UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re:	:	Chapter 11
DBMP LLC,[1]	:	Case No. 20-30080 (JCW)
Debtor.	:	

THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS' AND THE FUTURE CLAIMANTS' REPRESENTATIVE'S REPLY TO THE DEBTOR'S OBJECTION TO THE MOTION 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 Movants[2] hereby submit this reply in support of the Motion and in response to the Objection to the Motion filed by the Debtor [Dkt. No. 1039] (the "Objection"). In support, the Movants respectfully state as follows:

PRELIMINARY STATEMENT

1. The Debtor has failed to carry its burden under Fourth Circuit law that a privilege exists with respect the Withheld Documents, and even if a privilege existed (which the Movants do not concede), that the Debtor has not waived such a privilege itself questioning the legitimacy of CertainTeed's[3] settlements with the asbestos claimants.[4] Contrary to the Debtor's arguments in

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

[2] Any capitalized term not defined in this reply shall have the meaning ascribed to it in the Motion.

[3] 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.

[4] *See United States v. Bolander*, 722 F.3d 199, 222 (4th Cir. 2013) (holding that the party asserting privilege has the burden to show that a privilege exists and has not been waived); *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 243 (M.D.N.C. 2010) ("Over the course of more than four decades, district judges and magistrate judges in the

the Objection, it is the Debtor that has placed its settlement history at issue by filing this bankruptcy with the intent to seek an estimation proceeding that minimizes CertainTeed's asbestos liabilities. Having done so, the Debtor cannot now attempt to shield the Withheld Documents—and indeed all the Sample Claim Files—from disclosure.

2. Even if the Court found that a work product protection exists, the Movants have demonstrated substantial need for the work product contained within the Withheld Documents and are entitled to production of the Withheld Documents in their entirety and without redaction. Indeed, if the Debtors are entitled to test their theory that CertainTeed's settlements were impacted by the withholding of alternative exposure information, the Movants are likewise entitled to test their theory that the Debtor and CertainTeed neither requested such information nor considered such information as part of the settlement decision process. The Debtor's ongoing failure to produce the Withheld Documents is extremely prejudicial to the Movants, and the Court should order the production of the Withheld Documents and overrule the Objection.

REPLY

I. THE MOVANTS' WAIVER ARGUMENT IS TIMELY

3. The Motion is not premature. Since the first day of this bankruptcy case—even *before* the Court appointed the Committee and the FCR—and at every opportunity thereafter, the Debtor has repeatedly challenged the legitimacy of CertainTeed's settlements and continuously asserted that it intends to demonstrate that CertainTeed's settlements were impacted by, among other things, the suppression of exposure evidence and the desire to avoid defense costs. *See, e.g., Informational Brief of DBMP LLC* [Dkt. No. 22], 18-24 (asserting CertainTeed's pre-petition asbestos settlements are not reliable); *Motion of the Debtor for Estimation of Current and Future*

Fourth Circuit . . . have repeatedly ruled that the party or person resisting discovery, not the party moving to compel discovery, bears the burden of persuasion.").

Mesothelioma Claims [Dkt. No. 948] ("Debtor's Estimation Motion"), ¶ 34; Trust Discovery Motion ¶ 20. CertainTeed's reason for creating the Debtor and domiciling it in North Carolina, home of the *Garlock* estimation decision, is transparent. Through the chapter 11 process, CertainTeed—via the Debtor—intended to challenge the legitimacy of Old CT's settlement history.[5] Without such intent, this bankruptcy would not exist, and DBMP, with the Funding Agreement, could have gone forward by continuing to pay all asbestos claims in full in the ordinary course of business within the state tort system.

4. In requesting unwarranted and intrusive Trust Discovery, the Debtor cherry-picked excerpts from the Selected Plaintiffs' case files to demonstrate the Debtor's purported reasoning for seeking discovery into the claims—if any—that thousands of CertainTeed's asbestos victims creditors may have filed—or not—against third-party asbestos settlement trusts. Despite attaching part of the file, the Objection contends that the Withheld Documents were appropriately excluded from the Debtor's production to the Movants. The Debtor cannot credibly argue that the Movants are not entitled to the complete picture of the Selected Plaintiff information when, at the same time, it uses that same information to support its allegations and bases for the Trust Discovery Motion. 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." *McKinley v. Casson*, 80 A.3d 618, 623 (Del. 2013) (internal quotation marks omitted). The Court should similarly refuse to do so here as the Movants are entitled to nothing less—the right to have the discovery they need to challenge

[5] *See* Gross Dep. Tr. at 107:20-23 ("**Q. Did you understand that an estimation proceeding was part of the objective of the bankruptcy?** A. Of course."); *see also id*. at 108:8-16 (testifying that estimation was "what happened with Garlock to a favorable outcome. And that, you know, was where the Bestwall matter was heading, and so . . . the understanding is that the *end objective is to obtain a final asbestos liability bill for less . . . than the tort system*." (emphasis added)) (attached as Exhibit A).

the very allegations raised by the Debtor since the petition date.

