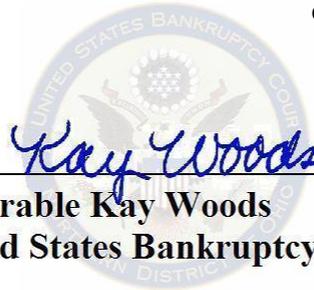


IT IS SO ORDERED.



Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

RANDALL JOSEPH HAKE and  
MARY ANN HAKE,

Debtors.

\*\*\*\*\*  
BUCKEYE RETIREMENT CO.,  
L.L.C., LTD.,

Plaintiff,

vs.

RANDALL JOSEPH HAKE and  
MARY ANN HAKE,

Defendants.

CASE NUMBER 04-41352

ADVERSARY NUMBER 06-4153

HONORABLE KAY WOODS

\*\*\*\*\*  
MEMORANDUM OPINION REGARDING PLAINTIFF'S MOTION FOR  
RECONSIDERATION ON ADMISSIBILITY OF PLAINTIFF'S EXHIBIT 13  
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Before the Court is Plaintiff's Motion for Reconsideration on Admissibility of Plaintiff's Exhibit 13 ("Motion for Reconsideration") filed by Plaintiff Buckeye Retirement Co., L.L.C.

Ltd. ("Buckeye") on November 16, 2007. Buckeye asks the Court to reconsider its ruling at trial that denied the admissibility of Plaintiff's Exhibit 13 ("Px 13") because Px 13 was protected by the attorney-client privilege. Buckeye reiterates the argument it made at trial that Debtor waived any attorney-client privilege that may have existed with regard to Px 13. Pursuant to this Court's policy and practice, Defendant Randall J. Hake ("Debtor") has properly not filed a response to the Motion for Reconsideration.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

#### **I. STANDARD FOR REVIEW**

There is no provision in the Federal Rules of Civil Procedure for a motion for "reconsideration." This type of motion, if filed within ten (10) days after entry of the underlying order or judgment, may be deemed to be a motion to alter or amend a judgment pursuant to FED. R. CIV. P. 59(e). *Foman v. Davis*, 371 U.S. 178, 181 (1962) ("The Court of Appeals' treatment of the motion to vacate as one under rule 59(e) was permissible, at least as to the original matter, and we will accept that characterization here.") Here, Buckeye filed the Motion for Reconsideration on November 16, 2007,

seeking "reconsideration" of the Court's ruling, on the admissibility of a trial exhibit, that was made on November 1, 2007, and confirmed on November 2, 2007. Thus, Buckeye's motion for Reconsideration is outside the ten-day period for a Rule 59 motion.

If a motion for reconsideration is filed beyond the ten-day period, it is considered a Rule 60(b) motion for relief from judgment. *Am. Ironworks & Erectors Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001) ("[A] 'motion for reconsideration' is treated as a motion to alter or amend judgment under Federal Rule of Civil Procedure Rule 59(e) if it is filed within ten days of entry of judgment. Otherwise, it is treated as a Rule 60(b) motion for relief from a judgment or order." (citation omitted)).

The purpose of a motion for relief from a judgment or order, pursuant to FED. R. CIV. P. 60, made applicable through FED. R. BANKR. P. 9024, is to correct manifest errors of law or present newly discovered evidence; under traditional standards, such motion should be granted only when there has been a mistake of law or fact or material evidence is discovered that was previously unavailable. *Corretjer Farinacci v. Picayo*, 149 F.R.D. 435, 437 (D. P.R. 1993). It is not sufficient that the movant is dissatisfied or unhappy with the prior order or judgment.

The bases for relief from judgment are enumerated in Rule 60:  
The moving party under Rule 60(b) is entitled to relief

from judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief from the operation of the judgment.

