UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

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

REPLY IN SUPPORT OF MOTION OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS AND THE FUTURE CLAIMANTS' REPRESENTATIVE TO COMPEL DISCOVERY PURSUANT TO THE CRIME-FRAUD EXCEPTION AND / OR WAIVER OF THE ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION

The Official Committee of Asbestos Personal Injury Claimants (the "Committee"), and Sander L. Esserman, the representative for future asbestos-related personal injury claimants (the "Future Claimants' Representative," together with the Committee, the "Movants"), respectfully submit this Reply in support of the *Motion of the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants' Representative to Compel Discovery Pursuant to the Crime-Fraud Exception and/or Waiver of the Attorney Client Privilege and Work Product Protection* (ECF No. 1006) (the "Motion")[2] and in response to (i) the *Debtor's Objection to the Official Committee of Asbestos Personal Injury Claimants' and the Future Claimants' Representative's Motion to Compel Discovery Pursuant to the Crime-Fraud Exception and/or Waiver of the Attorney Client Privilege and Work Product Protection* (ECF No. 1071) (the "Objection") and (ii) the *Joinder to Debtor's Objection and Objection of CertainTeed LLC and Saint-Gobain*

[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] Capitalized terms not otherwise defined herein have the same meaning as in the Motion.

Corporation to Claimant Representatives' Motion to Compel Discovery Purportedly Based on the Crime-Fraud Exception or Privilege Waiver (ECF No. 1073) (the "Joinder"), and state as follows:

PRELIMINARY STATEMENT

1. In their Motion, the Movants presented two straightforward arguments as to why Debtor has waived its overbroad and excessive claims of privilege. First, the evidence already before this Court is more than sufficient to make out a *prima facie* showing that the subject of the withheld documents was part of an effort to mislead the creditors and the Court, including, but not limited to, the concealment of facts that could further confirm the Corporate Restructuring and resulting DBMP bankruptcy was a fraudulent transfer. Under the black-letter law of this Circuit, that is in and of itself sufficient to trigger the crime-fraud exception to the attorney-client privilege and compel the disclosure of Debtor's attorney-client communications and work product.

2. Second, it is indisputable that the Debtor and its affiliates have sought to use the attorney-client privilege as both a sword and a shield when defending the purpose and rationale behind the Corporate Restructuring and bankruptcy filing. As this Court found, these transactions were part of a "lawyer-designed" and lawyer-driven strategy, but that did not stop representatives of the Debtor, New CT or Saint-Gobain Corporation ("SGC") from testifying freely regarding those transactions when they deemed it "advantageous" to do so. At the same time, however, those same entities refused to turn over thousands of contemporaneous documents—including emails, notes and minutes from meetings, and internal memoranda—which would have allowed the Movants and this Court to better assess the veracity of that testimony, and their counsel repeatedly shut down deposition questions they thought might elicit responses undermining their preferred narrative. The Debtor and its affiliates may not have it both ways—and, given that they cannot withdraw what they have already put at issue, the only appropriate remedy is to shine a light on the entire process that gave rise to the Corporate Restructuring and the bankruptcy filing.

3. Rather than respond to these points head on, the Debtor misstates the applicable law and facts governing the Motion. On crime-fraud, the Debtor disregards the *prima facie* standard, ignores the prior findings of the Court, and instead engages in a lengthy and *ad hominem* attack on Amiel Gross. But the Debtor's arguments are flawed. The *prima facie* standard merely requires evidence which, if credited, would establish that counsel participated in a crime or fraud (including a fraudulent transfer). Here, as is clear from the various findings that this Court recently made on the Debtor's Motion for a Preliminary Injunction (ECF No. 343) (the "PI Findings and Conclusions"), the record demonstrates the presence of numerous badges of fraud as well as extensive documents and testimony demonstrating that the Corporate Restructuring and bankruptcy filings were undertaken to hinder, delay and defraud the Debtor's asbestos creditors.

4. Debtor's arguments with regard to at-issue waiver are similarly deficient. The Debtor ignores this Court's conclusion that many of the Debtor's contentions remain "largely untested" because repeated assertions of privilege "block[ed] a fulsome inquiry" regarding those matters. PI Findings and Conclusions., ¶¶ 94-95. Nor does it make any real attempt to reconcile that approach with the fact that DBMP and New CertainTeed's corporate representatives *were* allowed to testify regarding attorney-client communications or attorney work product when the Debtor deemed that helpful to its case. PI Findings and Conclusions, ¶ 97 (emphasis added). Instead, the Debtor first argues that the statements it placed at issue regarding the purpose and rationale behind the Corporate Restructuring were merely "corporate statements" relating to "business decisions." If that is the case, however, then communications about that topic were never privileged in the first place, regardless of whether they were stated by or to attorneys. And the Debtor does not and cannot deny that it repeatedly withheld and instructed its witnesses not to share even factual information relating to the high-level and self-serving testimony they offered

regarding "optionality" and the desire for a "full and fair" resolution of asbestos claims if that information was provided to them by counsel—which it almost invariably was. Accordingly, any privilege has been waived as to (1) the origins and implementation of the divisional merger, and (2) the decision to file the instant bankruptcy case.

I. THE CRIME-FRAUD EXCEPTION APPLIES TO CLAIMS OF PRIVILEGE SHIELDING DISCOVERY RELATED TO THE CORPORATE RESTRUCTURING AND THE RESULTING BANKRUPTCY FILING

A. The Applicable Legal Standard

5. The parties agree that, in the bankruptcy context, the crime-fraud exception is satisfied by a *prima facie* showing of a fraudulent transfer. *See* Objection at 17 (citing to *In re Grand Jury Procs. #5 Empanelled Jan. 28, 2004*, 401 F.3d 247, 251 (4th Cir. 2005)); Joinder at ¶ 2. As the Fourth Circuit has made clear, Movants face a low burden in attempting to make such a showing; specifically, they need only proffer evidence sufficient "to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted." *In re Grand Jury Proceedings #5 Empaneled Jan. 28, 2004*, 401 F.3d 247, 251 (4th Cir. 2005); *Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280, 298 (E.D. Va. 2004) (*prima facie* standard applied to crime fraud in civil case; *X Corp. v. Doe*, 805 F. Supp. 1298, 1307 (E.D. Va. 1992) (same). In the present context, Movants need not even submit evidence that the Debtor actually intended to defraud asbestos claimants (although, as the evidence adduced in the Motion makes clear, they have done so); a *prima facie* showing that badges of fraud existed is sufficient. *See In re Andrews,* 186 B.R. 219, 224, n.3 (Bankr. E.D. Va. 1995) (to find that the crime-fraud exception is applicable, this Court need "not determine whether the debtor intended to defraud his creditors . . . the badges of fraud are enough to establish a prima facie case of fraud which excepts the communications from the attorney-client privilege."); *see also Jones v. Tauber & Balser, P.C.*, 503 B.R. 162, 184 (N.D. Ga. 2013) ("To establish a prima facie case of intentional fraud, the plaintiff need not present

evidence on each factor."); *Clark v. United States*, 289 U.S. 1, 15 (1933) (prima facie evidence requires "something to give color to the charge" showing "some foundation of fact").

6. This forgiving evidentiary standard is consistent with the law of other Circuits. The Third Circuit has described the *prima facie* standard as the "presentation of evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met." *In re Grand Jury Investigation*, 445 F.3d 266, 274 (3d Cir. 2006) (internal quotation marks omitted) (the "burden is not a particularly heavy one"). Courts in the Second Circuit have applied a similar "probable cause" standard to the crime-fraud exception, requiring only "a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud and that the communications were in furtherance thereof." *Amusement Indus., Inc. v. Stern*, 293 F.R.D. 420, 426-27 (S.D.N.Y. 2013) (citing cases) (holding "the probable cause necessary to sustain the exception is not an overly demanding standard").

