

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

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In re:	:	Chapter 11
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DBMP LLC, <sup>1</sup>	:	Case No. 20-30080 (JCW)
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Debtor.	:	
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**MOTION OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY  
CLAIMANTS AND FUTURE CLAIMANTS' REPRESENTATIVE TO COMPEL THE  
DEBTOR TO PRODUCE ALL SETTLEMENT DOCUMENTS WITHHELD ON THE  
BASIS OF PRIVILEGE OR, IN THE ALTERNATIVE, TO PRECLUDE THE  
DEBTOR FROM SELECTIVELY OFFERING EVIDENCE IN SUPPORT OF THE  
TRUST DISCOVERY MOTION**

The Official Committee of Asbestos Personal Injury Claimants (the “Committee”) and Future Claimants’ Representative (the “FCR” and together with the Committee, the “Movants”) hereby submit this motion (the “Motion”) seeking an order to (i) compel DBMP LLC (the “Debtor”) to produce all documents in its possession, custody, or control related to the settled claims that the Debtor discusses in detail in the *Debtor’s Motion for Bankruptcy Rule 2004 Examination of Asbestos Trusts* [Dkt. No. 416] (the “Trust Discovery Motion”) and the *Reply in Support of Debtor’s Motion for Bankruptcy Rule 2004 Examination of Asbestos Trusts* [Dkt. No. 949] (the “Trust Discovery Reply” and, together with the Trust Discovery Motion, the “Trust Discovery Pleadings”), including claimant files withheld on the basis of privilege or work-product protection relating to the settlement history of it and CertainTeed<sup>2</sup> with individuals who asserted

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are 8817. The Debtor’s address is 20 Moores Road, Malvern, Pennsylvania 19355.

<sup>2</sup> For purposes of this Motion, “CertainTeed” refers to (1) CertainTeed Corporation and CertainTeed LLC, as that entity existed prior to the Texas divisional merger on October 23, 2019, and (2) CertainTeed LLC, as it exists after the divisional merger. When the context requires greater specificity, “former CertainTeed” refers to pre-divisional merger CertainTeed and “current CertainTeed” refers to post-divisional merger CertainTeed.

asbestos-related personal-injury claims (the “Claim Files”) and any settlement memoranda, communications, or other memoranda from local counsel discussing settlement (the “Settlement Documents”) and together with the Claim Files, the “Withheld Documents”) or, in the alternative, (ii) precluding or limiting the Debtor from offering any testimony or other evidence that alleged non-disclosures by asbestos claimants in the tort system had any impact on settlement values or are otherwise relevant to the liabilities of the Debtor, the administration of the Debtor’s estate, or the formulation of a plan. In support of this Motion, the Movants respectfully states as follows:

### **PRELIMINARY STATEMENT**<sup>3</sup>

Once again, the Debtor seeks to use the attorney client privilege and work-product protections as both a sword and a shield. The Debtor asserts that it and CertainTeed “settled the vast majority of [asbestos] claims not because they posed a material liability risk, but because it was far cheaper than actively defending all cases and trying cases to verdict”<sup>4</sup> and, further, that it and CertainTeed settled these claims at inflated values because they lacked access to information about plaintiffs’ exposures to other asbestos products. While continuing to advance these arguments, the Debtor continues to selectively assert privilege claims over the Withheld Documents—the very documents that would show what the Debtor and CertainTeed knew at the time of settlement and what factors they considered in reaching those settlements. This is a classic sword and shield maneuver that unfairly prejudices the Movants and cannot be countenanced by this Court.

In support of its Trust Discovery Pleadings, the Debtor presents excerpts from eight case files winnowed from thousands as the focus of the Trust Discovery Motion (the “Selected

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<sup>3</sup> Any capitalized term not defined in the Preliminary Statement shall have the meaning ascribed to it subsequently herein.

<sup>4</sup> Trust Discovery Motion at 6 n.6.

Plaintiffs”) to argue that it needs discovery into the claims that thousands of the Debtor’s and CertainTeed’s former creditors filed against third-party trusts. Putting aside the merits of that argument, dubious as they are, the Court should preclude the Debtor from using selective excerpts from eight cherry-picked cases, out of thousands of case files, in support of the Debtor’s Trust Discovery Pleadings while it simultaneously shields contemporaneous information about why CertainTeed settled the Selected Plaintiffs’ claims, what information it had available when it chose to settle, and which factors it considered in reaching a settlement. This Court should compel the Debtor to produce the Withheld Documents or, alternatively, preclude the Debtor from offering any evidence or advancing any arguments related to the Debtor’s claim that evidence / information suppression had an impact on the values of past settlements with asbestos personal injury claimants.