5. The Debtor misconstrues the *Lidoderm* case in its Objection. In *Lidoderm*, the plaintiffs initially argued that the defendant "put 'at issue' attorney-client communications by relying on subjective beliefs informed by its counsel with respect to testimony [the defendant] gave to the Federal Trade Commission." *In re Lidoderm Antitrust Litig.*, No. 14-MD-02521-WHO, 2016 WL 4191612, at *2 (N.D. Cal. Aug. 9, 2016). In the Objection, the Debtor omitted the fact that the *Lidoderm* court initially concluded that the information was protected by privilege because the defendant provided an "express disclaimer of any intent to rely on its subjective belief" and depositions of the defendants had not yet taken place.[6] *Id*. Here, the Debtor has placed its mindset, beliefs, and information at the time of settlement at issue. In support of its Trust Discovery Motion, the Debtor relied on the available information it evaluated surrounding the Selected Plaintiffs. In connection with the preliminary injunction, the Debtor's counsel provided deposition testimony on its beliefs concerning its historical settlements. *See, e.g.*, Apr. 30, 2021 30(b)(6) Dep. 142:10-14 (Starczewski) ("There are obviously factors that can affect [Old CT's] settlements, for instance, nondisclosure of information, [Old CT] attempts to avoid having to expend defense costs.") (attached as Exhibit B).

6. Unlike in *Lidoderm*, the Debtor has clearly placed its subjective beliefs directly at issue. The Debtor already previewed its estimation argument and clearly placed the matter at issue:

> The Debtor has already taken steps to secure such information through its Discovery Motions—information that, among other things, will answer the important question of whether the Debtor was subject to practices of evidence manipulation in its historical mesothelioma cases. This inquiry is highly relevant given the Claimant Representatives' position that historical settlements are accurate measures of (indeed, proxies for) the Debtor's liability for

[6] Moreover, a dispute existed as to the "breadth of defendants' privilege assertions" and there was an "unsettled question of what exact subjective beliefs defendants intend to rely on." *Lidoderm Antitrust Litig.*, 2016 WL 4191612, at *1. Here, the breadth of the Debtor's assertions with respect to the Selected Plaintiffs is readily apparent.

current and future mesothelioma claims.

Debtor's Estimation Motion at ¶ 34. When viewed through this lens, the current situation precisely mimics the *Lidoderm* case: the court in that case declined to find waiver initially but did so once the defendants identified the matters that they intended to introduce or rely on at trial. *See Lidoderm*, 2016 WL 4191612, at *1. Here, the Debtor has already asserted an intention to use CertainTeed's subjective belief as a key part of its proposed estimation arguments. The Movants must be allowed to test the Debtor's assertions and arguments. Therefore, the Motion is timely.

II. THE DEBTOR HAS WAIVED ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION

7. Where, as here, the assertion of privilege fails to advance the fundamental purpose for which the privilege exists, the Fourth Circuit requires that the privilege yield to permit a full and fair investigation of the truth. *N.L.R.B. v. Harvey*, 349 F.2d 900, 907 (4th Cir. 1965) (instructing that, because the assertion of privilege "pose[s] an obstacle to the investigation of the truth," it must "be strictly confined within the narrowest possible limits consistent with the logic of its principle"); *cf. Doe 1 v. Baylor Univ.*, 335 F.R.D. 476, 496 ("When a party seeks a greater advantage from its control over work-product than the law must provide to maintain a healthy adversary system, the privilege should give way." (quoting *Pamida, Inc. v. E.S. Originals,* 281 F.3d 726, 732 (8th Cir. 2002))). Despite having the burden on this issue, the Debtor fails to explain how its invocation of privilege and work-product protection here would serve the purposes underlying those doctrines.