7. The reason for this low evidentiary standard is simple—the crime-fraud exception necessarily applies to situations where the moving party lacks access to discoverable information specifically because its opponent is using counsel to assist in the perpetration of a fraud or crime. In such situations, the moving party is unlikely to have exhaustive evidence of the fraud or crime due to the invocation of the privilege. Accordingly, the Court should examine whether the Court's previous findings of fact, the documentary and testimonial evidence already in the record, and Mr. Gross's supplemental testimony, if credited, would establish a *prima facie* basis for the application of the crime-fraud exception to the assertion of privilege and work product.

B. The Evidence in the Record Clearly and Consistently Meets Movants' Burden to Make a *Prima Facie* Showing that the Corporate Restructuring Was an Actual Fraudulent Transfer

8. In their responses, the Debtor, New CT and SGC ignore the plentiful evidence before this Court establishing a *prima facie* case for a fraudulent transfer claim. Instead, they focus

myopically on Mr. Gross's testimony, erect a series of strawmen of no relevance to the arguments advanced by the Motion,[3] and offer up the conclusory—and wholly untenable—assertion that "the Debtor engaged in no criminal or fraudulent scheme."[4] In doing so, they urge this Court to ignore the exhaustive record underlying its own prior findings of fact.

1. The Debtor Has Failed to Rebut the Movants' Showing that the Corporate Restructuring and Bankruptcy Filing Were Characterized By the Existence of Several Badges of Fraud.

9. First, the Debtor asserts definitively that "there [are] no badges of fraud [and] no other circumstances indicat[ing] wrongdoing of any kind."[5] But the Debtor's Objection itself acknowledges the existence of five such badges; it merely fails to interpose *any* facts refuting their existence. This is hardly surprising. After all, even the Debtor must concede that the Corporate Restructuring involved "insiders" and that Old CT faced thousands of asbestos litigations at the time those transactions took place. Nor is there any question that the "transfers were concealed," that Old CT's assets and asbestos liabilities were cleaved off from one another (with New CT inheriting the former and the Debtor the latter), or that asbestos claimants now face a much longer and more uncertain road to recovering on their claims.[6] *See* Motion at 28-30 (ECF No. 1006).

[3] The Debtor makes a point to note at the outset that the Movants withdrew their prior motion to compel, asserting (whether explicitly or implicitly) that such withdrawal should have a prejudicial effect in considering this Motion. Objection at 2 (ECF No. 1071). As the Court knows, Movants did withdraw their prior motion in the interest of expediency in the proceedings relevant to the preliminary injunction, and for no other reason. And that motion was withdrawn without prejudice, which the Debtor well knows. Surely the Debtor does not wish to establish precedent that withdrawing a pleading without prejudice means the exact opposite (*i.e.*, result in a withdrawal with prejudice).

[4] Objection at 19 (ECF No. 1071).

[5] Objection at 22 (ECF No. 1071).

[6] The Debtor also asserts that it is entitled to rebut the *prima facie* showing. *See* Objection 18 n. 22 (ECF No. 1071). Even if that were true, which the Movants question, the Debtor does not, in fact, actually rebut any of the articulated badges of fraud present here. *See generally* Objection. Movants submit that the Debtor fails to refute the badges of fraud because it cannot. For instance, there is no dispute that Old CT was subject to asbestos lawsuits, substantially all of the assets were transferred in the Corporate Restructuring, these transactions were among insiders, the transfers were concealed, and resulted in a hindrance, delay, and defrauding of their asbestos claimants. Motion at 28-30 (ECF No. 1006); Objection at 20 (ECF No. 1071).

10. Instead, the Debtor (as it did during litigation over its motion for a preliminary injunction) points repeatedly to the existence of the Funding Agreement, as if that document could somehow negate the presence of fraud. Objection at 20 (ECF No. 1071).[7] Although the relative value of the Funding Agreement has been one of the primary disputes between the Debtor and the Movants since the very beginning of this case, and one of which this Court has taken note,[8] it is a red herring for purpose of the analysis of whether the crime-fraud exception applies.[9] The presence of a funding agreement (let alone belated amendments to such an agreement) does not and cannot vitiate the existence of an actual fraudulent transfer.[10] An attacker cannot absolve himself of liability simply by offering his victim a bandage.

11. Moreover, and although this is not the appropriate forum to discuss the merits of the Motion to Amend Funding Agreement, it should be noted that the proposed amendments do nothing to cure the injury to asbestos claimants caused by the Corporate Restructuring. Nothing stops the parties to the Funding Agreement from refusing to honor their commitments on a going-

[7] Remarkably, the Debtor even suggests that the recent amendments offered to the Funding Agreement in its *Motion of the Debtor for an Order Authorizing It to Enter Into Second Amended and Restated Funding Agreement* (ECF No. 1051) ("Motion to Amend Funding Agreement"), and a record of payments made by New CT pursuant to that Agreement, are somehow germane to the issue here. *See* Objection at 21 (ECF No. 1071). Movants reserve their rights to oppose the Motion to Amend Funding Agreement at the appropriate time.

[8] PI Findings and Conclusions ¶¶ 62-77, 170 (ECF No. 972).

[9] The Debtor also remarks, in a footnote, that the Funding Agreement here is "not unlike" that effected by Georgia-Pacific LLC in advance of the chapter 11 filing of Bestwall LLC, and that certain statements made by the asbestos committee in that case should "provide an additional basis for the Court to find that Old CT acted in good faith, rather than with fraudulent intent, when transferring its assets." Objection at 21 n.26 (ECF No. 1071). This argument is flawed and purposefully misleading. The Bestwall committee, in the referenced pleading, explicitly states that "Old GP structured the 2017 Corporate Restructuring" by *attempting* to imbue it with the "hallmarks of a valid restructuring and to provide a defense to a fraudulent conveyance challenge . . . ." *See In re Bestwall LLC*, Case No. 17-31795 (LTB) (Bankr. W.D.N.C. Oct. 17, 2018), ECF No. 653, at 8 n.19. It then stated—in the very next few sentences—that "whether the 2017 Corporate Restructuring is *actually* a fraudulent transfer under either the Bankruptcy Code or state law is an issue that is not presently before the Court" and that "the Committee will address fraudulent transfers under the 2017 Corporate Restructuring at the appropriate time." *See id.* Debtor's intentional omission of this context is improper—particularly when the point of the footnote is ostensibly to buttress Debtor's own claims of good faith.

[10] PI Findings and Conclusions, ¶ 169 (ECF No. 972).

forward basis,[11] and a funding agreement—a mere promise to pay—cannot be equated to tangible assets and operations from which a claimant can directly seek a remedy. *See* Motion at 18 n.47 (ECF No. 1006).[12] And it is undisputed that, aside from the Funding Agreement, DBMP has never had sufficient assets to satisfy the liabilities thrust upon it by the Corporate Restructuring.[13]

12. The Debtor also cites to the Court's PI Findings and Conclusions to suggest that an action challenging the Corporate Restructuring may not be "necessary or productive" if New CT intends to fund the "full and fair" resolution of asbestos liabilities. *See* Objection at 24 (ECF No. 1071). But that suggestion has nothing to do with this Motion, which is premised on the fact that neither New CT nor the Debtor had any intent of fair dealing at the time they decided to pursue the Corporate Restructuring. Moreover, the Debtor ignores the fact that the decision to forego an action challenging the transactions at issue would have to be based on full and fair *resolution* of asbestos liabilities—one to which asbestos claimants would have to agree. But no such agreement exists, and none seems likely based on the Debtor and New CT's approach to this case thus far.

2. <u>The Debtor Fails to Grapple with Other Documentary and Testimonial Evidence that the Corporate Restructuring and Bankruptcy Filing Were Undertaken to Hinder, Delay and Defraud Asbestos Creditors</u>.