The Debtor’s decision to allege that its settlements were tainted by evidence suppression has thoroughly waived any privilege or protection otherwise applicable to the Withheld Documents. *See Dudley v. City of Kinston*, No. 4:18-CV-00072-D, 2021 WL 1222798, at \*7–8 (E.D.N.C. Mar. 31, 2021) (holding that plaintiff waived privilege by placing attorney-client communications directly at issue in the case); *see also In re Omnicom Grp., Inc. Sec. Litig.*, 233 F.R.D. 400, 413 (S.D.N.Y. 2006) (“Implied waiver of the privilege will also be recognized—even in the absence of a party’s disclosure of privileged material—when that party makes factual assertions, the truthfulness of which may be assessed only by an examination of the privileged communications or documents.”). For this Court to authorize the discovery sought in the Trust Motion under Rule 2004, the Debtor must establish that the discovery sought “bear[s] some relation to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right

to a discharge.” *In re Yahweh Ctr., Inc.*, 2017 WL 327473, at \*2 (Bankr. E.D.N.C. Jan. 23, 2017). By presenting evidence related to Selected Plaintiffs’ cases, as well as the testimony of Debtor’s witnesses that purports to show why the Debtor and CertainTeed settled claims at the values they did, the Debtor has put facts at issue whose truthfulness may be assessed only by examination of the Withheld Documents. To be clear, such a waiver extends to all of the Debtor’s and CertainTeed’s Claim Files, not simply the files of the cherry-picked Selected Plaintiffs.<sup>5</sup>

The Debtor has made bare, factual allegations about the reasons why it and CertainTeed settled claims at the values they did in order to establish a threshold issue under Rule 2004: that the information sought relates to the Debtor’s liabilities. The Movants and the Court are thus entitled to a full and fair understanding of those allegations. *Cf. McKinley v. Casson*, 80 A.3d 618, 623 (Del. 2013) (explaining that courts will “refuse[] to allow a party to make bare, factual allegations, the veracity of which are central to resolution of the parties’ dispute, and then assert the privilege as a barrier to prevent a full understanding of the facts disclosed” (internal quotation marks omitted)).

The Debtor cannot have it both ways. If the Debtor wants to assert that it and CertainTeed “settled the vast majority of claims not because they posed a material liability risk, but because it was far cheaper than actively defending all cases and trying cases to verdict”<sup>6</sup> and, further, that it and CertainTeed settled these claims at inflated values because they lacked information about plaintiffs’ other exposures, fairness requires that the Movants be given access to the contemporaneous information necessary to test or rebut the Debtor’s assertions about the factors underlying these settlements. *See* Adv. Dkt. No. 343, ¶ 98 (“Obviously, DBMP and new

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<sup>5</sup> The Committee reserves all rights to seek additional relief related to discovery of CertainTeed’s and the Debtor’s case files.

<sup>6</sup> Trust Discovery Motion at 6 n.6.

CertainTeed cannot have it both ways. The attorney-client and work-product privileges may not be used as both shield and sword.”) (citing *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995); *see also Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010)); *In re Lidoderm Antitrust Litig.*, No. 14-MD-02521-WHO, 2016 WL 4191612, at \*6 (N.D. Cal. Aug. 9, 2016) (“[D]efendants’ position is essentially this: ‘Trust us. The justifications we are putting forward here *are* why we settled.’ But in order to test or rebut defendants’ assertions, in fairness, plaintiffs should be given access to contemporaneous information . . .”).

Accordingly, for all of these reasons, and as set forth in more detail below, the Court should grant the Motion and compel the Debtor to produce the Withheld Documents.

### **JURISDICTION AND VENUE**

1. This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and may be determined by the Bankruptcy Court. For purposes of a hearing on this Motion, venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The authority for the relief requested is Federal Rules of Evidence 502, 802, and 804 and the Federal Rules of Bankruptcy Procedure 7034, 7037, and 9014.

### **MEET AND CONFER CERTIFICATION**

2. In accordance with Federal Rule 37(a)(1), the Movants hereby certify that they have conferred in good faith with the Debtor in an effort to obtain the Withheld Documents without court action.

