 Attorneys for Defendants
WILLIAM W. HUTCHINS and ANNE HUTCHINS
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8 UNITED STATES BANKRUPTCY COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 In re:) Case No. ND 01-11549 RR
12 REED E. SLATKIN,)
13 Debtor.) CHAPTER 11
14) Adv. No. 02-1164
15)
16) MOTION FOR RECONSIDERATION OF
R. TODD NEILSON, Trustee of) PROTECTIVE ORDER; MEMORANDUM
17 the Chapter 11 Bankruptcy) OF POINTS AND AUTHORITIES IN
18 Estate of Reed E. Slatkin,) SUPPORT THEREOF; DECLARATION
19 Plaintiff,) OF RICHARD M. MONEYMAKER IN
20) SUPPORT THEREOF
21 vs.)
22) DATE: [TO BE SET]
23) TIME:
WILLIAM W. HUTCHINS, an) PLACE: 1415 State Street
24 individual, and ANNE)
25 HUTCHINS, an individual) Courtroom 201
26) Santa Barbara, CA
27)
28 Defendants.)

22 COME NOW William W. and Anne Hutchins, and move the court
23 for an order reconsidering the court's grant of a protective
24 order requiring the Defendants to return all transcripts in
25 their possession regarding the testimony made under oath of Reed
26 Slatkin.
27 / / /

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1 The motion is based upon the following grounds:

2 1. The Defendants filed their Evidentiary Objections to
3 the Hearsay Statements contained in the declaration in support
4 of the Trustee's exparte motion for a protective order. No
5 ruling was made on these evidentiary objections, which if
6 sustained, would have defeated the Trustee's claim of a work
7 product privilege.

8 2. The Declarations of the two counsels for the Trustee do
9 not assert the existence of the work product privilege. In any
10 event volume II of the examination of Reed Slatkin was conducted
11 by Andrew S. Rotter, and Jollee M. Adamovitch, neither of which
12 has asserted that their examination, in that transcript, was
13 privileged as work product.

14 3. The work product privilege was waived because of the
15 attendance of members of the Federal Bureau of Investigation
16 ("FBI") and the Internal Revenue Service ("IRS") at the
17 examination. Neither of these government agencies had any
18 interest in bringing this litigation against these Defendants,
19 or against any other creditors, investors or defendants. No
20 declarations have been provided to this court from either of
21 these agencies, alleging that the common interest purported to
22 exist by the Trustee does in fact exist, and the Trustee has
23 neither the standing nor the capacity to know what the interests
24 of the U.S. Attorney/FBI and the IRS are.

25 4. The Trustee waived any privilege by having his counsel,
26 Andrew Rotter, recite the substance of Slatkin's testimony in
27 convincing the court to approve the compromise in the George

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1 Elvin matter (See Exhibits "B" and "C").

2 WHEREFORE, the Defendants respectfully request that the
3 Court reconsider its order in this matter and that the Court
4 rule that the transcripts of the Trustee's examination of Reed
5 Slatkin are not privileged.

6 DATED: December 30, 2002 Respectfully submitted,

7 LAW FIRM OF MONEYSMAKER & MONEYSMAKER

8 By: Vincent Moneymaker
9 VINCENT B. MONEYSMAKER, ESQ.
10 Attorneys for Defendants,
11 WILLIAM W. HUTCHINS and
12 ANNE HUTCHINS
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1 MEMORANDUM OF Points AND AUTHORITIES

2 1. This Motion For Reconsideration is Permitted by
3 Federal Bankruptcy Rule 9023.

4 Technically neither the Federal Rules of Bankruptcy
5 Procedure nor the Federal Rules of Civil Procedure specifically
6 recognize a motion for reconsideration. However, the courts
7 have held that, regardless of the title, any motion for
8 reconsideration, filed within 10 days of the entry of a judgment
9 is treated as a motion to alter or amend the judgment pursuant
10 to Federal Rule Civil Procedure 59. This rule is certified
11 pursuant to Federal Bankruptcy Rule 9023, and was adopted to
12 make clear that the court possesses the power to rectify its own
13 mistakes in the period immediately following the entry of
14 judgment. See In re Melton, 238 Bankr. 686, 692 (Bankr. N.D.
15 1999).

16 2. The Declaration of Trustee's Counsel Does Not
17 Establish the Work Product Privilege.

18 The exparte motion by the Trustee contains a great many
19 allegations in the argument of the motion, but almost none are
20 supported by any admissible testimony in the declarations. The
21 only declaration that even discusses the work product privilege
22 is the one from Alexander Palmer. However, almost all of those
23 allegations are found in conversations he had with the Spherion
24 Reporting Service and all are inadmissible pursuant to Federal
25 Evidence Rule 802.