13. The Debtor chooses to focus its Objection on Mr. Gross, characterizing him as a mere disgruntled former employee whose testimony should be completely disregarded.[14] But Debtor's Objection is noticeably silent on the critical points—that Mr. Gross's testimony is

[11] This Court has even questioned the legal enforceability of the Funding Agreement, particularly because such agreement was not an "arms-length" transaction and was executed by and among insiders who wear hats on both sides of the transaction. *See* PI Findings and Conclusions ¶ 63 (ECF No. 972).

[12] *See* PI Findings and Conclusions ¶¶ 77, 170 (ECF No. 972).

[13] *See* PI Findings and Conclusions ¶ 57 (ECF No. 972).

[14] Even if Mr. Gross was a disgruntled employee who was motivated to testify against his former employer, that does not mean that he would (or did) lie under oath. Mr. Gross had nothing to gain from testifying against the Debtor in this proceeding. Moreover, Mr. Gross is an attorney with decades of ligation experience and thus certainly well-aware of the penalties for providing false testimony during his deposition. He would be subject not only to criminal penalties, but also could have his law license suspended for violating the professional rules of conduct.

entirely consistent with and in fact amplifies the recent findings of this Court regarding the Debtor's Motion for a Preliminary Injunction. *See* PI Findings and Conclusions (ECF No. 343).

14. First, the Court has already rejected Debtor's contention that the Corporate Restructuring was designed solely to provide "flexibility" and "optionality" to address CertainTeed's historic asbestos liabilities. *See* PI Findings and Conclusions, ¶¶ 47, 94 (ECF No. 972). Specifically, the Court found that (1) it was highly unlikely that Old CT would have engaged in the "expense and disruption of the Corporate Restructuring unless it intended" to have DBMP file for bankruptcy; (2) the "option" of defending asbestos claims was not an "option," but simply the status quo; (3) Old CT never considered other options, such as transferring liabilities to a third party; and thus that (4) the decision to file for bankruptcy occurred prior to the formation of the Debtor by the Corporate Restructuring, the entire purpose of which was to facilitate that filing. PI Findings and Conclusions, ¶¶ 102-06 (emphasis added).

15. Mr. Gross's testimony provided context and detail regarding the above findings. Mr. Gross testified that he was aware that CertainTeed and Saint-Gobain executives internally disseminated an "official company story" designed to portray the Corporate Restructuring as a "legitimate transaction to create optionality." Gross Dep. 106:5-12, June 2, 2021. Mr. Gross explained that this "story" was "in large part . . . inaccurate and misleading" and that:

> I believed and knew that the real purpose was to wind up with a sub . . . an entity loaded with asbestos liability for purpose of a bankruptcy proceeding and ultimate estimation that was less than continuing business as usual.

Id. at 105:18-22, 106:17-107:10. When asked about DBMP's purported "independent decision" to file for bankruptcy, Mr. Gross explained that "the decision had already been made prior, with clear directive and instructions, and the occurrence of independence is not accurate. It's not truthful." *Id.* at 121:22-122:2. Mr. Gross explained that the decision to engage in the Corporate

Restructuring and file for bankruptcy was made at the same time by the highest executives at the Saint Gobain Parent. *Id*. at 137:22-25.

16. Rather than respond substantively to the above, the Debtor seeks to change the subject, contending that "[w]ho may or may not have 'approved' the transactions and filings as a matter of corporate governance and when they may have approved them has nothing to do with whether anyone intended to perpetrate a fraud."[15] But the allegations of fraud here relate directly to the decisions to engage in the Corporate Restructuring and file for bankruptcy, and a key part of the Debtor's narrative is that those decisions were independently undertaken at different times by Old CT and the Debtor, respectively. If, as the documents and testimony underlying the PI Findings and Conclusions as well as Mr. Gross's testimony strongly suggest, that is not in fact the case, the decision to obfuscate the facts surrounding those approvals is obviously relevant to whether the Debtor and its affiliates had the requisite intent to hinder, delay or defraud asbestos claimants. Yet the full picture of the conversations and approval process surrounding the Corporate Restructuring and bankruptcy filing remain shrouded in assertions of privilege.[16]

17. Second, the Court also found that in 2019, Old CT was aware of the *Bestwall* case and was investigating whether it too could place its asbestos liabilities in a new company that would file for bankruptcy. PI Findings and Conclusions, ¶ 100. By June 5, 2019, Old CT had brought in outside bankruptcy counsel and "began preparations for such a bankruptcy filing." *Id.* The Court further recognized that the Corporate Restructuring and the resulting bankruptcy filing "closely paralleled the three other asbestos bankruptcy cases filed by the Jones Day law firm in this judicial district – *Bestwall*, *Aldrich*, and *Murray*." *Id.*, ¶ 101. Each of these cases were filed

[15] Objection at 4 (ECF No. 1071).

[16] *See* Motion, Ex C.

shortly after utilizing the Texas Divisional Merger statutes to place historic asbestos liabilities into a newly-formed entity for the stated purpose of providing the "option" to file bankruptcy. *Id.* Indeed, in the Findings of Fact and Conclusions of Law recently issued in connection with the *Aldrich* matter, this Court explicitly found that it was no "coincidence" that DBMP as well as the debtors in each of those three cases were all represented by the "same law firm" and that the "Texas Two-Step is an attorney designed strategy for use in a bankruptcy case."[17]

18. Mr. Gross's testimony confirmed this point, providing additional clarity and detail regarding Old CT's tracking of *Bestwall* and other asbestos bankruptcies and the involvement of the same outside counsel. Specifically, Mr. Gross testified that he "knew that Georgia-Pacific had just blazed a trail . . . putting all of their asbestos liabilities in a North Carolina company and running it into bankruptcy" and that Old CT was contemplating a similar strategy in 2019. Gross Dep. 46:21-47:3. As set forth in the Motion, he explained that the introduction of the *Bestwall* paradigm allowed Old CT's French parent, which had in his experience been adamantly opposed to a more traditional bankruptcy filing, to "have [their] cake and eat it too" by separating out asbestos liabilities from assets and subjecting only the former to bankruptcy. Motion at 14-15. And, *further* underscoring the intimate involvement of counsel in the scheme, Mr. Gross was cut off by counsel for the Debtor before he could describe Old CT's decision to "find out whether there [was] some business in North Carolina" that could serve as a jurisdictional hook. *Id*.

19. Third, the Court concluded that the Corporate Restructuring (including the Funding Agreement) had "a material, negative effect on the asbestos creditors' ability to recover on their claims," providing a "viable cause" of action to contest the merger and its allocation of Old CT's

[17] *See Findings of Fact and Conclusions of Law Regarding Order: (I) Declaring That the Automatic Stay Applies to Certain Actions Against Non-Debtors, (II) Preliminarily Enjoining Such Actions, and (III) Granting in Part and Denying in Part the Motion to Compel*, *Aldrich Pump LLC and Murray Boiler LLC v. Those Parties et al.* (*In re Aldrich Pump LLC)*, 20-ap-03041, ECF No. 308 (Bankr. W.D.N.C. Aug. 23, 2021), at ¶ 108 n. 156.

asbestos claims to DBMP under fraudulent transfer law. PI Findings and Conclusions, ¶ 172. Again consistent with the above, Mr. Gross testified that CertainTeed and the Saint-Gobain Parent Entity's internal goal was to use the Divisive Merger and subsequent bankruptcy filing in order to save money, delay recovery by asbestos claimants, and avoid having to subject CertainTeed's operating business to bankruptcy court oversight. Gross Dep. 46:21-47:3, 108:4-16 (stating that the goal was to place "all their asbestos liabilities in a North Carolina company and run[] it into bankruptcy" in order to "obtain a final asbestos liability bill for less … than the tort system").