### **BACKGROUND**

3. On August 19, 2020, the Debtor filed the Trust Discovery Motion.

4. On June 11, 2021, the Committee filed its *Objection of the Official Committee of Asbestos Personal Injury Claimants to Debtor's Motion for Bankruptcy Rule 2004 Examination of Asbestos Trusts* [Dkt. No. 872] (the "Committee Objection"), and the FCR filed his *Objection of the Future Claimants' Representative to Debtor's Motion for Bankruptcy Rule 2004 Examination of Asbestos Trusts* [Dkt. No. 870].

5. On July 29, 2021, the Debtor filed the Trust Discovery Reply.

6. The Debtor has asserted in the Trust Discovery Motion and the Trust Discovery Reply that it and CertainTeed paid inflated values in their settlements with the Selected Plaintiffs—and with thousands of other plaintiffs—because the Debtor and CertainTeed lacked adequate information about the plaintiffs' other exposures to asbestos. *See* Trust Discovery Motion ¶¶ 22–34; Trust Discovery Reply, Exhibit C.

7. Thereafter, the Movants sought discovery into the Settlement Documents and Claims Files that would indicate why and how the Debtor or CertainTeed settled a case at a particular value and what information was considered or otherwise available at the time of settlement.<sup>7</sup> To date, however, the Debtor has refused to produce this information, claiming that it is protected by the attorney-client privilege and work-product immunity. Indeed, the Debtor has refused to even disclose how the Selected Plaintiffs were identified, claiming that information is protected by attorney-client privilege and work-product immunity. *See* Deposition of Michael

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<sup>7</sup> The Movants requested that the Debtor produce "all Documents or Communications regarding authorization for counsel to settle asbestos-related personal injury claims for mesothelioma." *DBMP LLC's Responses and Objections to the Official Committee of Asbestos Personal Injury Claimants' and Future Claimants' Representative's Second Requests for Discovery Pursuant to Federal Rules of Bankruptcy Procedure 7026, 7033, 7034, 7036, and 9014* (May 5, 2020) (attached hereto as Exhibit C). The Debtor refused to produce any such documents. *See id.*; *see also* Letter from Elizabeth Geise to Sharon M. Zieg, p. 4 (April 14, 2021) (attached hereto as Exhibit D) ("Any emails discussing settlement authority would be protected from disclosure by the attorney-client and/or work product privileges. Hence, DBMP has nothing to produce in response to this Request.").

Starczewski (“Starczewski Dep. Tr.”) at 116:1-23 (objecting to a question regarding how the Selected Plaintiffs were identified for the Trust Discovery Motion).

8. The Withheld Documents are necessary to allow the Movants to test or rebut the Debtor’s assertions about why claims were settled at a particular value. The Movants and the Court are entitled to a full and fair understanding of the veracity of the Debtor’s assertions and need the Withheld Documents in order to adequately respond to the Trust Discovery Motion.

### **RELIEF REQUESTED**

9. The Movants respectfully request entry of an order, substantially in the form attached hereto as **Exhibit A**, compelling the Debtor to produce the Withheld Documents. In the alternative, the Movants respectfully request entry of an order, substantially in the form attached hereto as **Exhibit B**, precluding the Debtor from offering any testimony or evidence that the Selected Plaintiffs’ or any other plaintiffs’ alleged non-disclosures had an impact on CertainTeed’s or the Debtor’s settlement values or are otherwise relevant to the liabilities of the Debtor or any matter which may affect the administration of the Debtor’s estate or formulation of a plan.

### **BASIS FOR RELIEF REQUESTED**

#### **I. THE DEBTOR HAS WAIVED ANY CLAIM OF PRIVILEGE OVER THE WITHHELD DOCUMENTS BY PLACING THE INFORMATION AT ISSUE.**

10. The Court should require the Debtor to produce the Withheld Documents without redactions and in their entirety. The Debtor, as the party asserting privilege over the Withheld Documents, has the burden of demonstrating both that a privilege or protection exists and that it has not been waived. *See, e.g., United States v. Bolander*, 722 F.3d 199, 222 (4th Cir. 2013); *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011). As the Fourth Circuit has previously held, the attorney-client privilege should be narrowly construed under federal law. *See United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1993) (noting narrow construction of

privilege); *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990). Indeed, one reason for narrowly construing privilege is to avoid “hinder[ing] an investigation into the true facts.” *Suggs v. Whitaker*, 152 F.R.D 501, 505 (M.D.N.C. 1993); *see also Hoskins v. Liberty Mut. Grp.*, 2020 U.S. Dist. LEXIS 288658 (S.D. Oh. Dec. 4, 2020) (same).