8. The Withheld Documents were not prepared by the Debtor or CertainTeed for the purposes of this chapter 11 case. Rather, the Withheld Documents concern resolved pre-petition asbestos personal-injury cases. The Debtor would suffer no harm by producing the Withheld Documents. The asbestos victims are presently stayed from proceeding against the Debtor and

CertainTeed in the tort system. Further, the Debtor has already argued that should the Debtor succeed in proposing and successfully confirming a plan of reorganization that provides CertainTeed with section 524(g) relief, CertainTeed will never return to the tort system.[7] Instead of identifying any harm it would suffer from producing the Withheld Documents, the Debtor attempts to argue, without any citation to any relevant authority, that disclosure of work product could give plaintiffs' counsel insight into how defense counsel may defend *other claims* against *other defendants*. Moreover, the Debtor's concerns are already addressed by the *Agreed Protective order Governing Confidential Information* (Dkt. No. 251), which limits the use of confidential information and provides the ability to designate documents as "Professional Eyes Only." Even if the Debtor's concerns were valid—and they are not—the Debtor has already provided testimony regarding its asbestos settlements.[8] The Movants have a right to test the veracity of these assertions and the Court is more than capable of crafting an order that would appropriately limit the use or disclosure of the Withheld Documents.

9. The Debtor's other arguments can be handily refuted. First, the Debtor's claim that it has not yet waived privilege rests on an excessively narrow interpretation of waiver under *Rhone*.[9] As explained in the Motion, the Fourth Circuit has not yet picked a definitive standard,

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[7] *Motion of the Debtor for an Order (I) Preliminarily Enjoining Certain Actions Against Non-Debtors or, (II) in the Alternative, Declaring That the Automatic Stay Applies to Such Actions and (III) Granting a Temporary Restraining Order Pending a Final Hearing on the Merits* at 23, *DBMP LLC v. Those Parties Listed on Appendix A to Complaint (In re DBMP LLC)*, Adv No. 20-03004 (Bankr. W.D.N.C. Jan. 23, 2020), Dkt. No. 2.

[8] Apr. 30, 2021 30(b)(6) Dep. Tr. (Starczewski)142:5-14 ("I believe the settlements that [Mr. Guers] negotiated were generally fair in the capacity of the tort system and based upon the information and knowledge that we had at the time. There are obviously factors that can affect those settlements, for instance, nondisclosure of information, or CertainTeed's attempts to avoid having to expend defense costs.").

[9] The Fourth Circuit has not adopted a single, controlling rule when considering at issue waiver. Motion ¶ 12 n.8. *Shaheen v. WellPoint Cos.*, 490 F. App'x 552 (4th Cir. 2012), which the Debtor cites as evidence of the Fourth Circuit's "preference" for the *Rhone* test, cites both *Rhone* and *Hearn* precisely one time—to stand for the single proposition that the at issue doctrine did not apply in those circumstances. *Id.* at 557. Indeed, the last decade of case law from within the Fourth Circuit includes numerous instances of courts applying *Hearn* or endorsing both *Hearn* and *Rhone*. *See id.*; *Botkin v. Donegal Mut. Ins. Co.*, No. 5:10cv00077, 2011 WL 2447939, at *4 (W.D. Va. June 15, 2011) ("Although the *Hearn* framework has not been met with universal acceptance, it remains the most widely

but even under *Rhone*, as properly understood, the Debtor has waived privilege in this instance. The crux of the *Rhone* court's analysis rested not on whether a party specifically disclosed or described an attorney-client communication, but on whether attorney-client communications or work-product material formed "an essential element of [the party's] claim." *Rhone-Poulenc Rorer Inc. v. The Home Indemn. Co.*, 32 F.3d 851, 864 (3d Cir. 1994). Under the *Rhone* framework, if a party would need to rely on attorney-client communications or work product to prove an "essential element" of its case, the party has placed that material "in issue" for purposes of the litigation.[10] *Id*. at 863. Since the decision in *Rhone* was rendered, this interpretation of its holding