*Am. Ironworks & Erectors Inc.*, 248 F.3d at 899; see also FED. R. Civ. P. 60(b). "The decision as to whether relief should be granted is committed to the sound discretion of the court." 12 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE, § 60.22[1] (Matthew Bender 3d ed. 2002); see also *Nat'l. Union Fire Ins. Co. of Pittsburgh v. Alticor, Inc.*, 2007 U.S. App. LEXIS 22585, \*20 (6th Cir. Sept. 19, 2007) ("The decision to grant or to deny a Rule [60(b)] motion is discretionary with the district court. Our review of such a decision, therefore, is solely to determine whether the court abused that discretion."). "[R]econsideration of a previous order is an extraordinary remedy, to be used sparingly in the interest of finality and conservation of judicial resources." MOORE ET AL., *supra* p. 4, at § 59.30[4].

## **II. BUCKEYE'S ARGUMENT FOR RECONSIDERATION**

Buckeye simply presents the same argument in its Motion for Reconsideration that it made at trial: Debtor waived his right to assert attorney-client privilege with respect to Px 13 because he failed to assert the privilege or "request the return of Px 13 at . . . any other time prior to the conclusion of the trial of [this] adversary proceeding." (Mot. for Recons. ¶¶ 6, 7, 8, 9, 10, 14.) Buckeye adds that:

it would be fundamentally unfair for [Debtor] to reclaim confidentiality of a document already filed of public record in numerous fora, and a document relied upon by Buckeye in preparing its trial strategy in numerous cases. . . . Buckeye's lead trial counsel . . . was of the belief that any claim of attorney/client privilege had been waived, and thus . . . . relied on the admissibility of Px 13 in developing a significant portion of Buckeye's strategy for proving [Debtor's] fraudulent intent in th[is adversary proceeding.]

(Mot. to Recons. ¶ 15.) (citations omitted). As indicated above, Buckeye does not argue it has discovered new evidence or that there has been a change in controlling legal principles in arguing for this Court to reconsider the decision to exclude Px 13. Indeed, Buckeye does not allege any of the enumerated reasons in Rule 60(b) to justify reconsideration of this Court's prior order. Buckeye's only argument is that "the Court erred in ruling that Px 13 was covered by the attorney/client privilege" because "the undisputed facts show beyond doubt that any claim of privilege as to Px 13 has . . . been waived." (Mot. for Recons. ¶ 16.)

#### **A. Attorney-Client Privilege**

"The attorney-client privilege exists 'to protect confidential communications between a lawyer and his client in matters that relate to the legal interests of society and the client.'" *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983). "[W]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." *Constr. Indus. Servs. Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43, 48 (E.D.N.Y. 2001) (quoting *United States v. Kovel*,

296 F.2d 918, 922 (2d Cir. 1961)). The party asserting the attorney-client privilege with respect to communications has the burden of establishing the privilege exists. *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d at 450.

Under federal law, "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," [or] between the client and the client's lawyer . . . . The attorney client privilege "belongs to the client, and only the client can waive it."

*In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 255 (Bankr. S.D.N.Y. 2005) (emphasis added) (citation omitted).

Px 13 is a two-page letter from James Rusnov, President of Rusnov & Company, to Ronald Hamo, of Adams, Kelly & Associates, LLC, discussing the possibility of forming a limited liability company to pursue a potential redevelopment project. Debtor is mentioned as a proposed member of the limited liability company. Debtor is also listed at the end of the letter as recipient of a copy of the letter. There are numerous handwritten notes between the paragraphs and in the margins of Px 13. At trial, as shown below, the handwriting was identified as belonging to attorney Michael Rosenberg, who (i) serves as trustee for the Hake Family Irrevocable Trust and (ii) was Debtor's estate planning attorney, but who was not involved as counsel in this case.

Although the letter itself is not privileged, the handwritten notes on Px 13 constitute confidential communications between Mr.