11. In the Trust Discovery Pleadings, the Debtor has expressly put at issue whether CertainTeed relied upon the absence of other asbestos exposures in resolving thousands of previously settled claims for which it now seeks third-party discovery pursuant to Bankruptcy Rule 2004. The Debtor has also expressly put at issue the reasons why CertainTeed settled claims at the values it did and the information or other factors that went into the decision to settle a particular claim. Thus, the Debtor cannot selectively offer some information on this contention, while maintaining privilege or immunity to other information, such as the Withheld Documents. *Cf. Dudley v. City of Kinston*, No. 4:18-CV-00072-D, 2021 WL 1222798, at \*7–8 (E.D.N.C. Mar. 31, 2021); *In re Lidoderm Antitrust Litig.*, No. 14-MD-02521-WHO, 2016 WL 4191612 (N.D. Cal. Aug. 9, 2016); *Cincinnati Ins. Co. v. Zurich Ins. Co.*, 198 F.R.D. 81, 86 (W.D.N.C. 2000) (holding that excess insurer waived work-production protection when it presented testimony that its lawyer disagreed with primary insurer’s decision to reject settlement offer); *LendingTree, LLC v. Zillow, Inc.*, No. 3:10-cv-439-FDW-DCK, 2013 WL 6385297, at \*6 (W.D.N.C. Dec. 6, 2013) (finding a waiver of privilege when a company asserted that it had no knowledge of allegations until in-house counsel informed the CEO and thus impliedly put at issue the communications in which in-house counsel learned of the allegations).

12. In *Lidoderm*, for instance, the plaintiffs alleged that a settlement in a patent case was anti-competitive, and the parties to the settlement defended on the grounds that they entered into the settlement for reasons that were not anti-competitive. The plaintiffs argued that the

defendants had put attorney-client communications at issue because the defendants' argument that the settlement was not anti-competitive depended on what the defendants believed at the time of the settlement. The defendants unsuccessfully countered that "at issue waiver only occurs when a party makes an affirmative choice to rely on attorney advice for a claim or defense." *Lidoderm*, 2016 WL 4191612, at \*2. The court explained that the defendants' conception of at-issue waiver was "too narrow": "The privilege which protects attorney-client communications may not be used both as a sword and a shield. Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." *Id.* at \*3–4 (quoting *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992)). According to the *Lidoderm* court, "in practical terms, this means that parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials. The party asserting the claim is said to have implicitly waived the privilege." *Id.* at \*3 (quoting *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003)).<sup>8</sup>

13. Accordingly, the *Lidoderm* court held that a party could not testify about its reasons for entering into a settlement and still rely on attorney-client privilege to block discovery into its reasons for entering into the settlement: "defendants' position is essentially this: 'Trust us. The justifications we are putting forward here *are* why we settled.' But in order to test or rebut

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<sup>8</sup> Courts in the Fourth Circuit have previously applied two different tests to determine whether an "at issue" waiver has occurred—the *Hearn* test and the *Rhone-Poulenc* test. Under the *Hearn* test, courts consider the following three factors: (1) whether the assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; (2) whether through the affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) whether the application of the privilege would deny the opposing party access to information vital to his defense. See *Dudley*, 2021 WL 1222798, at \*7 (E.D.N.C. Mar. 31, 2021). The *Rhone-Poulenc* test is largely similar to *Hearn*, with one exception. Under the *Rhone-Poulenc* test, waiver only occurs when the party asserting the privilege makes use of the privileged information, "like when it attempts to prove [a] claim or defense by disclosing or describing an attorney client communication." *Id.* (citing *Rhone-Poulenc*, 32 F.3d 851, 863 (3d Cir. 1994)). Here, a waiver has occurred under either test as the Debtor has plainly offered portions of privileged information (information relating to the Selected Plaintiffs) to prove a claim or defense. See e.g., *Starzewski Dep. Tr.* at 142:1-14 ("There are obviously factors that can affect [Old CT's] settlements, for instance, nondisclosure of information, while [Old CT] attempts to avoid having to expend defense costs.").

defendants’ assertions, in fairness, plaintiffs should be given access to contemporaneous information regarding those topics that necessarily implicate attorney-client advice.” *Id.* at \*6.