accepted approach."); *U.S. Tobacco Coop., Inc. v. Certain Underwriters at Lloyd's*, No. 5:19-CV-00430-BO, 2021 WL 1341360, at *14 (E.D.N.C. Apr. 9, 2021); *Smith v. Scottsdale Ins. Co.*, 40 F. Supp. 3d 704, 724 (N.D.W. Va. 2014); *Brown Univ. v. Tharpe*, No. 4:10CV167, 2012 WL 12894480, at *3 (E.D. Va. Mar. 30, 2012). An entire line of cases rests on the South Carolina district court's application of *Hearn* in *City of Myrtle Beach v. United Nat. Ins. Co.*, No. 4:08-1183-TLW-SVH, 2010 WL 3420044, at *5 (D.S.C. Aug. 27, 2010). *See, e.g., ContraVest Inc. v. Mt. Hawley Ins. Co.*, 273 F. Supp. 3d 607, 616 (D.S.C. 2017), *Graham v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 0:16-cv-01153-MBS, 2017 WL 116798, at *4 (D.S.C. Jan. 12, 2017); *State Farm Fire & Cas. Co. v. Admiral Ins. Co.*, No. 4:15-2745-RMB, 2016 WL 4051271, at *4 (D.S.C. July 25, 2016); *Hege v. Aegon USA, LLC*, Nos. 8:10-cv-1578-GRA, 7:10-cv-1630-GRA, 7:10-cv-1631-GRA, 1:10-cv-1635-GRA, 2011 WL 1791883, at *5 (D.S.C. May 10, 2011). The Debtor does not appear to dispute that its conduct would constitute a waiver of privilege under the *Hearn* test, so the Movants do not re-state their arguments from the Motion.

[10] The Objection argues that the Debtor did not waive privilege simply because the Sample Claim Files are "relevant." *See* Objection at 10. To the contrary, the Debtor waived privilege, not because the Sample Claim Files are relevant to the Debtor's arguments, but because, as the Debtor itself acknowledges, "the touchstone of identifying at issue waiver is whether an attorney-client communication or work product material forms 'an essential element of a party's claim.'" *Id*. Here, the Selected Claimant Files do.

has been espoused by numerous courts within the Third Circuit,[11] several courts within the Fourth Circuit,[12] and other jurisdictions across the country.[13]

10. The differences between this case and *Rhone* illustrate precisely why the Debtor's actions constitute a waiver. In *Rhone*, the court considered whether filing suit to establish insurance coverage waived attorney-client privilege by putting at issue the question of whether the insureds knew, prior to obtaining coverage, that their pharmaceutical products were causing transmission of AIDS. *Id.* at 864. The court found that, because advice of counsel was not "interjected" as an essential claim in the case, no at issue waiver had occurred. *Id.* The fact that the insureds' knowledge about the risks of transmission was relevant did not waive the attorney-client privilege because they did not base their claim on advice from an attorney.

11. In stark contrast here, the Debtor has put the advice of counsel directly at issue by claiming its settlement decisions—based on the advice of counsel—were "tainted." It is not simply a question of the state of mind of former CertainTeed, but rather the subjective analysis that led to counsels' decision to settle cases. Stated differently, the Movants need to discover what facts CertainTeed's attorneys considered, including a claimant's alternative exposures to asbestos, to determine the impact, if any, that the claimed "suppression of evidence" had on settlements. While

[11] *See, e.g.*, *Noonan v. Kane*, No. 15-6082, 2019 WL 5722213, at *2 (E.D. Pa. Nov. 5, 2019); *N.J. Mfrs. Ins. Co. v. Brady*, No. 3:15-CV-02236, 2017 WL 264457, at *12-13 (M.D. Pa. Jan. 20, 2017); *Mine Safety Appliances Co. v. N. River Ins. Co.*, 73 F. Supp. 3d 544, 572 (W.D. Pa. 2014); *In re Processed Egg Prods. Antitrust Litig.*, MDL No. 2002, No. 08-MD-02002, 2014 WL 6388436, at *9 (E.D. Pa. Nov. 17, 2014); *Mine Safety Appliances Co. v. N. River Ins. Co.*, No. 2:09-CV-00348-DSC, 2012 WL 12930275, at *5 (W.D. Pa. Mar. 9, 2012); *AstraZeneca LP v. Breath Ltd.*, No. 08-1512 (RBK/AMD), 2010 WL 11428457, at *5-7 (D.N.J. Aug. 26, 2010); *In re Benun*, 339 B.R. 115, 132 (Bankr. D.N.J. 2006); *Haynes Int'l, Inc. v. Special Metals Corp.*, No. 2:04CV1046, 2005 WL 8174644, at *3 (W.D. Pa. Dec. 15, 2005); *McCrink v. Peoples Benefit Life Ins. Co.*, No. 2:04CV01068LDD, 2004 WL 2743420, at *2 (E.D. Pa. Nov. 29, 2004); *Sheehan v. Mellon Bank, N.A.*, No. 95-2969, 1996 WL 243468, at *2 (E.D. Pa. Apr. 23, 1996).