26 Filed herewith as Exhibit "A" are the evidentiary objections
27 made by the Defendants upon which no ruling has issued. This

1 case is too important, for the court not to create a clear,
2 unambiguous record. Thus, this court should rule on the
3 objections and sustain them, thus removing the entire factual
4 basis for any claim of a work product privilege. If this is
5 done, which it should be given that the Trustee had the burden
6 of establishing the asserted privilege but failed to produce any
7 admissible evidence in support of the privilege, the protective
8 order will have to be vacated. See Resolution Trust Corp. v.
9 Dabney, 73 F.3d 262, 266 (10th Cir. 1995).

10 Furthermore, it should be noted that not only is a mere
11 assertion of the work product allegation not enough to establish
12 the privilege, but in the case at hand no declaration of any of
13 the Trustee's attorneys even makes the assertion. The
14 declarations presented only recite conversations with the
15 reporting service. In addition, there is no allegation in any
16 declaration that the transcripts are anything but factual, and
17 thus, do not reflect the "mental impressions, conclusions,
18 opinions or legal theories of an attorney, or other
19 representative of a party concerning the litigation" as defined
20 by Federal Rule of Civil Procedure 26(b)(3).

21 Addressing this issue in the very recent decision of Dobbs
22 v. Lamonts Apparel, Inc., 155 F.R.D. 650 (D. Alaska 1994), the
23 court held that the work product privilege did not extend to
24 verbatim answers of third party witnesses in any fashion
25 whatsoever. Specifically, the Dobbs court stated as follows on
26 this point:

27 Discovery of the material contained in verbatim, third
28

1 642 F.2d. 1285 (DC Cir. 1990), both MCI and the government were
2 parties to a lawsuit with AT&T. As a result, because they were
3 joint parties in the litigation, MCI did not waive the work
4 product privilege by sharing its documents with the government.

5 In United States ex rel Burroughs v. De Nardi Corp., 167
6 F.R.D. 680 (S.D. Cal. 1996), the plaintiff filed suit under the
7 False Claims Act (31 U.S.C. Sec. 3729 et seq.) which required it
8 to sue in the name of the government. Based on this statutory
9 requirement, the court concluded that the disclosure of the
10 documents to the government did not waive the privilege given
11 that the plaintiff and the government were co-plaintiffs in the
12 matter. Finally, in In re Imperial Corp. of America 179 F.R.D.
13 286 (S.D. Cal 1998), the parties sought documents created by
14 plaintiff's former counsel, which had been turned over to the
15 new counsel that replaced former counsel. The court denied such
16 a turnover in that matter because the common interest definition
17 obviously had applied given that both counsel were representing
18 the same party in the same or related litigation.

19 In contrast to each of the cases cited by the Trustee,
20 nowhere in this case is there any admissible allegation or
21 contention that the U.S. Attorney's Office and the IRS were or
22 are interested in the present litigation involving these
23 Defendants. As a result no legal or factual basis exists for
24 the Trustee's common interest argument.

25 **4. The Trustee Waived The Privilege By Citing Slatkin's**
26 **Testimony in George Elvin's Compromise.**

27 The Trustee waived the work product privilege with respect
28

1 to Slatkin's testimony when Andrew Rotter recited the substance
2 of it to obtain the court's approval of the compromise in the
3 George Elvin matter. See Exhibits "B" and "C" attached hereto;
4 see also Worthington v. Endee, 177 F.R.D. 113, 118 (N.D.N.Y.
5 1998); Harding v. Dana Traup, Inc., 914 F. Supp. 1084, 1098-1099
6 (D.N.J. 1996). Specifically, Mr. Rotter stated as follows in
7 his declaration that was submitted in support the compromise
8 that this court approved:

9 During the afternoon of June 27, 2002, I had a telephone
10 conversation with R. Alexander Palmer, Esq., one of the
11 attorneys for the Official Committee of Unsecured
12 Creditors and special litigation counsel to the Trustee.
13 In this conversation, Mr. Palmer told me that he had
14 examined Mr. Slatkin under oath earlier that day about
15 (among other things) Mr. Slatkin's ownership interest in
16 Raptor. Mr. Palmer told me that Mr. Slatkin testified
17 that he had never heard of Slatkin Enterprises General
18 Partnership ("Enterprises"); that, even if Enterprises
19 had been formed, Mr. Slatkin would have been its sole
20 owner; and that, since Raptor was formed, Mr. Slatkin
21 always believed that he, individually, was a member of
22 Raptor.