14. The court explained that “the party holding the privilege [must] produce the privileged materials if it wishes to go forward with its claims implicating them.” *Id.* at \*3. Effectively, “the holder of the privilege [has] a choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it.” *Id.* The defendants offered a “sky-is-falling protest” that the choice offered by the court would “eviscerate” the attorney-client privilege and leave the defendants in an untenable position. *Id.* at \*4, \*6. The court would have none of it: “Defendants’ position would put plaintiffs in a truly untenable posture – requiring them to challenge the subjective beliefs defendants assert to justify the [settlement] post-hoc without access to the contemporaneous information and documents defendants *actually* relied on.” *Id.* at \*6.

15. Similarly, in the *Cincinnati Insurance* case, the District Court for the Western District of North Carolina held that an excess insurance carrier had impliedly waived work-product protection regarding its internal assessment of a claim when it attempted to introduce evidence that it had disagreed with the primary insurer’s decision to reject the plaintiff’s settlement offer. *See Cincinnati Ins. Co. v. Zurich Ins. Co.*, 198 F.R.D. 81 (W.D.N.C. 2000).

16. In *Cincinnati Insurance*, the primary insurer declined to settle a claim within policy limits and thereafter suffered a jury verdict substantially in excess of the policy limits. The excess insurer sued the primary insurer for failing to settle the claim within the limits of the primary policy. The excess insurer attempted to introduce testimony from its attorney who had argued in favor of the settlement offer, but when the primary insurer sought discovery into the excess

insurer's pretrial valuation of the claim, the excess insurer asserted work-product immunity. *Id.* at 84.

17. The District Court held that the excess insurer had impliedly waived any work-product immunity by placing its settlement position at issue. *Id.* at 87. The District Court noted that the Fourth Circuit recognizes that an implied waiver of work-product doctrine extends to an attorney's opinion work-product "where a litigant does attempt to use an opinion as its sword, all the while shielded by the work product doctrine." *Id.* at 87. Because the excess insurer in *Cincinnati Insurance* had attempted to introduce its opinion regarding the settlement offer, it waived any work-production protection related thereto. *Id.* The court concluded that "this is surely an implied waiver of privilege as to both fact and opinion work product." *Id.*

18. Here, the Debtor has asserted, over and over, that it settled to avoid defense costs and overpaid claims because it lacked evidence of claimants' other exposures:

- "[CertainTeed] and DBMP settled the vast majority of claims not because they posed a material liability risk, but because it was far cheaper than actively defending all cases and trying cases to verdict." Trust Discovery Motion, at 6 n.6.
- "I believe the settlements that [were] negotiated were generally fair in the capacity of the tort system and based on the information and knowledge we had at the time. There are obviously factors that can affect those settlements, for instance, nondisclosure of information, while CertainTeed [] attempts to avoid having to expend defense costs." Starczewski Dep. Tr. at 141:25-142:14.
- "It is true that [CertainTeed] settled a large number of claims not based on any case-specific evaluation of its liability, but instead to avoid high defense costs." Trust Discovery Reply ¶ 25.
- "DBMP has good reason to believe it was subjected to the same pattern and practice of evidence manipulation that the court found in Garlock." Trust Discovery Motion ¶ 20.
- "DBMP is seeking this discovery because it believes that it and [CertainTeed] were subjected to a pattern and practice of non-disclosure of bankruptcy trust claims and similar alternative exposure evidence for years." Trust Discovery Reply, Exhibit C at 13.

19. In the Trust Discovery Motion, the Debtor has also asserted, over and over, that the Selected Plaintiffs did not disclose other exposures before settling their claims against CertainTeed:

- “The production included a declaration signed by Plaintiff 1 that had not been produced in discovery and that told a diametrically different story about his Navy exposures, providing numerous specific examples of his exposure to asbestos-containing insulation in the Navy.” Trust Discovery Motion ¶ 21.
- “In connection with the cases I worked on, I was aware of the facts that were developed during the litigation that indicated there were instances of nondisclosure of other exposures in the course of the case.” Starczewski Dep. Tr. at 118:23-119:11.
- “[A]fter a defense verdict was reversed on appeal and the court ordered a new trial, [former CertainTeed] learned in discovery that shortly after the first verdict, Plaintiff 2 submitted 23 bankruptcy claims.” Trust Discovery Motion ¶ 22.
- “DBMP has determined from the public estimation record in the Garlock proceeding that there were additional cases where material exposure evidence was withheld from [former CertainTeed] before it agreed to a significant settlement with the plaintiff.” Trust Discovery Motion ¶ 24.
- “[A]vailable discovery from the Garlock case shows that Plaintiff 4 subsequently alleged numerous other exposures in asbestos trust and bankruptcy filings that were never disclosed to [former CertainTeed].” Trust Discovery Motion ¶ 26.
- “Plaintiff 5 submitted a PIQ in Garlock showing that he filed 23 trust claims, starting in late December 2009, three weeks after his deposition. At least 12 of those trust claims were submitted before [former CertainTeed] settled the case. None of these claim forms were ever turned over in discovery.” Trust Discovery Motion ¶ 28.
- “The Garlock record reveals that Plaintiff 6 ultimately filed 13 more trust claims (in addition to the single claim disclosed in his case), which his attorneys started filing less than a week after plaintiff settled with all remaining defendants during jury selection. All of these claims were based on products and exposures not disclosed in his tort case.” Trust Discovery Motion ¶ 30.
- “Plaintiff 7’s PIQ in the Garlock case indicates she filed 14 trust claims, 12 of which reflect exposures that were never disclosed in her tort case.” Trust Discovery Motion ¶ 32.