Rosenberg, as Debtor's attorney, and Debtor. Mr. Rosenberg is neither the author nor the recipient of the letter; he received a copy of the letter from Mr. Hake, who is listed as receiving a copy. (Trial Tr. at 730.) The handwritten notes constitute confidential legal advice by Mr. Rosenberg to Debtors. Mr. Rosenberg testified that the handwriting was his and made in his capacity as Debtor's attorney rather than as trustee. (Trial Tr. at 728, 730, 735.) Indeed, Buckeye sought to have the document admitted into evidence for the express purpose of attempting to prove that Debtor's "estate planning" attorney provided him with certain advice. Buckeye admitted that it did not need and would not seek to have a "clean" copy of the document admitted into evidence since Buckeye's purpose in seeking admission of the document was solely for the marginal handwriting. (Trial Tr. at 927-28.)

Buckeye does not dispute that privilege exists with respect to Px 13; rather, its claim is that Debtor waived the privilege by virtue of his failure to assert such privilege earlier in the course of either (i) this adversary proceeding, (ii) the underlying bankruptcy case, or (iii) any other proceedings in which Buckeye has previously used Px 13.

#### **B. Waiver**

The attorney-privilege belongs solely to the client, and "[o]nly the client can waive [the] privilege[.]" *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 451 (S.D.N.Y. 1955). See also

81 AM.JUR. 2D *Witnesses* § 333 (2007). The Motion for Reconsideration is based entirely on Buckeye's argument that Debtor waived the attorney-client privilege with respect to Px 13. "However, courts have recognized that waiver of the attorney-client privilege is an extreme sanction and that it therefore should be reserved for cases of unjustifiable delay, inexcusable conduct, or bad faith in responding to discovery requests." *United Steelworkers of America, AFL-CIO-CLC v. IVACO, Inc.*, No. 1:01-CV-0426-CAP, 2003 U.S. Dist. LEXIS 10008, \*13 (N.D. Ga. Jan. 13, 2003).

In support of its waiver argument, Buckeye relies on *Calderwood, Jr. v. Omnisource Corp.*, No. 3:04-CV-7765, WL 1305092 (N.D. Ohio May 10, 2006), wherein the court discussed both voluntary waiver of the attorney-client privilege and inadvertent disclosure:

"[W]hen a party [voluntarily] reveals specific privileged communications, that party waives the privilege as to all communications on the same subject matter." . . . "When a producing party claims inadvertent disclosure, it has the burden of proving that the disclosure was truly inadvertent and that the attorney/client privilege has not been waived." . . . Where a producing party fails to object or seek to rectify an "inadvertent disclosure" promptly after learning of it, courts generally find the party has waived the privilege.

*Id.* at \*1 (alterations in original) (citations omitted).

In the instant case, however, Buckeye misapplies the holding in *Calderwood* because Debtor was not the party that produced Px

13.<sup>1</sup> Buckeye repeatedly argues in the Motion for Reconsideration that Debtor's failure to (i) assert the attorney-client privilege, and/or (ii) seek the "return" of Px 13 constitutes a waiver of any attorney-client privilege. Buckeye totally ignores the fact that Debtor did not produce the document for which he asserted privilege at trial.

As set forth below, the Court confirmed, prior to excluding the document, that (i) Debtor did not produce the document; and (ii) because Debtor had been unable to identify the handwriting on Px 13, he did not know that the note in question had been authored by Mr. Rosenberg in his capacity as Debtor's attorney. (Trial Tr. at 727-36.)

MR. ARMSTRONG: Your Honor, I tried to get [Px 13] into evidence earlier, and [Debtor] could not identify the handwriting in the margin. I'd like to prove it up with Mr. Rosenberg. It goes to fraudulent intent.

THE COURT: Well, I'll let you identify - see if he knows who the handwriting is. The letter is neither to nor from Mr. Rosenberg.

\* \* \*

MR. ARMSTRONG: Mr. Rosenberg, you've seen [Px 13] before, haven't you?

MR. ROSENBERG: Yes.

MR. ARMSTRONG: The handwriting on the letter in the right-hand margin, whose handwriting is that?