20. In sum, the Debtor's attacks on the credibility of Mr. Gross are unavailing and ultimately irrelevant as his testimony is entirely consistent with prior findings of the Court.

3. The Debtor Incorrectly Claims That Mr. Gross Lacks Personal Knowledge Regarding the Events and Transactions at Issue.

21. Because it cannot effectively challenge the content of Mr. Gross's testimony, the Debtor seeks to undermine its import by describing what he had to say as "miscellaneous musings", "bias-tainted speculation", "surmise", "supposition", and "foundation-free guesses at what others knew or decided." *See* Objection at 3-14 (ECF No. 1071). But this hyperbolic language should not obscure the fact that Mr. Gross's testimony rest on a firm foundation. Specifically, Mr. Gross was employed as in-house counsel by CertainTeed for over seven years; he reported directly to Michael Starczewski; and he one of only three attorneys responsible for managing asbestos litigation between 2016 and 2019. *Id.* at 18:21-19:14; 21:12-23. To suggest that Mr. Gross was unaware of CertainTeed's position on asbestos-related issues (including a potential bankruptcy filing) during his tenure is simply not credible.

22. Nevertheless, the Debtor doggedly pursues this angle, at one point asserting that Mr. Gross's knowledge of the Saint Gobain Parent's position regarding a bankruptcy filing was based *solely* on a single conversation he had during his job interview. Objection at 9 (ECF No.

1071). But as the Motion sets forth, Mr. Gross held conversations with Mr. Starczewski over the course of several years about filing for bankruptcy as a "cost-savings measure." Gross Dep. 30:19-24. However, as Mr. Gross explained, the idea never gained traction because both men understood that the Saint Gobain Parent was opposed to putting CertainTeed in bankruptcy—a point which Mr. Starczewski's self-serving declaration does not dispute. *Id.* at 29:22-31:3.

23. The Debtor attempts to make hay of Mr. Gross's ostensibly limited role in Project Horizon. But it cannot deny that he signed a Non-Disclosure Agreement, attended a critical Project Horizon meeting in August 2019 (where he was instructed to prepare information for the eventual bankruptcy filing Debtor denies had yet been planned), and participated in direct conversations with numerous CertainTeed personnel, including in-house attorneys, regarding the Corporate Restructuring and bankruptcy filing. *See, e.g.*, Motion at 11-17 (ECF No. 1006) (discussions with Ms. Gray and Mr. Starczewski regarding (1) "all-hands-on-deck" July 2 meeting at which executives and counsel discussed *Bestwall*-type restructuring and bankruptcy filing; (2) authorization of bankruptcy by the Saint Gobain Parent; and (3) CertainTeed's expectation that any bankruptcy would last several years, thus indefinitely delaying asbestos claimants' ability to recover); *id.* at 17-18 (attendance at a presentation regarding the "official company story" and subsequent discussions regarding the Corporate Restructuring with Craig Smith, the architect of Project Horizon). For all its bluster regarding Mr. Gross's "speculation," the Debtor never denies that the vast majority of these conversations actually occurred during the course of Gross's employment.[18]

[18] The major exception is with regard to a conversation between Mr. Gross and Mr. Starczewski, which Mr. Gross identified during his deposition as having occurred on October 10, 2019. Mr. Starczweski later offered a declaration that he could not have met with Mr. Gross that day as he was attending to a family medical emergency. But Mr. Starczweski's declaration does not dispute the substance of Mr. Gross's recollection that Mr. Starczweski had described the bankruptcy filing as a "done deal," and Mr. Gross himself stated several times that he could not be 100% certain regarding precise dates given his lack of access to his work calendar. In any event, even if that conversation

24. Mr. Gross's participation in the events leading up to the Corporate Restructuring and his personal interactions with his co-workers are more than sufficient to meet the personal knowledge requirement under Federal Rules of Evidence 602. For example, in *In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litigation*, 870 F.Supp. 1293 (E.D. Pa. 1992), the court held that a witness had personal knowledge to testify on information he learned from corporate documents and discussions with corporate management. *Id.* at 1304 (citing *Agfa-Gevaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518, 1523 (7th Cir. 1989) ("most knowledge is based on information obtained from other people.")). Similarly, in *In re A.H. Robins Co. Inc.*, 575 F. Supp. 718 (D. Kan. 1983), the district court held that witnesses had personal knowledge about actions outside of the confines of their departments because the employees all worked for the same company and "communicated freely with one another." *Id.* at 726.

25. Moreover, it is incorrect for the Debtor to suggest that Mr. Gross's testimony has "no evidentiary value" simply because he could not recall every single detail of events occurring more than a year ago. *See* Objection at 6-7 (ECF No. 1071). Courts have routinely held that "Rule 602 does not require the witness' personal knowledge to rise to the level of certainty to be admissible," so long as the "witness had an opportunity to observe and obtained some impressions based on his observations." *S.E.C. v. Singer*, 786 F. Supp. 1158, 1167 (S.D.N.Y. 1992) (citing *United States v. Reitano*, 862 F.2d 982, 987 (2d Cir.1988)). That description fits Mr. Gross to a tee. He attended meetings related to the Corporate Restructuring and bankruptcy filing and had direct and frequent interactions with other in-house attorneys who were deeply involved in the decision-making process. And, as discussed above, his testimony is completely consistent with the remainder of the record and this Court's own findings.

---

did not take place on that date and time prescribed, that would hardly justify simply disregarding the rest of Mr. Gross's well-documented (and undisputed) testimony.

C. The Debtor's Remaining Arguments Regarding the Applicability of the Crime-Fraud Exception Are Unavailing.

26. Unable to rebut the Movants' *prima facie* showing that the crime-fraud exception applies, the Debtor falls back on a grab-bag of technical, legalistic arguments suggesting that the Movants' burden is far heavier than it actually is. The Debtor's reading of the law is wrong. But even if the Debtor was correct, there is still no question that the Movants have proffered more than enough evidence to show that the Debtor and its affiliates acted in a deceptive and fraudulent manner and that their attorneys' involvement in that conduct justifies the production not only of attorney-client communications but work product as well.

1. The Conduct At Issue Meets the Standard for Triggering the Exception.

27. First, the Debtor, citing to the *Puerto Rico* and *Caesars* cases, suggests that the crime-fraud exception may not apply to transactions undertaken in order to hinder creditors if the intent to do so was not concealed.[19] In addition to implicitly conceding that the Corporate Restructuring hindered asbestos claimants, the Debtor's argument ignores the significant distinctions between those cases and this one. In *Puerto Rico*, the court simply found that the crime-fraud exception had not been met because the attorneys were retained for a proper purpose.[20] Here, the Movants have proffered evidence showing that, at the very least, outside counsel's retention facilitated the *improper* purpose of hindering, delaying, and defrauding creditors.

28. *Caesars*—a non-controlling, non-published decision—is equally far afield. Hr'g Tr., *In re Caesars Entm't Operating Co., Inc.*, Case No. 15-bk-1145, ECF No. 5334, at 46-47 (Bankr. N.D. Ill. Sept. 21, 2016). Although the court in that case determined that the crime-fraud

[19] *See* Objection at 23 n.28 (citing *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 392 F. Supp. 3d 244, 258 (D. P.R. 2019) and *In Caesars Entm't Operating Co., Inc.*, No. 15 B 1145, 2016 Bankr. LEXIS 4552, 2016 WL 7477566, at *3 (Bankr. N.D. Ill. Sept. 21, 2016)).

