

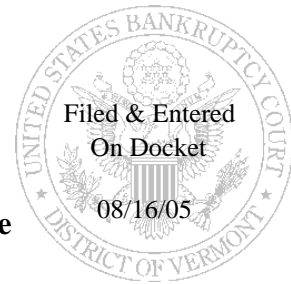
UNITED STATES BANKRUPTCY COURT  
DISTRICT OF VERMONT

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In re:  
**FIBERMARK, INC.,  
FIBERMARK NORTH AMERICA, INC., and  
FIBERMARK INTERNATIONAL HOLDINGS, INC.,  
Debtors.**

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Chapter 11 Case  
# 04-10463  
Jointly Administered



**ORDER**  
**STRIKING UNTIMELY SUPPLEMENT FILED BY AKIN GUMP**

The Court established a scheduling order for the consideration of motions to unseal the Examiner's report, as well as joinders and objections thereto (doc. # 1694) which set 9:00 a.m. on August 1, 2005 as the deadline for filing of motions and joinders supporting the unsealing of the Examiner's report (the "Report") as well as objections by the parties opposing the unsealing of the Report. The Court held a hearing on the issue on August 4, 2005. Akin Gump Strauss Hauer & Feld LLP ("Akin Gump") timely filed an opposition to the unsealing of the Report in which its primary argument was that the Report contains material protected by the attorney client privilege and work product doctrine. However, Akin Gump did not identify any specific portion of the Report that disclosed protected information (doc. # 1739). Akin Gump did not produce or file a privilege log prior to the hearing. Silver Point and other parties in interest pointed this out during the August 4, 2005 hearing (Tr. p. 16-23). Akin Gump's response was that it deliberately decided not to file privilege logs or to detail which excerpts of the Report it asserted to be privileged (Tr. p. 191). Then, on August 5, 2005, after both the deadline for filing objections to the unsealing of the Report and the hearing, Akin Gump filed "catalogs" or privilege logs with the Court (doc. # 1776) (the "Akin Catalogs").

**The Dispute**

The Debtors, Silver Point Capital LP and Wilmington Trust Company have requested that the Court strike the Akin Catalogs as untimely filed (docs. ## 1783, 1785, and 1787, respectively) (the "Motions to Strike").

In its response to the Motions to Strike, Akin Gump contends that the focus of the papers due on August 1<sup>st</sup> and the purpose of the hearing on August 4<sup>th</sup> was the determination of whether the Report should be unsealed, under §107, not for an assessment of the merits of the Report or its conclusions. That is correct. However, Akin Gump has argued that the privilege issues are critical to the §107 analysis. Akin must therefore sustain its burden of proof on the privilege argument if it wishes to keep the Report sealed on this basis. To the extent Akin sought to protect certain allegedly privileged communications

from disclosure through a continuation of the seal on the Report, August 1<sup>st</sup> was the deadline for it to present its arguments and evidence on this point.

### **The Logs are Untimely**

The Court finds that the Akin Catalogs were not filed by the Court established deadline and therefore are not timely. The post-hearing timing of the filing deprived other parties in interest any opportunity to respond to Akin Gump's assertion of the protections afforded by the attorney client privilege and work product doctrine prior to the hearing. This is an adequate basis for striking them from consideration. The Court has considered Akin Gump's arguments on this point and finds them to be without merit.

### **Akin Gump has Failed to Show Excusable Neglect for, or Justify, the Tardiness**

Moreover, Akin Gump's failure to include a motion for leave to file the Akin Catalogs after the deadline had expired, demonstrate excusable neglect for the tardy filing, or to file a statement justifying the tardy filing, constitute an additional ground for striking the Akin Catalogs from consideration in this contested matter. The Court has considered Akin Gump's responses on this point and finds them to be without merit.

### **Even if Timely, the Logs are Insufficient to Be Considered on the Merits**

Even if the Court were to consider the substance of the Akin Catalogs, the Court would find them to be fatally deficient. As the case law makes clear, the party seeking to protect material from disclosure based upon the attorney client privilege or work product doctrine must present specific logs and detailed arguments as to the basis for protection. The burden of establishing privilege is not "discharged by mere conclusory or *ipse dixit* assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed." In re Bonanno, 344 F.2d 830, 833 (2d Cir. 1965), see also, Saxholm v. Dynal, Inc., 164 F.R.D. 331, 333 (E.D. N.Y. 1996) ("Meeting the burden requires the submission of affidavits or other competent evidence to establish sufficient facts to prove the applicability of the privilege."). The information contained within the Akin Catalogs does not set forth enough information about its privilege argument or enough specificity about the particular provisions allegedly protected by the attorney client privilege or the work product doctrine for the Court to assess Akin Gump's entitlement to relief or to meet the standard of proof. See generally, Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541 (10th Cir.1984), cert. dismissed, 469 U.S. 1199 (1985) (assertion of privilege must be timely and must also be accompanied by sufficient information to allow the court to rule intelligently on the privilege claim); Marx v. Kelly Hart & Hallman,

P.C., 929 F.2d 8, 12 (1<sup>st</sup> Cir. 1991) (failure to make a timely objection on privilege grounds may result in holding that any or all objections have been waived). Thus, the Court finds the insufficiency of the Akin Catalogs to be an alternative basis for striking the Akin Catalogs.

**Conclusion**

On these grounds, the Court GRANTS the Motions to Strike and will not consider the Akin Catalogs in its analysis of whether to unseal the Report.\*

The striking of the Akin Catalogs in connection with the Motions to Unseal is without prejudice to Akin Gump's rights to assert its arguments under the attorney client privilege and work product doctrine in connection with any adversary proceeding or contested matter addressing the merits of the Report.

**SO ORDERED.**

August 16, 2005  
Rutland, Vermont



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Colleen A. Brown  
United States Bankruptcy Judge

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\* The Court's cursory review of the Akin Catalogs suggests a coincidence between this and AIG's assertion of privileges and proposed redactions. Since AIG's privilege log was timely filed and has resulted in redaction of material the Court finds to be protected, as a practical matter, some of the materials Akin Gump claims to have been improperly disclosed have been redacted.