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<sup>1</sup>On day two of the trial of this adversary proceeding, Buckeye attempted to introduce Px 13 into evidence and was unable to establish a foundation for its admission through Debtor. (Trial Tr. at 403-06; 727-28.) Buckeye then attempted to provide that foundation through Mr. Rosenberg. (Trial Tr. at 727-33.)

MR. ROSENBERG: I think it's mine in the entire margin.

MR. ARMSTRONG: Yours in the entire margin?

MR. ROSENBERG: Yeah, I think all the notes on it are mine.

\* \* \*

THE COURT: Before we go any further with this, since Mr. Rosenberg has identified this as his handwriting, I don't know that - that [Debtor] has waived any attorney-client privilege with respect to any - any advice that Mr. - Mr. Rosenberg may have given. If you're talking to him in his capacity as the trustee, that's one thing. But I think you need to establish in what capacity this writing was - was made.

MR. ARMSTRONG: Your Honor, this - this letter we have had for years. It's been part of the record for years. There's - any - any attorney-client privilege has been waived. It has been filed as public record for years. There's been no assertion of the attorney-client privilege. It's been waived.

THE COURT: Are you going to ask Mr. Rosenberg what these notes mean?

MR. ARMSTRONG: Yes.

THE COURT: Well, then I think you may be getting into privileged communications.

\* \* \*

THE COURT: - I think you need to establish a record and see what - see what you're doing, but I - I want to know, if no one else does, in what capacity these notes were written.

MR. ARMSTRONG: Mr. Rosenberg, on [Px 13], this letter was provided to you by [Debtor], correct?

MR. ROSENBERG: Yes.

MR. ARMSTRONG: And the handwriting, as we've established in the right-hand margin, all of the handwriting on it except the signature is your

handwriting, correct?

MR. ROSENBERG: Yes.

MR. ARMSTRONG: At this time, Your Honor, I offer [Px 13].

MR. DETEC: I'm going to object, Your Honor.

THE COURT: Speak into the microphone, please.

MR. DETEC: Oh, sorry. It's - we have not established from whom [Buckeye] received this document. Only [Debtor] can waive the attorney-client privilege, not his attorney. And so we have no foundation again to address the attorney-client privilege or the admissibility of this letter. And only [Debtor] can waive the attorney-client privilege.

\* \* \*

MR. DETEC: Mr. Rosenberg was personally sued in the lawsuit and produced it as a document request to Mr. Rosenberg as a defendant in that lawsuit, not as Mr. Hake's attorney.

MR. STEINER: That's not an issue for today. That would be an issue between Mr. Rosenberg and his client.

MR. DETEC: It's absolutely - the circumstances of the production are absolutely relevant to this issue.

THE COURT: It is very clear to this Court that [Debtor] did not produce this document. I don't think there's any question about that. Is that correct, Mr. Armstrong?

MR. ARMSTRONG: It is very clear to the Court [Debtor] did not produce this document.

(Tr. pp. 727-733.)

MR. O'KEEFE: Mr. Rosenberg, you've acknowledged that the handwriting on Exhibit 13 is yours. Can you state for the Court and for the record the capacity in which those notes were prepared, whether as trustee of the Trust or as counsel to Mr. Hake?

MR. ROSENBERG: Attorney.

MR. O'KEEFE: Your Honor, I think we are moving for the admission or we did move for the admission. So that the record is clear, it would probably be appropriate now that he has indicated that he prepared those notes in his capacity as counsel for the Court to rule on the pending objection.

THE COURT: I'm going to sustain the objection, even though this letter has been around apparently, based upon the information that Mr. Steiner was saying. It was not produced by Mr. Hake. Only Mr. Hake can waive the privilege, and as Mr. Detec has entered the objection on the basis of attorney-client privilege, I'm taking that to be Mr. Hake's assertion of the privilege. So this letter's out.

(Tr. pp. 735-736.)