[20] *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 392 F. Supp. 3d 244, 258 (D. P.R. 2019).

exception did not apply where the parties seeking to pierce the privilege failed to establish that they had been defrauded, the circumstances in that case actually support the necessity of compelling the production of privileged documents here. In particular, the *Caesars* court had already appointed an Examiner with broad Rule 2004 authority to perform an exhaustive investigation which included the review and analysis of tens of thousands of privileged documents and interviews of at least a dozen in-house and outside counsel. *Id.*; *see also* Final Report of Examiner, Richard J. Davis, *In re Caesars Entm't Operating Co., Inc.*, No. 1:15-bk-01145 (ABG), ECF No. 3401 (Bankr. N.D. Ill. Mar. 15, 2016). In this proceeding, by contrast, the Movants have had no such access to CertainTeed's privileged communications. Nevertheless, they have still made out a *prima facie* showing that a fraudulent conveyance took place. And, to the extent the issue is one of "concealment," as Debtor contends, there is no question that these transactions separating Old CT's "good" assets from its "bad" liabilities were completely hidden from the view of asbestos claimants, many of whom continued to negotiate settlements with Old CT in reliance on their understanding that it would be Old CT—and not some new, insolvent entity—which would be liable for the payments they were owed.[21] When the Corporate Restructuring was revealed, many months later, the value of those settlements fell precipitously,[22] while the CertainTeed enterprise enjoyed a windfall.[23] This type of conduct easily qualifies as fraudulent, a

[21] Indeed, secrecy was so paramount that the Corporate Restructuring was hidden not only from asbestos claimants but also from the vast majority of CertainTeed employees until the moment it was announced. *See* PI Findings and Conclusions at ¶ 41; *see, e.g.*, ACC-FCR Ex. 66 (DBMP-BR_0150410) (letter from Craig Smith stating "it is critical that the existence of Project Horizon and all information concerning Project Horizon not be disclosed to anyone"); ACC-FCR Ex. 139 (DBMP-BR_0150418) (same); *see also* Bondi Dep. 112:5-22, Oct. 9, 2020; CertainTeed 30(b)(6) Dep. 88:3-9 (Campbell).

[22] Motion at 28-29; *Motion of the Official Committee of Asbestos Personal Injury Claimants and the Future Claimants' Representative for Entry of an Order (i) Granting Leave, Standing and Authority to Investigate, Commence, Prosecute and to Settle Certain Causes of Action, and (ii) to Conduct Relevant Examinations* (ECF No. 1008) ("Standing Motion") at 18.

[23] CertainTeed 30(b)(6) Dep. 217:16-24 (Campbell); *see also* Findings and Conclusions ¶ 42 (ECF No. 972).

point the *Caesars* court itself recognized in citing the *absence* of such concealment in that case as a reason for its denial of the waiver motion.[24]

29. Relatedly, the Debtor also cites the (non-controlling) *United Bank* decision to suggest that, for the crime-fraud exception to apply, the creditor must demonstrate the existence of some affirmative act of "deception, dishonesty, misrepresentation, falsification or forgery." *United Bank v. Buckingham*, 301 F. Supp. 3d 547, 555 (D. Md. 2018). As an initial matter, the Debtor's over-aggressive interpretation of *United Bank* does not appear to be supported by any other caselaw Movants were able to find.[25] As the Supreme Court made clear in *Husky*, mere "wrongful intent" is enough to qualify as "actual fraud" in the context of a fraudulent conveyance. *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586, 194 L. Ed. 2d 655 (2016). As Judge Sotomayor explained, "wrongful intent" need not involve some affirmative misrepresentation or dishonest inducement: to the contrary, "concealment and hindrance is enough." *Husky*, 136 S. Ct. at 1587.

30. Moreover, even under a fair interpretation of the standard applied by *United Bank* (which cites *Husky* approvingly), the conduct at issue in this case would still qualify.[26] As the

[24] In explaining its decision, the *Caesars* court also referred to the incredible burden associated with either the production of or *in camera* review of the documents at issue in that case, which numbered over 180,000. Here, by contrast, the number of documents at issue (4,000) is a tiny fraction of that sum.

[25] *See In re Stewart*, 2021 WL 1157928, at *5 (Bankr. W.D. Ok. Mar. 25, 2021) (citing cases); *Hrobuchak v. Navistar Fin. Corp.*, 2016 WL 368433, at *8 (M.D. Pa. Jan. 27, 2016) (noting that the same court in a related case ordered certain communications were subject to the crime-fraud exception as they were "possibly in furtherance of an allegedly fraudulent transfer."); *Jones v. Tauber & Balser, P.C.*, 503 B.R. 162, 187 (N.D. Ga. 2013) ("The crime-fraud exception applies to any communications with counsel made in furtherance of the alleged fraudulent transfer or closely related to it."); *Cendant Corp. v. Shelton*, 246 F.R.D. 401, 405 (D. Conn. 2007); *Official Committee of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 342 B.R. 416, 427 (S.D.N.Y. 2006); *In re Galaxy Computer Servs., Inc.*, No. 1:04-CV-00007-LMB, 2004 WL 3661433, at *2 (E.D. Va. Mar. 31, 2004) ("Such allegations of fraudulent transfer and fraud . . . are sufficient allegations of fraud in a bankruptcy case to invoke the crime-fraud exception."); *In re Vereen*, No. 96-78369-W, 1999 WL 33485642, at *2 (D.S.C. Sept. 7, 1999) ("[T]the attorney-client privilege will not protect communications between the Debtor, the Trust, the Partnership, Five Star and Sutton since such communications involved fraudulent transfers and, therefore, fall within the crime-fraud exception to the attorney-client privilege.").

[26] In attempting to distinguish the caselaw cited by Movant, Debtor characterizes those cases as involving "demonstrable acts of deceit and fraud" which the Debtor posits are "absent here." Objection at 23 (ECF No. 1071). Notably, however, those very cases include examples of (a) concealment of the true nature of a transaction to induce

evidence discussed above and the PI Findings and Conclusions demonstrates, there is no real dispute that the CertainTeed enterprise concealed the Corporate Restructuring until its completion and that the Corporate Restructuring and attendant DBMP bankruptcy were intended to effectuate disparate treatment of their asbestos claimants, which would have a resulting material, negative effect on the claimants' ability to recover on their claims. *See* PI Findings and Conclusions, ¶ 172. This is textbook "deception and dishonesty." The Debtor does not get to absolve itself by disclosing it months after the fact, either, although its proud proclamation that it exhibited "transparency" by doing so in its first-day declaration (as required by law) is so audacious as to be almost admirable.

2. There Was a "Close Relationship" Between Privileged Communications and the Alleged Fraudulent Transfers.

31. The Debtor does not push this argument particularly aggressively, nor can it. *See* Objection at 26 (ECF No. 1071). As even the Debtor itself must acknowledge, Movants have cited scores of instances where witnesses for Debtor, New CT and/or SGC refused to answer questions relevant to the Corporate Restructuring and related DBMP bankruptcy because the information came from attorneys.[27] Moreover, the assertions on the privilege log clearly "reflect[] legal planning concerning a potential corporate restructuring, including the preparation of background materials informing potential restructuring decision." Motion, Ex. B. The Debtor suggests that the legal advice at issue simply "informed business decisions," and, thus, should not vitiate the attorney-client privilege. *See id.* at 27.[28] The legal advice at issue here did more than inform

a counterparty to contract and (b) pre-bankruptcy movement of assets to evade creditors, which is precisely the conduct at issue here. *See* Objection at 23; Motion at 24-25.

[27] *See* Motion, Ex. C.