20. Moreover, in the Trust Discovery Reply, the Debtor continually asserted that it considered, or would have considered, other exposures when settling a case:

- “[T]hose trust claims, along with any other evidence of exposure that [former CertainTeed] may have been able to develop through investigation, would have provided an explanation for the amosite fiber in Plaintiff 2’s lungs and a cause for his mesothelioma.” Trust Discovery Reply, Exhibit C at 7.
- “[CertainTeed] settled this case after Plaintiff 2’s discovery abuses came to light.” Trust Discovery Reply, Exhibit C at 9.
- “If those affidavits had been disclosed prior to the witness’s death, [CertainTeed]’s counsel would have asked him about Plaintiff 3’s husband’s exposure to those 35 products.” Trust Discovery Reply, Exhibit C at 12.
- “[Former CertainTeed] settled [Plaintiff No. 3’s] case after discovering the non-disclosure.” Trust Discovery Reply, Exhibit C at 13.
- “Had these and whatever exposures are shown in the other 21 claim forms been disclosed in discovery, [former CertainTeed] could have questioned Plaintiff 4 about them and otherwise investigated these alternative exposures. Plaintiff 4’s non-disclosure denied [former CertainTeed] the opportunity to do that. While it is impossible to know the outcome in the absence of such extensive non-disclosure, there is no doubt that [former CertainTeed] would have evaluated the case quite differently given the significant evidence to support non-party allocation it would then have had.” Trust Discovery Reply, Exhibit C at 21.
- “Due to Plaintiff 5’s non-disclosure, however, [former CertainTeed] settled the case without knowing anything about any of the 23 trust claims or the exposures underlying them. The case would have looked very different with 23 or more other exposures, many to extremely dusty products.” Trust Discovery Reply, Exhibit C at 26.
- “[C]omplete responses to discovery would have elicited testimony and written admissions from Plaintiff 6 regarding the exposures for which he claimed these bankrupt entities were responsible.” Trust Discovery Reply, Exhibit C at 31.
- While Old CT considered “information about other potential exposures from any source” in valuing and reaching settlements, “in [his] experience, I would say, typically, [that information] was not provided” by plaintiffs in the tort system. Starczewski Dep. Tr. at 70:16-24; 270:1-20.

21. The principles of fundamental fairness implicated in *Lidoderm*, *Dudley*, and *Cincinnati Insurance* thus apply with no less force here. The Debtor has made an issue of why

and how it and CertainTeed settled claims at the values they did and has thus waived any privilege or immunity that may otherwise have applied to the Withheld Documents. Stated differently, the Movants have every right to test the various allegations of the Debtor through the discovery process. The Withheld Documents may indicate that CertainTeed never sought information related to alternative exposures or had access to such information but did not consider it to be material in reaching a settlement. For instance, the Withheld Documents may reveal that CertainTeed settled claims without any prior investigation or request for information about alternative exposures. Alternatively, the Withheld Documents may reveal that CertainTeed had knowledge of alternative exposures from independent sources (such as their own investigations) and, therefore, any allegation of claimant suppression would be irrelevant. Finally, the Withheld Documents could reveal that the primary factors CertainTeed considered in settling the Selected Plaintiffs' claims, at values they did, had nothing to do with alternative exposures or a lack of information about such exposures. If CertainTeed settled all claims in a similar range regardless of whether or not alternative exposure information was disclosed, that would strongly indicate that settlement values were not impacted by alternative exposures. In sum, the Movants have every right to test whether the Debtor or CertainTeed actually had the information they now allege was absent and, to the extent it was absent, whether the absence of such information may have had any impact on settlement values.