23 See Exhibit "C" at p. 35, lines 1-9 (emphasis added).

24 The court should carefully note that Mr. Rotter sworn under
25 oath "that Mr. Palmer told me he had examined Mr. Slatkin under
26 oath." During oral argument, however, counsel for the Trustee,
27 denied that Slatkin had been the subject of an examination, but

1 rather had only been interviewed as a witness. Accordingly,
2 because Mr. Slatkin's examination testimony was disclosed in
3 order to obtain approval of the Elvin settlement, the disclosure
4 of the substance of Mr. Slatkin's testimony operates as a waiver
5 in all subsequent proceedings. See Bowne of N.Y City, Inc v.
6 AmBase Corp., 150 F.R.D. 465, 478-481 (S.D.N.Y. 1993).


7 Indeed, It has long been the rule by the majority of courts
8 that a privilege cannot be both a shield and a sword. A partial
9 disclosure waives the privilege to all related communications.
10 See U.S. v. Bilzerian 926 F.2d. 1285, 1292 (2d Cir. 1991).

11 **CONCLUSION**

12 The court should rule on these Defendants' evidentiary
13 objections and create a clear and unambiguous record in this
14 matter. The court should then conclude that the Trustee failed
15 to sustain his burden that the transcripts were privileged, or
16 if they were, that the privilege waived by the Trustee's own
17 disclosure of Mr. Slatkin's testimony in proceedings before this
18 Court.

19 **DATED:** December 30, 2002 Respectfully submitted,

20 **LAW FIRM OF MONEYSMAKER & MONEYSMAKER**

21 By: 
22 VINCENT B. MONEYSMAKER, ESQ.
23 Attorneys for Defendants,
24 WILLIAM W. HUTCHINS and
25 ANNE HUTCHINS
26
27
28

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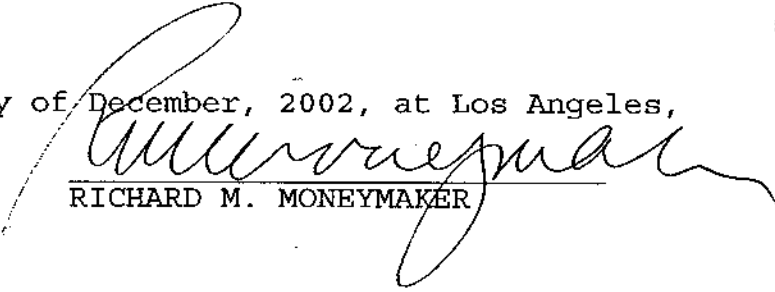
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had been formed, he would have been its sole owner; and that, since Raptor was formed, he always believed that he, individually, owned the membership interest in Raptor. Rotter Decl. ¶12;

5. Attached hereto and marked Exhibit "C" is a true and correct copy of the Declaration of Andrew S. Rotter filed in support of the Trustee's Notice of Motion and Motion for Settlement with the Elvins.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of December, 2002, at Los Angeles, California.

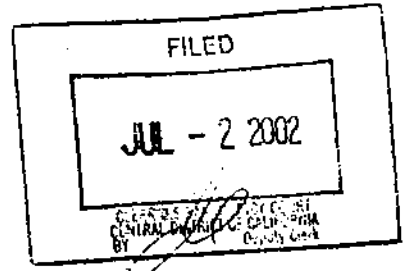


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5 Los Angeles, California 90071-2627
6 Telephone: (213) 452-4900
7 Facsimile: (213) 623-3302

8 Attorneys for R. Todd Neilson,
9 Chapter 11 Trustee of the Bankruptcy Estate
10 of Reed E. Slatkin



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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
NORTHERN DIVISION

In re

REED E. SLATKIN,

Debtor.

Case No. ND 01-11549-RR

Chapter 11

NOTICE OF MOTION AND MOTION
FOR ORDER AUTHORIZING
SETTLEMENT WITH GEORGE
ELVIN, VIRGINIA ELVIN, RAPTOR
PARTNERS, LLC, AVIARIAN, LLC,
AND ORNO PARTNERS, LLC;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATIONS OF
DAVID H. JUDD AND ANDREW S.
ROTTER; AND EXHIBITS

DATE: July 25, 2002

TIME: 10:00 a.m.

PLACE: 1415 State Street
Courtroom 201
Santa Barbara, CA 93101
[Judge Riblet]

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EXHIBIT B

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1 TO DEBTOR REED E. SLATKIN, MARY JO SLATKIN, THE OFFICIAL
2 COMMITTEE OF UNSECURED CREDITORS, THE OFFICE OF THE UNITED
3 STATES TRUSTEE, AND ALL PERSONS ENTITLED TO NOTICE PURSUANT TO
4 THE COURT'S ORDER OF AUGUST 8, 2001 LIMITING NOTICE:

5 NOTICE IS HEREBY GIVEN that, on the 10:00 a.m. calendar on July 25, 2002,
6 in Courtroom 201 of the United States Bankruptcy Court for the Central District of
7 California, Northern Division, located at 1415 State Street, Santa Barbara, California
8 93101-2511, the Honorable Robin Riblet, United States Bankruptcy Judge, will conduct a
9 hearing on the motion (the "Motion") to approve a Settlement Agreement and Mutual
10 General Release (the "Settlement") entered into between R. Todd Neilson, trustee (the
11 "Trustee") of the chapter 11 bankruptcy estate (the "Estate") of Reed E. Slatkin
12 ("Slatkin"), on one hand, and George Elvin ("Elvin"), Virginia Elvin, Raptor Partners,
13 LLC ("Raptor"), Aviarian Partners, LLC ("Aviarian"), and Orno Partners, LLC ("Orno")
14 (collectively the "Elvin Parties"), on the other hand. The Settlement relates to Slatkin's
15 investment in Raptor and its affiliates, i.e., Aviarian (which is 100% owned by Raptor) and
16 Orno (which is approximately 93% owned by Raptor). Specifically, the Trustee requests
17 an order that does each of the following:

- 18 1. Approves all of the terms of the Settlement, a copy of which is attached as
19 Exhibit 1;
- 20 2. Determines that the Settlement was made and entered into in good faith and in
21 an arms-length transaction;
- 22 3. Determines that the Settlement is fair, equitable, and in the best interests of
23 creditors and the Estate;
- 24 4. Determines that adequate notice of the hearing on this Motion was given;
- 25 5. Authorizes the parties to the Settlement to perform its terms, including (but
26 not limited to) those pertaining to the transfer of the Estate's interest in Raptor to Elvin;
- 27 6. Directs that the Trustee's transfer of the Estate's interest in Raptor to Elvin is
28 free and clear of all monetary liens, claims, and interests; and

1 12. During the afternoon of June 27, 2002, I had a telephone conversation with R.
2 Alexander Pilmer, Esq., one of the attorneys for the Official Committee of Unsecured
3 Creditors and special litigation counsel to the Trustee. In this conversation, Mr. Pilmer
4 told me that he had examined Mr. Slatkin under oath earlier that day about (among other
5 things) Mr. Slatkin's ownership interest in Raptor. Mr. Pilmer told me that Mr. Slatkin
6 testified that he had never heard of Slatkin Enterprises General Partnership ("Enterprises");
7 that, even if Enterprises had been formed, Mr. Slatkin would have been its sole owner; and
8 that, since Raptor was formed, Mr. Slatkin always believed that he, individually, was a
9 member in Raptor.

10 13. On June 18, 2002, I met in New York with Mr. Elvin, his attorney Steven D.
11 Oppenheim, Esq., and David H. Judd, CPA, one of the Trustee's accountants. The
12 purpose of this meeting was to interview Mr. Elvin and to discuss with him his business
13 relationship with Mr. Slatkin and the Estate's economic interest in businesses which
14 Messrs. Slatkin and Elvin jointly owned, directly and indirectly. On June 19, 2002, I
15 examined Mr. Elvin pursuant to the Rule 2004 Order and a subpoena issued in connection
16 therewith. Attached as **Exhibit 9** are the following excerpts from the "Rough ASCII"
17 transcript of that examination: the cover page and pp. 2, 6, 12-16, 23, 26-29, 55-57, 60-
18 61, 72-82. I have attached excerpts from the "Rough ASCII" version of the transcript
19 because I was informed by Paula L. Grider, the court reporter for this examination; that the
20 original and certified copy of Mr. Elvin's Rule 2004 examination would not be available
21 until on or after July 1, 2002, the date on which I anticipate that the Motion for approval of
22 the Settlement will be served.

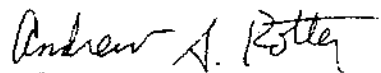
23 14. I have reviewed information prepared by Mr. Elvin's representatives
24 concerning some of the assets that Mr. Elvin will transfer to the Estate pursuant to the
25 Settlement. According to that information, both Headstrong Group, Inc. and CSL Lighting
26 Manufacturing, Inc. went bankrupt several years ago.

27 15. I am informed and believe that, on June 26, 2001, Timothy F. Morton, a
28 paralegal employed by GRM performed a search in the WestLaw UCC-ALL database.

1 among other things to determine whether there are any UCC liens against the Slatkin's
2 interest in Raptor. Mr. Morton performed this search at my request. Also at my request,
3 Mr. Morton searched that database for filings with respect to Reed Slatkin, Mary Jo
4 Slatkin, Raptor Partners, LLC, and Slatkin Enterprises General Partnership. I have
5 reviewed a print-out of the results of those searches and identified no liens relating to
6 Raptor or Slatkin Enterprises.

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I declare under penalty of perjury that the foregoing is true and correct and that I
executed his declaration on June 29, 2002, at Los Angeles, California.



Andrew S. Rotter

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