[28] In support of its position, the Debtor cites to cases that simply state the general premise, without any analogous relation to this case. *See* Objection at 27 (citing *Digit. Vending Servs. Int'l, Inc. v. Univ. of Phoenix, Inc*., 2013 WL 1560212, at *9, 2013 U.S. Dist. LEXIS 53108 (E.D. Va. Apr. 12, 2013) and *Great Plains Mut. Ins. Co. v. Mut. Reinsurance Bureau*, 150 F.R.D. 193, 198 (D. Kan. 1993)). The Debtor's further citation to *In re Grand Jury Procs.*

business decisions, it ***was*** the company's decision. The entire Corporate Restructuring and resulting DBMP bankruptcy was an attorney-driven, attorney-executed process.[29]

3. The Distinction Between Attorney-Client Privilege and Work Product Is Irrelevant in the Instant Context.

32. In a last-ditch effort to split the baby and avoid the disclosure of what are almost certain to be the most critical documents in the case given the predominant role played by their attorneys in effecting the transactions at issue, Debtor and New CT and SGC seek to draw a distinction between documents protected by the attorney-client privilege and those protected by the work product doctrine. *See* Objection at 18 n.21 (ECF No. 101); *see also* Joinder at ¶ 6 (ECF No. 1073). The Debtor contends that the work product protection requires an attorney's awareness or knowing participation in the conduct giving rise to the application of the crime-fraud exception. *See* Objection at 18 n.21 (ECF No. 1071). Yet the Debtor fails to explain why this distinction makes any difference here—for good reason. The Debtor cannot contend that its counsel knew nothing about the fraudulent conveyance effectuated as a result of the Corporate Restructuring, and it does not attempt to do so.[30] *See* Motion at 26-27. That is the end of the inquiry.

#5, 401 F. 3d. at 249, is a red herring. Again, the case has no analogous circumstances to those here, has no involvement of fraudulent transfers, and addressed a circumstance where the record could not show the "close relationship" between the privileged documents and the purported wrongdoing. Here, the privilege log alone describes the documents at issue and includes reference to their relation to the fraudulent transfer, including those involving advice relevant to the fraudulent Corporate Restructuring, or Project Horizon. *See* Motion, Ex. B. Finally, none of the cases the Debtor cites on this score involved attorneys spearheading a transaction as was the case in Project Horizon.

[29] CertainTeed 30(b)(6) Dep. 62:2-7 (Campbell) (describing Project Horizon as a "legal-driven process"); Placidet Dep. 49:22-50:3, Oct. 14, 2020; *see also* PI Findings and Conclusions ¶ 43 (ECF No. 972).

[30] Indeed, by admitting—as they must—that the material over which they claim work product protection was created "in anticipation of litigation," New CT and SGC, as well as the Debtor, make Movants' case for them. *See* Joinder at ¶ 6 (ECF No. 1073); Objection at 18 n.21 (ECF No. 1071); *see also* Motion, Ex. B. After all, given the sophisticated counsel involved, there is no real doubt that the "litigation" contemplated had to have included an assertion of actual fraudulent transfer. Tellingly, all three entities are conspicuously silent on that point.

4. The Assertion of a Common Interest Exception to Waiver by New CT and SGC Cannot Block Application of the Crime-Fraud Exception.

33. Finally, New CT and SGC claim that, as to documents where SGC and/or New CT hold an attorney-client privilege or work product protection, the Motion should be denied because they share a common legal interest with the Debtor and have not consented to any such waiver. But this contention is both factually and legally improper. As an initial matter, Movants seek the application of the crime-fraud exception as it applies to any discovery documents withheld or redacted by any of the entities within the CertainTeed enterprise, regardless as to which hat or hats a particular employee or officer wore when effectuating the Corporate Restructuring. As the Court well knows, DBMP has no employees of its own. The few employees DBMP utilized, of which there are three (including two attorneys and one administrative assistant who devotes one-third of her time or less to the Debtor) are borrowed from SGC.[31] Furthermore, the board is comprised of overlapping employees of SGC and/or New CT, with the exception of the single "independent" member.[32] Those who made decisions to enter the Corporate Restructuring to create DBMP, as well as those who authorized DBMP's bankruptcy filing, were all from the same enterprise that claims to share the privilege. Thus, in this context, SGC and New CT are clearly not independent third parties to whom a consideration of privilege would be a different calculus, and the crime-fraud exception should apply. Moreover, New CT and SGC are the direct and indirect recipients of the actual fraudulent transfer, as they emerged from the Corporate Restructuring with CertainTeed's healthy operations while its asbestos liabilities were sloughed off onto the Debtor.[33]

[31] ACC-FCR Ex. 188 (Letter from Jeffrey B. Ellman to Kevin C. Maclay, at 3 (June 9, 2020) (listing individuals seconded to DBMP)).

[32] Starczewski Decl. ¶ 25 (Adv. Pro. Dkt. 238); *see also* Bondi Decl. ¶¶ 7, 8 (Adv. Pro. Dkt. 238).

[33] *See* ACC-FCR Ex. 27 (DBMP-BR_0001976), § 5(b)(ii) ("Plan of Divisional Merger"); Hr'g Tr. 155:16-156:5, Mar. 1, 2021; *see also* PI Findings and Conclusions ¶ 53 (ECF No. 972).

So, again, New CT and SGC are not third parties, but instead direct potential defendants in the actual fraudulent transfer context. Moreover, they share no "common legal interest" with the Debtor sufficient to require their assent to any waiver. *See, e.g., Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 607-09 (S.D. Fla. 2013) (discussing the "common legal interest" doctrine and finding that if the parties are not perceived as joint clients, communicating with others who have waived the privilege and co-defendants "cannot preclude the other member of the joint defense group from having waived the privilege it possessed as to its own statements").

II. THE DEBTOR CANNOT REASONABLY DISPUTE THAT AN AT-ISSUE WAIVER HAS OCCURRED

A. The Debtor Has Placed "At Issue" the Rationale and Decision to Engage in the Corporate Restructuring and the Filing of the Bankruptcy Case.

34. The Debtor first contends that the Court has not yet been called upon to resolve the challenges to privilege advanced in the Motion. Objection at 15 (ECF No. 1071). That statement is correct, but unremarkable. Indeed, there would be no reason for the Movants to have filed the Motion had it done so. But the Court did conclude that certain facts supported an at-issue waiver:

- DBMP made the assertion that "the Corporate Restructuring was intended only to provide the Debtor with 'flexibility' in dealing with its asbestos liabilities and that a bankruptcy filing by DBMP was simply one of those options" and that the DBMP's decision to enter bankruptcy was made independently;

- DBMP and New CertainTeed's interposition of "attorney client privilege and work product privilege assertions to block a fulsome inquiry" about those issues;

- DBMP and New CertainTeed's decision to allow their corporate representatives to "testify about the same topics—*to the extent that they found it advantageous*."

PI Findings and Conclusions, ¶¶ 94-98 (emphasis added). The Debtor does not dispute the Court's conclusions, asserting only that they are non-binding because they were reached in the context of a preliminary injunction. Objection at 15-16 (ECF No. 1071). But that is irrelevant. By selectively

testifying as to the reasons and rationale for the Corporate Restructuring and the bankruptcy filing, the Debtor has placed its attorney-client communications at issue and waived the privilege.

B. The Debtor's Claimed Attorney-Client Privilege Does Not Apply To Corporate Statements Related To Business Decisions.

35. The Debtor first maintains that it did not put privileged communications at issue because the purpose, reasons for, and effect of the Corporate Restructuring and the bankruptcy filing were simply "corporate statements" related to "business decisions." Objection at 27 (ECF No. 1071). But even if the Debtor were correct, then the attorney-client and work product privileges would simply be inapplicable across the board, as communications regarding mere business decisions are not privileged even when they involve counsel.[34]

36. Courts within the Fourth Circuit have reached the same conclusion. In *United States v. Cohn*, 303 F. Supp. 2d 672 (D. Md. 2003), the district court held that "[c]ommunications are not privileged merely because one of the parties is an attorney or because an attorney was present when the communications were made . . . [w]hen the legal advice is merely incidental to business advice, the privilege does not apply." *Id.* at 683 (internal citations omitted). Moreover, the mere presence of an attorney in a meeting or on a communication does not trigger the attorney-client privilege. "What would otherwise be routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda." *F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A.*, 184 F.R.D. 64, 71 (D. Md. 1998).