[12] *See, e.g., Botkin v. Donegal Mut. Ins. Co.*, No. 5:10cv00077, 2011 WL 2447939, at *6 (W.D. Va. Jun. 15, 2011); *Twigg v. Pilgrim's Pride Corp.*, No. 3:05-CV-40, 2007 WL 676208, at *8 (N.D. W.Va. Mar. 1, 2007).

[13] *See, e.g., Plate, LLC v. Elite Tactical Sys., LLC*, No. 3:18-CV-265-CLC-HBG, 2020 WL 5209303, at *10 (E.D. Tenn. Sept. 1, 2020); *Jackson v. City of Chicago*, No. 03 C 8289, 2006 WL 2224052, at *7 (N.D. Ill. July 31, 2006).

both *Rhone* and this situation involve the question of what a party knew when, the key difference is that here, the Debtor has claimed its decisions rested on the advice and knowledge of counsel. This case presents exactly the type of "affirmative step" the *Rhone* court found lacking. *Id.* at 863.

12. For instance, the Trust Discovery Reply is replete with descriptions of attorney client communications.[14] By contending that it settled cases *because of* the extent of disclosure (or alleged non-disclosure), and then stating that settlement followed after discovery of non-disclosure, the Debtor is describing the communications and analysis from counsel that precipitated settlement.[15] Similarly, by contending what it *would have done* had the circumstances been different, the Debtor is describing the advice of counsel it relied on in making the decisions it did.[16] It places the contemporaneous advice and decision making directly at issue.

13. The Debtor further argues "it has not advanced any attorney-client privileged advice or work product as an essential element of any claim or defense it is making," as required by *Rhone*, because the Debtor construes its "claim" as the evidence-suppression argument that it hopes to make in connection with any estimation ordered in this case. Objection at 10. This is elevating form over substance and fails to acknowledge that it is *already* claiming—for purposes of the Trust Discovery Motion itself—that its settlements were affected. The "claim" here is the Debtor's request for trust discovery—which is based on specific assertions about why the Debtor

[14] "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, Ex. C at 12. The Debtor could not know what questions counsel "would have" asked absent a communication from counsel that included that information.

[15] CertainTeed "settled this case after Plaintiff 2's discovery abuses came to light," Trust Discovery Reply, Ex. C at 9; Former CertainTeed "settled [Plaintiff No. 3's] case after discovering the non-disclosure," Trust Discovery Reply, Ex. C at 13.

[16] "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, Ex. C at 21 (emphasis added).

settled specific claims. The Movants cannot appropriately address and respond to this argument while allowing the Debtor to maintain it has not waived the privilege.

14. Second, despite the Debtor's arguments to the contrary, the additional cases cited in the Objection further illustrate why compelling production of the Settlement Documents is indeed appropriate. For instance, the Debtor's criticism of *Lidoderm* rests in part on its erroneous belief that *Hearn* is not a widely accepted and valid test within the Fourth Circuit for at issue waiver. *See supra* ¶¶ 5-6 and n.9. The Debtor also suggests there is "no basis" for the privilege waiver until it has the opportunity to decide whether it will rely on subjective proof that would waive the privilege, or objective testimony provided by an expert. Objection at 11. Assuming, *arguendo*, that waiver is only appropriate at that decision stage, by filing the Trust Discovery Motion, the Debtor has already elected to pursue the strategy of relying on subjective beliefs and attorney communications. Thus, while it is appropriate for the Court to apply either the *Hearn* test or the *Rhone* test, under either test, the Debtor has waived the attorney-client privilege regarding the Settlement Documents by asserting that the communications it received from counsel were tainted by plaintiffs' alleged non-disclosures, thereby placing the attorney communications at issue. Consequently, any otherwise applicable privilege that might have protected such communications and work-product from disclosure is required to yield to the opposing party's discovery request.