22. When a party makes such bare, factual allegations, the veracity of which are central to resolution of the parties' dispute, its opponent is entitled to a fair and full understanding of those allegations. Otherwise, parties like the Debtor can present their version of the facts in a one-sided, misleading manner that prejudices their opponents and prevents courts from receiving a full, objective picture. *Dudley*, 2021 WL 1222798, at \*5 ("Waiver can also occur if the client puts

privileged matters at issue.”); *In re Omnicom Grp., Inc. Sec. Litig.*, 233 F.R.D. 400, 413 (S.D.N.Y. 2006) (“Implied waiver of the privilege will also be recognized—even in the absence of a party’s disclosure of privileged material—when that party makes factual assertions, the truthfulness of which may be assessed only by an examination of the privileged communications or documents.”).

23. Without the Withheld Documents, the Movants will be forced to litigate with a blindfold while the Debtor can pick and choose what CertainTeed’s settlement history “says,” even if legitimate questions exist about whether the cases that the Debtor has (partially) presented support the Debtor’s contentions. The Movants and the Court are entitled to a full and fair understanding of the veracity of the Debtor’s assertions. Accordingly, the Court should require the Debtor to produce the Withheld Documents without redactions and in their entirety.

## **II. THE COURT SHOULD PRECLUDE THE DEBTOR FROM SELECTIVELY OFFERING EVIDENTIARY MATERIAL RELATED TO THE SELECTED PLAINTIFFS.**

24. If the Court does not compel the production of the Withheld Documents, the Court should preclude the Debtor from offering any testimony or evidence that plaintiffs’ alleged non-disclosures had an impact on settlement values or are relevant to the liabilities of the Debtor or any matter which may affect the administration of the Debtor’s estate or formulation of a plan.

25. The Debtor has cherry-picked a handful of cases out of literally thousands of claims submitted against CertainTeed and presents a carefully crafted, limited, and one-sided view of those handful of cases. *Cf. In re Pittsburgh Corning Corp.*, No. BR .00-22876 JFK, 2013 WL 2299620, at \*38 (Bankr. W.D. Pa. May 24, 2013) (denying the admission of state-court discovery responses, which a party had selected to show that plaintiffs in the tort system hid their exposure to other entities’ asbestos, because those discovery responses, among other things, “were not offered as a random or representative sample”).

26. As the Fourth Circuit has recognized, cherry-picking data to fit a theory is an unreliable and unhelpful approach because it produces a misleadingly favorable result. *See, e.g., In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624, 634 (4th Cir. 2018) (“Result-driven analysis, or cherry-picking, undermines principles of the scientific method and is a quintessential example of applying methodologies (valid or otherwise) in an unreliable fashion.”). “Just as omitting data might distort the result by overlooking unfavorable data, cherry-picking data produces a misleadingly favorable result by looking only to ‘good’ outcomes.” *E.E.O.C. v. Freeman*, 778 F.3d 463, 469–70 (4th Cir. 2015) (Agee, J., concurring) (agreeing with the district court’s determination that the plaintiff “had only a theory in search of facts to support it” where its expert was “capriciously selective” in his use of data (internal quotation marks omitted)).<sup>9</sup> Thus, where a party seeks to utilize a few examples to undermine the applicability of a large dataset by cherry picking a few self-serving examples (as is the case here), the data is completely misleading and unreliable.

27. Moreover, the Debtor’s citations to the specific plaintiffs that it chose to include are either incomplete or distorted, leading to more questions than answers. *See generally*, Committee Objection, Exhibit A. The Court should thus preclude the Debtor from offering any selective evidence related to the Selected Plaintiffs unless the Movants are able to obtain fulsome discovery of the Withheld Documents.

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<sup>9</sup> In *E.E.O.C. v. Freeman*, the Fourth Circuit held that the district court did not abuse its discretion in excluding expert testimony in light of the expert’s “pervasive errors and utterly unreliable analysis.” 778 F.3d at 468. Judge Agee concurred in the majority opinion but wrote separately “to address [his] concern with the EEOC’s disappointing litigation conduct” in “continu[ing] to proffer expert testimony from a witness whose work has been roundly rejected in our sister circuits for similar deficiencies” to those the court observed in the case before it. *Id.* (Agee, J., concurring).