[34] *See Nix v. Holbrook*, No. 5:13-02173-JM, 2015 WL 631155, at *6 (D.S.C. Feb. 13, 2015) (holding that deposition questions related to business decisions were not protected because it did "not suggest a response containing extensive legal advice"); *Alomari v. Ohio Dep't of Pub. Safety*, No. 2:11–cv–00613, 2013 WL 4499478, at *4 (S.D. Ohio Aug.21, 2013) ("Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected."); *Perius v. Abbott Labs*., No. 07 C 1251, 2008 WL 3889942, at *7 (N.D. Ill. Aug.20, 2008) ("The attorney-client privilege does not protect business advice, even when the advice is given by an attorney, but it does protect an attorney's legal advice about a business decision.").

37. An additional case referenced by the district court in *F.C. Cycles Int'l* is especially instructive. In *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508 (D. Conn. 1976), a deponent was asked to describe the considerations involved in decisions to grant or refuse a license in a patent dispute. The witness claimed that the business and legal reasons were so interwoven that he could not answer without disclosing privileged considerations. In compelling the witness to testify, the district court concluded that, although the licensing decisions at issue may have "contain[ed] a legal component," they were not "inherently dependent on legal advice" and thus were "essentially business decisions." To preclude disclosure of those decisions simply because they had been "alluded to by conscientious counsel" would be a "distortion of the privilege." *Id*. at 517.

38. The same principle applies with equal force here. In light of the Debtor's concession that counsel participated in the business decision to engage in the Corporate Restructuring and to file for bankruptcy, the attorney-client and work product privileges are inapplicable. Accordingly, any previously withheld information must be produced on this basis.

C. To the Extent the Debtor's Overbroad Privilege Assertions Related to Legal Advice, the Debtor Has Waived Privilege as to Certain Issues.

39. To the extent the Debtor's claims of privilege remain viable, such privilege has been waived to the extent the Debtor selectively offered testimony on privileged topics related to Corporate Restructuring and filing of the bankruptcy.

40. As an initial matter, the Debtor is incorrect that the *Rhone* standard "controls" in the Fourth Circuit. *See* Objection at 31 (ECF No. 1071). As explained in the Motion, the Fourth Circuit has not yet addressed what standard applies. In *Shaheen v. WellPoint Cos.*, 490 F. App'x 552 (4th Cir. 2012), which the Debtor cites as evidence that the Fourth Circuit has previously approved of the *Rhone* standard, the Fourth Circuit cited to both *Rhone* and *Hearn* for the singular proposition that the at-issue doctrine did not apply under either test. *Id*. at 557. Indeed, the last

decade of Fourth Circuit caselaw yields numerous instances of courts applying *Hearn* or endorsing both *Hearn* and *Rhone*.[35] 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).[36] Thus, it is incorrect for the Debtor to suggest that *Rhone* is the only applicable standard.

41. Even under *Rhone*, moreover, the Debtor has waived privilege. To be clear, a waiver is found under the *Rhone* standard when a "the client makes use of the privileged communication." Objection at 32 (ECF No. 1071). As further detailed in the Motion and in Paragraph 35, *infra*, the Debtor has repeatedly made representations throughout this case about the purpose and reasons for, and the effect of, the Corporate Restructuring and the resulting bankruptcy filing. *See* Motion at 37-43 (ECF No. 1006). It has used the privilege to shield itself from a "fulsome inquiry" about these matters and as a sword to permit testimony it deemed "advantageous." PI Findings and Conclusions, ¶¶ 95, 97. As the Court has recognized, "DBMP and New CertainTeed cannot have it both ways." *Id.*, ¶ 98.

42. Although the Debtor downplays them, the Movants have already offered several specific examples of at-issue waiver in the Motion. *See* Motion at 35-36 (ECF No. 1006). For instance, the Movants asked several of the Debtor's witnesses about (1) the benefits of the Corporate Restructuring, (2) the financial savings that might have resulted from a bankruptcy

[35] *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 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 *3-4 (E.D. Va. Mar. 30, 2012).

[36] *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).

filing, and (3) the general obligations of the parties under the funding agreement. These queries all sought factual information. Nevertheless, in each instance, counsel for the Debtor or New CT instructed the witnesses not to answer if the witness learned of that (factual) information from counsel, even as those same witnesses were allowed to parrot "advantageous" information which those witnesses likely acquired from counsel. Motion at 35-36 (ECF No. 1006).[37] Accordingly, Movants were entirely precluded from discovering large swaths of factual information because it came from lawyers. This is quintessential at-issue waiver.

43. The cases cited by Debtor are analogous and support the finding of an at-issue waiver here.[38] *See* Objection at 34-35 (ECF No. 1071).[39] In *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476 (3d Cir. 1995), the Third Circuit affirmed the district court's decision holding that the plaintiff had placed at issue advice related to the structure of a particular transaction and had, therefore, waived the attorney-client privilege as to all communications, both written and oral, to or from counsel as to the entire transaction. *Id*. at 486-87. As the court noted:

> [t]here is an inherent risk in permitting the party asserting a defense of its reliance on advice of counsel to … define selectively the subject matter of the advice of counsel on which it relied in order to

[37] The Motion contains three examples of the Debtor's overinclusive privilege objections, which precluded any inquiry on even factual information that was conveyed by counsel to client. In one deposition, Attorney Seiden (counsel for the Debtor) stated: "***To the extent you learned the benefits from counsel, direction not to disclose them.***" In another deposition, Attorney Torborg (counsel for the Debtor) stated: "***If it's based on entirely on communications of counsel, then you must not answer.***" And in a third deposition, Attorney Wyner (counsel for New CT) stated: "***If the information came from counsel, then I would instruct you not to disclose it***."

[38] The Debtor erroneously asserts that Movants cite to a series of cases in the Motion to support their privilege waiver argument. *See* Objection at 34-35 (ECF No. 1071). Specifically, the Movants have not cited to any of the following cases in support of the Motion: *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476 (3d Cir. 1995); *LendingTree, LLC v. Zillow, Inc*., No. 3:10–CV–439–FDW–DCK, 2013 WL 6385297 (W.D.N.C. Dec. 6, 2013); *Scalia v. Med. Staffing of Am., LLC*, No. 2:18cv226, 2020 WL 1811344 (E.D. Va. Apr. 8, 2020).

[39] The Debtor asserts that "a witness hardly puts legal advice at issue simply by answering a question about receipt of legal advice and declining to disclose the content of that advice." *See* Objection at 33-34 (citing *Botkin*, 2011 WL 2447939 and *Metric Constructors, Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 1998 WL 1742589 (E.D.N.C. Sept. 28, 1998). Of course. The privilege is not waived merely because a witness says that she relied on the advice of counsel in reaching a given conclusion. But Movants are not claiming that an at-issue waiver occurred because a deponent stated that they communicated with counsel. They contend that the Debtor specifically advanced contentions with the Court and then blocked an inquiry into the facts underpinning those contentions on grounds of privilege.

> limit the scope of the waiver of the attorney-client privilege and therefore the scope of discovery. To do so would undermine the very purpose behind the exception to the attorney-client privilege at issue here—fairness. The party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice—whether counsel was provided with all material facts in rendering their advice, whether counsel gave a well-informed opinion and whether that advice was heeded by the client.

Id. at 486 (citing *In re ML–Lee Acquisition Fund II, L.P.*, 859 F.Supp. 765, 767 (D. Del. 1994). The same is true here. The decision to engage in the Corporate Restructuring and to file for bankruptcy appears to have been largely driven by factual information, analysis, and advice provided by outside counsel. The Debtor has now offered the rationale, intent, and decision-making process as the basis for qualifying for chapter 11, for seeking a preliminary injunction, and for seeking other relief such as an estimation proceeding related to its asbestos liabilities. Movants must be permitted to pierce the attorney-client privilege to test the Debtor's contentions.