15. Moreover, as set forth in greater detail in the Motion, the recent Eastern District of North Carolina decision, *Dudley v. City of Kinston*, offers an apt illustration of this principle.[17] *See*

[17] In *Dudley v. City of Kinston*, No. 4:18-cv-00072-D (E.D.N.C. Mar. 31, 2021) civil plaintiff Dudley brought suit for wrongful imprisonment and alleged that the prosecutors had withheld exculpatory evidence (a so-called "*Brady* violation"). The civil defendants subpoenaed the original criminal trial defense files from the wrongful conviction clinic that had secured Dudley's release and asserted that Dudley had waived the privilege by "placing what he and his attorney knew about the allegedly withheld information at issue." *Dudley*, 2021 WL 1222798 at *6.

generally, Dudley, 2021 WL 1222798 (E.D.N.C. Mar. 31, 2021). In *Dudley*, the court held that the attorney-client privilege had been waived with respect to the plaintiff's evidence-suppression claims because the plaintiff was required to establish that evidence suppression occurred to prove his *prima facie* case, "[a]nd to do that he [would] eventually need to show that neither he nor his attorney knew about the allegedly withheld information." *Id*. at *14. Because the plaintiff would "need to rely on privileged information to prove [this element of] his claim," the court found that, under *Rhone*, the plaintiff had "waived the attorney-client privilege by putting his attorney's advice at issue." *Id.*

16. As in *Dudley*, the Debtor's Trust Discovery Motion and proposed estimation arguments (if ordered in this case) require it to rely on privileged information. Here, because the Debtor seeks to prove that historic settlements entered into by it and Old CT were based on plaintiffs' suppression of evidence, for the Debtor to prove that its settlements were impacted by plaintiffs' non-disclosures or by a desire to avoid defense costs, it must show that these were material considerations when the Debtor settled. Consequently, the Debtor, like the plaintiff in *Dudley*, will "need to rely on privileged information to prove [this element of] [its] claim." *Id.* Without the disclosure of the privileged information, the Court must assume that the Debtor had all the information it needed to settle claims at values that fairly reflected its liability. *See, e.g.*, *Nayab v. Capital One Bank (USA), N.A.*, 942 F.3d 480, 494 (9th Cir. 2019) ("It is a general rule of evidence that where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party." (internal quotation marks omitted)); *see also Campbell v. United States*, 365 U.S. 85, 96 (1961) ("[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.").

17. Under both *Rhone* and *Dudley*, the Debtor has put privileged material at issue and waived any privilege or protection that would otherwise apply. Though the Debtor attempts to limit the implications of *Dudley* since that court allowed the producing party to redact material unrelated to the waiver,[18] this is an unremarkable proposition—a waiver is only as broad as the material put at issue. The *Dudley* court, in finding a relatively narrow waiver, focused on what Dudley knew about a particular piece of evidence. By putting the entirety of its extensive settlement history at issue, the Debtor has effectuated a broad waiver. That the waiver here would be much broader than *Dudley* is not a result of overreach by the Movants, but a result of the Debtor putting at issue the entirety of Old CT's knowledge regarding each asbestos plaintiffs' exposures and the reasons that the Debtor and Old CT settled claims at the amounts they did.[19]

18. The Debtor's only other response to *Dudley* is that, putting aside the waiver issues, the court in that case concluded that the defendants had not shown a substantial need for Dudley's work product. That is a separate issue from the waiver holding, however, and as discussed in more detail in the Motion and below, the Movants have demonstrated a substantial need for this work product.

III. THE MOVANTS ARE ENTITLED TO THE SAMPLE CLAIM FILES INCLUDING WORK PRODUCT

19. The Objection fares no better with its contentions that the Debtor should be allowed to withhold work product in the Sample Claim Files. None of the cases cited by the Debtor supports its contention that a party who has waived privilege and work-product protection can

[18] *See also* Objection at 11–12 (citing *Lidoderm* for the proposition that the defendant's waiver of privilege as to the merits of its petition to the FDA and impact of that petition on the FDA's review did not waive privilege as to the details of the product launch).

[19] The Debtor has thus far declined to enter into a consensual 502(d) order with the Movants that would allow the Debtor to produce the Withheld Documents without waiving any privilege or protection; this refusal strongly suggests that the Withheld Documents do not support the Debtor's contentions.

continue to withhold documents on the theory that counsel has not separately waived work-product protection. *See* Objection at 14-17. As a preliminary point, the Fourth Circuit has recognized that "the line between opinion and non-opinion work product can be a fine one." *In re Martin Marietta Corp.*, 856 F.2d 619, 626 (4th Cir. 1988). In arguing that the documents that the Movants seek constitutes opinion work product,[20] the Debtor ignores the United States District Court for the Western District of North Carolina's holding in *Cincinnati Insurance*. Despite its attempts to distinguish *Cincinnati Insurance* based on a waiver of the attorney-client privilege, the Debtor does not and cannot differentiate the case regarding the waiver of the work product privilege.