As the *Calderwood* court noted, "[w]here the producing party fails to object or seek to rectify an 'inadvertent disclosure' promptly after learning of it, courts generally find the party has waived the privilege." (*Calderwood* at \*1.) Here, Mr. Rosenberg - not Debtor - was the producing party and, as noted above, Mr. Rosenberg did not have the ability to waive the privilege for his client.

The Court does not have to engage in a lengthy analysis to determine whether Debtor waived the attorney-client privilege through inadvertent disclosure of Px 13 because Debtor did not produce it, inadvertently or otherwise. Counsel for Buckeye expressly acknowledged, "Your Honor, [Px 13] was not produced to the plaintiff by [Debtor] or his counsel." (Trial Tr. at 927.)

It is undisputed that Mr. Rosenberg produced Px 13. Mr. Rosenberg produced the document in response to either: (i) a subpoena, dated November 2, 2006, issued by Buckeye to him as

Debtor's estate planning attorney in connection with this adversary proceeding (filed as Ex. EE to Notice of Filing of Proofs of Service of Subpoenas, filed by Buckeye on November 10, 2006, Doc. # 16); or (ii) a subpoena directed to Mr. Rosenberg as defendant in a separate state court lawsuit brought by Buckeye. (See Tr. pp. 732, 733, 927.) Buckeye asserts in the Motion for Reconsideration that Mr. Rosenberg produced Px 13 in response to the November 2, 2006, subpoena. In responding to Buckeye's subpoena in this adversary proceeding, Mr. Rosenberg definitely did not waive - and indeed, expressly asserted - the attorney-client privilege on behalf of his client. In moving to quash the subpoena, Mr. Rosenberg stated: "Furthermore, neither Randall Hake, Mary Ann Hake nor any of the related entities have waived their attorney-client privilege, which prohibitively limits the scope of any examination that might otherwise proceed as to Letson Griffith [Mr. Rosenberg's law firm]." (Motion of Letson, Griffith, Woodall, Lavelle & Rosenberg Co. L.P.A. to Quash Subpoena of Buckeye Retirement Co. LLC Ltd. at 2, filed November 30, 2006, Doc. # 20.) As a consequence, even though Buckeye asserts that the Court raised the issue of privilege concerning Px 13 *sua sponte*, the privilege issue previously had been raised by Mr. Rosenberg in this Court prior to production of any documents.

As discussed above, only the client can waive the attorney-client privilege in connection with confidential communications between the client and his attorney; the privilege does not reside

in the attorney and cannot be waived by the attorney. Therefore, Buckeye's argument that Debtor waived the privilege with respect to a document that he did not produce is not well founded.

Buckeye tries to bolster the waiver argument on the bases of: (i) Debtor's "inexcusable delay" in asserting the privilege, (ii) the filing of Px 13 "of public record in numerous fora" with Debtor's knowledge and "without [Debtor] claiming privilege[,]" and (iii) Buckeye's "reli[ance] on the admissibility of [Px 13] in developing a significant portion of Buckeye's strategy" in this adversary proceeding. (Mot. for Recons. ¶ 15.) These arguments are not persuasive and are unavailing.

First, the argument concerning the alleged "inexcusable delay" in asserting privilege is not meritorious because Debtor did not know whose handwriting was in the margin of Px 13. (See Tr. pp. 727, 731, 732, 928.) Debtor could not assert the privilege until he became aware, upon the testimony of Mr. Rosenberg, of the significance of the marginal handwriting. At that time, Debtor immediately objected to the admission of Px 13 on the basis that it was the advice of his legal counsel and thereby protected by the attorney-client privilege. Despite Buckeye's characterization to the contrary, there was no delay in Debtor's assertion that Px 13 was privileged communication between himself and his attorney.