D. The Debtor Has Continued to Place Privileged Communications at Issue in this Case By Relying Upon the First Day Declaration.

44. Finally, the Debtor's use of the First Day Declaration in support of its Estimation Motion serves as both (a) an independent basis for finding an at-issue waiver and (b) a clear example of how the Debtor continues to use the privilege as a sword and a shield. Mr. Panaro, the ostensible author of the First Day Declaration, testified that the statements therein regarding the Corporate Restructuring, the history of Old CT's asbestos liabilities, and the funding agreement derived exclusively from information he received from his lawyers. Panaro Dep. 84:20-24, 186:12-15, Oct. 6, 2020.[40] In citing extensively to that Declaration as part of its Estimation Motion, the Debtor has directly placed those communications at issue. Accordingly, the Movants are

[40] While the Debtor now argues that Mr. Panaro's statements were based on familiarity "with the Debtor's day-to-day operations, assets, financial condition, business affairs and books and records", that is at odds with his deposition testimony and should be disregarded as self-serving. Motion at 41-42 (ECF No. 1006).

entitled to full discovery related to those communications.

45. In an attempt to obfuscate the issue, the Debtor argues that it is fair and reasonable for Mr. Panaro to rely upon information he received from Mr. Starczewski regarding CertainTeed's defense of asbestos claims. Objection at 41-42 (ECF No. 1071). The Debtor asks rhetorically, "[w]here else would a corporate executive go to receive that data?" *Id.* But this question makes the Movants' point. If the Debtor's witnesses largely, or entirely, learned facts from lawyers and all communications with lawyers are privileged, then how can the Movants ever discover the information they need to fulfill their obligations in this case? The answer is simple: they cannot. Now that the Debtor has chosen to use information supplied by lawyers to fact witnesses to make its case, it must disclose all such information.

E. New CT and SGC Have Failed to Establish a Common Interest Exception to Waiver of the Attorney-Client and Work Product Privileges.

46. In the Joinder, New CT and SGC assert that they share a common interest in the documents over which the Debtor claims are privileged, and any waiver of privilege requires waiver by New CT and/or SGC, not just the Debtor. *See* Joinder (ECF No. 1073). However, the common interest rule is entirely inapplicable to the instant Motion.

47. The Fourth Circuit has expressly held that the common interest exception to a privilege waiver applies only where "multiple clients share a common interest in a legal matter." *In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990). As a result, a party asserting the exception must establish a "common litigation interest with respect to a specific litigation or anticipated litigation or, in other words, to 'an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation.'" *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 390 (M.D.N.C. 2003), *aff'd*, No. 1:00CV1262, 2012 WL 1565228 (M.D.N.C. Apr. 30, 2012) (citing *National Union Fire Ins. Co.*

of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 984 (4th Cir.1992)). The interest must be identical or nearly identical, s*ee Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308 (N.D. Cal. 1987), and must be legal, not commercial, in nature. *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 579 (N.D. Cal. 2007) (citing *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995)). Certainly, the common interest rule does not "encompass a joint business strategy which happens to include as one of its elements a concern about litigation[.]" *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 71 (S.D.N.Y. 2009).

48. As discussed in Section I.C.4, *supra*, the Debtor, New CT and SGC cannot claim a common legal interest with regard to the Corporate Restructuring and subsequent bankruptcy. First, only DBMP is a debtor in bankruptcy, with New CT and SGC serving purely as parties-in-interest. These parties specifically set up their businesses so that only the Debtor would carry the historic asbestos liabilities and be subject to bankruptcy court oversight. Having made the decision to treat these entities as separate, they cannot now credibly argue that they share a common interest. Indeed, all three parties are each represented by separate counsel. Second, the Debtor and New CT are contract counterparties to the Funding Agreement and, therefore, have competing interests in this bankruptcy. The Debtor has an obligation to its creditors to maximize their recovery, while New CT has an interest in paying the least amount necessary to meet its contractual obligations. As courts have previously concluded, there is no common interest exception when the parties are in direct conflict. *Union Carbide Corp. v. Dow Chemical Co.*, 619 F. Supp. 1036 (D. Del. 1985) (no common interest was found when the positions of the parties were directly in conflict).[41]

[41] SGC's connection is particularly attenuated. Although the Debtor seems to suggest otherwise, SGC may not simply claim that it has a common interest because it is the corporate parent of New CT and the Debtor. *See In re Grand Jury Subpoena #£06-1,* 274 F. App'x 306, 310 (4th Cir. 2008) (no common interest between parent and subsidiary because the parties had not established nearly identical legal interests).

49. In short, New CT and SGC cannot establish the existence of a common legal interest. Nor can they explain how the privileged communications related to anticipated litigation. Old CT specifically decided to engage in the Corporate Restructuring (likely only with authorization from SGC), which divided the assets and liabilities among the Debtor and New CT and made them parties to the Funding Agreement. Having chosen to structure the transactions in this manner, the parties no longer have any common interest in the bankruptcy case.

50. Finally, even assuming, *arguendo*, that New CT shared a common legal interest with the Debtor over the privileged documents, it too has waived that privilege. As noted by the Court, it was not just the Debtor's witnesses that testified selectively about privileged communications when it benefited them, but "officer and director witnesses" and "corporate representatives" from New CertainTeed as well. PI Findings and Conclusions, ¶¶ 95, 97. By allowing its own communications to be placed at issue, New CT has waived privilege as well.

CONCLUSION

WHEREFORE, for the foregoing reasons 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, (I) directing the production of all documents (a) relating to the origins and implementation of the divisional merger and (b) the decision to file the instant bankruptcy case and (II) precluding the Debtor from asserting attorney-client privilege regarding any testimony about the aforementioned subjects.

Dated: September 30, 2021
Charlotte, North Carolina

HAMILTON STEPHENS STEELE + MARTIN, PLLC

/s/ Glenn C. Thompson
Glenn C. Thompson (Bar No. 37221)
525 North Tyron Street, Suite 1400
Charlotte, North Carolina 28202
Telephone: (704) 344-1117
Facsimile: (704) 344-1483
Email: gthompson@lawhssm.com

-and-

Natalie D. Ramsey (admitted *pro hac vice*)
Davis Lee Wright (admitted *pro hac vice*)
ROBINSON & COLE LLP
1201 N. Market Street, Suite 1406
Wilmington, Delaware 19801
Telephone: (302) 516-1700
Email: nramsey@rc.com
dwright@rc.com

-and-

Kevin C. Maclay (admitted *pro hac vice*)
Todd E. Phillips (admitted *pro hac vice*)
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle NW, Suite 1100
Washington, DC 20005
Telephone: (202) 862-5000
Facsimile: (202) 429-3301
Email: kmaclay@capdale.com
tphillips@capdale.com

-and-

David Neier (admitted *pro hac vice*)
Carrie V. Hardman (admitted *pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10016
Telephone: (212)294-6700
Facsimile: (212)294-4700
Email: dneier@winston.com
chardman@winston.com

Counsel to the Official Committee of Asbestos Personal Injury Claimants

ALEXANDER RICKS PLLC

/s/ Felton E. Parrish
Felton E. Parrish (NC Bar No. 25448)
1420 E. 7thStreet, Suite 100
Charlotte, NC 28204
Direct: (980) 334-2001
Main: (704) 365-3656
Email: felton.parris@alexanderricks.com

- and -

James L. Patton, Jr. (admitted *pro hac vice)*
Edwin J. Harron (admitted *pro hac vice)*
Sharon M. Zieg (NC Bar No. 29536)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253
Email: jpatton@ycst.com
eharron@ycst.com
szieg@ycst.com

Counsel to the Future Claimants' Representative