20. In *Cincinnati Insurance*, as explained in the Motion,[21] the District Court noted that the "instant case is precisely the type that the Fourth Circuit speaks of []—where a litigant does attempt to use an opinion as its sword, all the while shielded by the work product doctrine." *Cincinnati Ins. Co. v. Zurich Ins. Co.*, 198 F.R.D. 81, 87 (W.D.N.C. 2000). The defendant in *Cincinnati Insurance* sought to introduce factual and opinion evidence regarding its view of the settlement at issue, and the court ruled that the "opinions as to the value of the underlying case and the advisability of accepting the settlement offer, and the facts giving rise to those opinions, unless otherwise privileged, are fair game." *Id*. However, the Debtor has on numerous occasions asserted that its settlement decisions were tainted by a lack of evidence about other exposures. *See* Motion ¶¶ 18-20. The fact that the attorney work product was placed in issue in *Cincinnati* through the proposed trial testimony of a lawyer does not mean that is the only way to place work product at issue: the *Cincinnati* court's holding rested on the party's decision to raise the issues of the "value of the underlying case and *the advisability of accepting the settlement offer*, and the facts giving

[20] Objection at 14-15.

[21] Motion at ¶ 15-17.

rise to that opinion." *Cincinnati*, 198 F.R.D. at 82 (emphasis added). So too here. The Debtor cannot be permitted to use an opinion on the merits of its settlements as a sword, all the while shielding its actual opinion under the work product doctrine. To do so would circumvent longstanding Fourth Circuit case law.

21. The two cases that the Debtor cites for the argument that subject matter waiver does not extend to opinion work product are also inapposite. For instance, *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988), the defendant was not attempting to use a mental impression or legal theory as a sword and as a shield in the trial to distort the fact-finding process as the Debtor is attempting to do here.[22] More importantly, the *Martin Marietta* court specifically left open discovery because, "conceivably there may be indirect waiver [of the opinion work product doctrine]" and that the "privilege derived from the work product doctrine is not in all cases absolute." *Id*. at 626.

22. Additionally, in *Carolina Power & Light Co. v. 3M Co*., 278 F.R.D. 156 (E.D.N.C. 2011), the court noted that "[t]he work-product privilege is not absolute and may be waived." *Id*. at 159. The factual circumstances here differ greatly from *Carolina Power*. The *Carolina Power* court ruled that the redacted documents were subject to the protection of the opinion work-product privilege because the communications in dispute were questions posed by plaintiffs' attorneys in emails to potential witnesses. *Id*. at 160. Thus, in *Carolina Power*, the redacted opinion work-product was related not to the underlying issue at hand; rather, it consisted of mere collateral content contained within otherwise discoverable information used to "create testimonial exhibits

[22] *Martin Marietta* dealt with a former employee, under indictment for mail fraud and conspiracy to defraud the Department of Defense, who attempted to discover certain documents held by his former employer. The employer acknowledged that portions of some documents it sought to withhold had been earlier quoted in disclosures made by it to the Government and the Court of Appeals determined this disclosure constituted waiver of attorney-client privilege and non-opinion work-product privilege. *Martin Marietta*, 856 F.2d at 621.

and refresh witnesses' recollection." *Id* at 158.

23. Further, the Debtor's effort to turn *Dudley* against the Movants fails because the Debtor has already placed at issue the attorneys' knowledge, impressions, and advice in connection with CertainTeed's, and the Debtor's, prior settlement determinations. The Debtor's active challenge to CertainTeed's settlement history is not the same thing as what "some people mentioned in their brief [that] no longer remember the events at issue." *Dudley*, 2021 WL 1222798, at *18. The Debtor has challenged CertainTeed's settlements; therefore, the Movants have a substantial need for CertainTeed's work product regarding those settlements.

24. Finally, the *Hanson*[23] case cited in the Objection certainly does not say that a party who has waived privilege and work-product protection can withhold documents because its counsel has not separately waived work-product protection—it holds only that a party to an ADR may continue to assert work-product protection even when the third-party neutral unilaterally disclosed work product without the party's consent and in violation of his contractual obligations. It is simply not the case that work-product protection must be waived twice before the work product (from resolved cases no less) can be produced. *See, e.g.*, *Doe 1 v. Baylor Univ.*, 335 F.R.D. 476, 488 (W.D. Tex. 2020) ("[M]any district courts have ruled that a party waives work product when it asserts a claim or defense that relies on work product to prove . . . the reasonableness of its conduct.").