**NOTICE**

28. Notice of this Motion has been provided to: (a) the Bankruptcy Administrator; (b) counsel to the Debtor; (c) counsel to New CT, and (d) all parties entitled to notice pursuant to Bankruptcy Rule 2002. The Movants submit that, in light of the nature of the relief requested, no other or further notice need be provided.

**NO PRIOR REQUEST**

46. No prior request for the relief sought herein has been made to this Court or any other court.

**CONCLUSION**

WHEREFORE, the Movants respectfully request that the Court (i) grant the Motion; (ii) enter an order directing the Debtor to produce the Withheld Documents to the Movants or, alternatively, precluding the Debtor from offering any evidentiary material related to the Selected Plaintiffs; and (iii) grant such other and further relief as the Court deems just and equitable.

Dated: August 26, 2021  
Charlotte, North Carolina

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**EXHIBIT A**

**Proposed Order Compelling Production of Withheld Documents**

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

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In re:	:	Chapter 11
	:	
DBMP LLC, <sup>1</sup>	:	Case No. 20-30080 (JCW)
	:	
Debtor.	:	
	:	

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**ORDER GRANTING MOTION OF THE OFFICIAL COMMITTEE OF ASBESTOS  
PERSONAL INJURY CLAIMANTS AND FUTURE CLAIMANTS  
REPRESENTATIVE'S TO COMPEL THE DEBTOR TO PRODUCE ALL  
SETTLEMENT DOCUMENTS WITHHELD ON THE BASIS OF PRIVILEGE OR, IN  
THE ALTERNATIVE, TO PRECLUDE THE DEBTOR FROM SELECTIVELY  
OFFERING EVIDENCE IN SUPPORT OF THE TRUST DISCOVERY MOTION**

Upon the motion (the "Motion")<sup>2</sup> of the Official Committee of Asbestos Personal Injury Claimants (the "Committee") and the Future Claimants' Representative's (the "FCR") for entry of an order (the "Order") to compel the Debtor to produce the Withheld Documents; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein

**IT IS HEREBY ORDERED THAT:**

1. The Motion is **GRANTED** as set forth herein.
2. By \_\_\_\_\_, 2021, the Debtor shall produce the Withheld Documents in their entirety and without redaction to the Committee and FCR.

*This Order has been signed electronically.  
The judge's signature and court's seal  
appear at the top of the Order.*

*United States Bankruptcy Court*

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<sup>1</sup> The last four digits of the Debtor's taxpayer identification number are 8817. The Debtor's address is 20 Moores Road, Malvern, Pennsylvania 19355.

<sup>2</sup> Capitalized terms used but not defined herein have the meanings ascribed to them in the Motion.

**EXHIBIT B**

**Proposed Order Excluding Improper Evidence Relating to the Debtor's Trust Discovery Motion**

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

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In re:	:	Chapter 11
	:	
DBMP LLC, <sup>1</sup>	:	Case No. 20-30080 (JCW)
	:	
Debtor.	:	
	:	

---

**ORDER GRANTING MOTION OF THE OFFICIAL COMMITTEE OF ASBESTOS  
PERSONAL INJURY CLAIMANTS AND FUTURE CLAIMANTS  
REPRESENTATIVE’S TO COMPEL THE DEBTOR TO PRODUCE ALL  
SETTLEMENT DOCUMENTS WITHHELD ON THE BASIS OF PRIVILEGE OR, IN  
THE ALTERNATIVE, TO PRECLUDE THE DEBTOR FROM SELECTIVELY  
OFFERING EVIDENCE IN SUPPORT OF THE TRUST DISCOVERY MOTION**

Upon the motion (the “Motion”)<sup>2</sup> of the Official Committee of Asbestos Claimants (the “Committee”) and the Future Claimants’ Representative’s (the “FCR”) for entry of an order (the “Order”), to preclude the Debtor from offering any evidentiary material, including testimony or documentary evidence, relating to the Selected Plaintiffs identified in the Trust Discovery Motion; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein

**IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED as set forth herein.
2. The evidentiary material related to the Selected Plaintiffs in the Trust Discovery Motion that the Debtor is attempting to offer into evidence is hereby excluded.

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are 8817. The Debtor’s address is 20 Moores Road, Malvern, Pennsylvania 19355.

<sup>2</sup> Capitalized terms used but not defined herein have the meanings ascribed to them in the Motion.

*This Order has been signed electronically.  
The judge's signature and court's seal  
appear at the top of the Order.*

*United States Bankruptcy Court*