Next, Buckeye's repeated filings of Px 13 in proceedings in other courts does not and cannot waive the attorney-client privilege. This argument is particularly disingenuous since the

other proceedings in which Buckeye filed Px 13 were, and continue to be, stayed against Debtors. Furthermore, despite Buckeye's repeated statement that Buckeye had possession of Px 13 "for years" (Trial Tr. 729, 731), the Motion for Reconsideration demonstrates that the document was produced in January 2007 in response to a subpoena issued by Buckeye upon Mr. Rosenberg's law firm in November 2006. (Ex. A to Mot. for Reconsid.) Thus, Buckeye seriously overstates the length of time it had the document (*i.e.*, approximately nine months). Buckeye also knew - unequivocally - that all proceedings in which Buckeye attempted to use Px 13 were stayed against Debtor. Debtor had no obligation to respond or object to Buckeye's filing of or citation to the privileged document because the stay applied to Debtor in the cases in which Buckeye attempted to utilize the privileged document.

Moreover, Buckeye may have misrepresented the content of Px 13 in those other proceedings.<sup>2</sup> No matter how many times Buckeye files Px 13 and/or how it (mis)characterizes the document, such conduct does not constitute Debtor's waiver of the attorney-client privilege. In order to waive the privilege with respect to Px 13, Debtor must have produced it. Since Debtor did not produce Px 13 and did not know it contained the handwriting of his attorney, the

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<sup>2</sup>Buckeye states, "Rosenberg wrote back to Hake that 'you and MA [Mary Ann Hake] can not take anything in your own name.'" (Mot. for Recons. ¶ 8.) There is no evidence that the "you" in the note refers to Randall J. Hake nor is there any evidence that "MA" refers to Mary Ann Hake. Even if Buckeye argues that such identification is self-evident, there is no basis whatsoever to conclude, from the content of Px 13, that Mr. Rosenberg "wrote back" to Debtors concerning the substance of the marginalia.

fact Buckeye has filed Px 13 in numerous proceedings in other courts does not - and cannot - waive the attorney-client privilege with respect to Px 13.

Last, Buckeye's reliance on Px 13 in developing trial strategy totally lacks merit. Buckeye knew from Debtor's deposition testimony prior to trial that Debtor could not identify the handwriting on Px 13. (Trial Tr. at 731-32.) Buckeye's citation to the deposition testimony of Debtor's son, Christopher Hake, is equally unpersuasive because Christopher Hake was also unable to identify the handwriting on Px 13. (Ex. C to Mot. for Reconsid.) To the extent Buckeye's counsel counted on Px 13 to be admissible at trial, he did so at his peril because he had no factual basis to anticipate that the document would be admissible. Indeed, he knew prior to trial that neither Debtor nor Debtor's son could identify the handwriting on Px 13. As a consequence, Buckeye's reliance on the admissibility of Px 13 in preparing for trial was not justified.

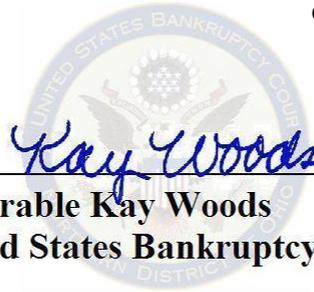
#### **IV. CONCLUSION**

Because the Court finds that Debtor neither produced Px 13 nor waived any privilege with respect to it, it finds no mistake in its previous order denying admissibility of Px 13. Plaintiff's Motion for Reconsideration on Admissibility of Plaintiff's Exhibit 13 is denied.

An appropriate Order will follow.

# # #

IT IS SO ORDERED.



Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

RANDALL JOSEPH HAKE and  
MARY ANN HAKE,

Debtors.

\*\*\*\*\*

BUCKEYE RETIREMENT CO.,  
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Defendants.

\*\*\*\*\*

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION  
\*\*\*\*\*

For the reasons set forth in this Court's Memorandum Opinion entered on this date, Plaintiff's Motion for Reconsideration on Admissibility of Plaintiff's Exhibit 13 (Doc. # 221) is denied.

IT IS SO ORDERED.

# # #