25. *Baylor* is instructive. There, Baylor University hired a law firm to investigate its institutional policies and procedures, and then published two documents summarizing the firm's findings and recommendations to show that Baylor had responded properly to reports of sexual assault and adopted appropriate reforms. *Id.* at 480-83. The court held that Baylor waived

[23] *Hanson v. United States Agency for Int'l Dev.,* 372 F.3d 286, 294 (4th Cir. 2004).

protection for work product related to the investigation by putting at issue the actions it took as a result of the investigation. *Id.* at 497-501. More specifically, the court found that Baylor waived work-product protection because it used work product to "defend[] itself by pointing to the investigation and reforms, and claiming they were reasonable responses, while simultaneously restricting Plaintiffs' discovery of the facts underlying the very same investigation and reform efforts." *Id.* at 495-96. According to the court, this was "a classic case of a party trying to use the work product doctrine as a sword and a shield . . . ." *Id.* at 495.

26. Here, much like in *Baylor*, the Debtor has put at issue why it settled claims at the amounts it did; it cannot now use privilege and work-product protection to shield the *actual reasons* it settled claims at the amounts it did.

27. Moreover, the Movants have demonstrated substantial need for the disclosure of the work product at issue, which the Objection does not even attempt to refute. As set forth in greater detail in the Motion, work product is discoverable if a party has a substantial need and the material is not available from other sources. *See* Fed. R. Civ. P. 26(b)(3); *see also Washington v. Follin*, Civ. Act. No. 4:14-CV-00416 RBH-KDW, 2016 WL 1614166, at *13 (D.S.C. Apr. 22, 2016) (explaining that fact work product enjoys only qualified immunity and that even opinion work product can be discoverable in appropriate circumstances). For the reasons set forth in the Motion, the Movants have demonstrated a "substantial need" for the work product contained within the Sample Claim Files—and the only source of this information is the Sample Claims Files within the Debtor's exclusive possession.

IV. THE MOVANTS ARE EQUALLY ENTITLED TO GOOD-FAITH DISCOVERY ON THE SELECTED PLAINTIFFS

28. The Trust Discovery Motion asserts intrusive discovery is needed regarding thousands of claimants across eleven asbestos settlement trusts because the Debtor unilaterally

selected eight specific plaintiffs' case files—from thousands that it reviewed—that supposedly support the Debtor's narrative. In the Objection, the Debtor argues that it offered the Selected Plaintiffs "to avoid a charge that it was engaged in an improper fishing expedition" and that they have "not even had an opportunity to take discovery on the Selected Plaintiffs' cases." Objection at 17. This is a puzzling argument because the Debtor possessed enough information on the Selected Plaintiffs to take up eight (8) pages in the Trust Discovery Motion and an additional forty (40) pages in its Trust Discovery Reply. Indeed, its counsel had to review an unknown number of other cases in its files to even provide its expert with the Selected Plaintiffs.[24] *See, e.g.*, Bates Dep. Tr. 50:5-51:6, 51:14-24, 58:14-59:21 (Apr. 16, 2021) (attached hereto as Exhibit C). As has been fully briefed in the objections of the FCR [Dkt. No. 870], and the Committee [Dkt. No. 872], the Movants maintain their belief that the trust discovery sought by the Debtor is both unnecessary and unwarranted.

29. Nonetheless, the Movants should also be entitled, in an equal measure of good faith and for the reasons set forth in the Motion and this Reply, to discovery on whether the known information affected the eight decisions to settle and what was known and evaluated at the time of settlement.

CONCLUSION

WHEREFORE, for the reasons set forth herein and in the Motion, the Movants respectfully request that the Court (i) grant the Motion and enter the proposed form of order attached as Exhibit A to the Motion, compelling the Debtor to produce the Withheld Documents, or in the alternative, (ii) enter the proposed form of order attached as Exhibit B to the Motion, precluding the Debtor

[24] Further, the Debtor's summary of several of the asbestos claimants' state tort cases in the Trust Discovery Motion (and the Debtor's Informational Brief), along with its descriptions of why CertainTeed, and the Debtor, resolved its cases for the values they did is also evidence that the Debtor has effectuated a waiver with respect to the Withheld Documents. *See generally Informational Brief of DBMP LLC* [Dkt. No. 22], 1-2, 17.

from offering any testimony or evidence that the Selected Plaintiffs' or any other plaintiffs' alleged non-disclosures had an impact on Old CT'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, and (iii) grant such other and further relief as the Court deems just and equitable.

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