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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re:

The Roman Catholic Bishop of Oakland,

Debtor in Possession.

Chapter 11 Case No. 23-40523-WJL

Hon. William J. Lafferty

MOTION FOR PROTECTIVE ORDER; MEMORANDUM OF LAW IN SUPPORT THEREOF

Date: April 17, 2024
Time: 10:30 a.m.
Place: U.S. Bankruptcy Court
1300 Clay Street, Courtroom 220
Oakland, CA 94612

Adversary Case No.: 23-04028

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

State Cases

<u>Federal Statutes</u>

Rules

*

Pursuant to Bankruptcy Local Rules 2004-1(b) and 1001-2(a), Westport Insurance Corporation, formerly known as Employers Reinsurance Corporation ("Westport"), submits this memorandum of law in support of its motion for a protective order with respect to the Official Committee of Unsecured Creditors' (the "Committee") Rule 2004 request for the production of privileged documents relating to Westport's reserves for sexual abuse claims asserted against the Roman Catholic Bishop of Oakland ("RCBO" or "Debtor").

PRELIMINARY STATEMENT

In support of its application for Rule 2004 discovery from RBCO's insurers (collectively, "Insurers"), the Committee claimed that it was seeking such discovery for the limited purpose of allowing it to "understand the nature and extent of the Debtor's insurance coverage, [] the Insurers' ability to fulfill its obligations with respect to the Insurance Policies, [and] for the Committee and the Debtor to work towards a potential global resolution of the treatment of sexual abuse claims in this Chapter 11 Case." Dkt. 502, ¶ 23. Following the Court's ruling granting its application, the Committee served Westport and other Insurers subpoenas that included eight document requests. Of those eight requests, only two remain in dispute and are the subject of this Motion – Request Nos. 7 and 8 seeking documents (i) "sufficient to show [Westport's] reserves for each of the Abuse Claims tendered by or on behalf of the RCBO," and (ii) all materials relating to Westport's "setting, calculating, analysis, adjustment, investigation, evaluation, and decision-making process with respect to" the "establishment of those reserves." Dkt. No. 796-5, Ex. 11 at Request 7, 8.

There are at least four independent reasons this Court should grant this Motion and order that Westport is not required to produce its reserve information. First, Westport's reserve-information falls squarely within the protections of the attorney-client privilege and work-product doctrine and thus, as courts have consistently ruled, it is not discoverable. *See* Arg. § II, below. As Westport's Vice President and Senior Claims Expert Ken Battis explains in his accompanying declaration, Westport's loss reserves are based on and reflect the analysis and advice of its outside counsel regarding both pending litigation against the policyholder, as well as the coverage litigation that followed. *See generally* accompanying Declaration of Ken Battis ("Battis Declaration").

Second, information concerning Westport's reserves will not facilitate the mediation process. Because they are a function of and set in accordance with statutory and administrative regulations imposed by state law, typically based on available information that is often limited and incomplete, courts have widely recognized that reserves are not evidence of a claim's ultimate value, the insurer's liability therefor, or the insurer's settlement authority. Battis Decl. ¶ 5; *see also* accompanying Declaration of Scott Harrington ("Harrington Declaration") at ¶ 16; *In re Couch*, 80 B.R. 512, 517 (S.D. Cal. 1987). Westport's reserve information will therefore neither help the Committee "understand the nature and extent of the Debtor's insurance coverage," nor facilitate the parties' settlement negotiations or mediation efforts. *See* Arg. § III, below.[1]

Third, disclosure of reserves would run contrary to the strong public policy California's insurance regulations are designed to protect. Requiring insurers to produce reserve information to an adversary party in litigation contravenes the important public policy of ensuring insurer solvency underlying regulatory reserving requirements by incentivizing insurers to be less conservative in their reserving practices. *See* Arg. § IV, below.

Finally, as discussed in Arg. § V, Westport's methodology for setting reserves involves an internal, proprietary process. Requiring Westport to disclose the basis of and process for setting its reserves would reveal trade secret and otherwise confidential commercial information protected from discovery. Fed. R. Civ. Pro. 45(d)(3)(B)(i) (court may quash "a trade secret or other confidential research, development, or commercial information").

For these reasons, the Court should grant Westport's Motion and deny Request Nos. 7 and 8 of the Committee's Rule 2004 Subpoena.[2]

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[1] Westport continues to object to production of reserves information on the basis that it is not relevant. While the Court's January 18, 2024 Order, Dkt. No. 796 (*see* Exhibit A to accompanying Declaration of Blaise S. Curet ("Curet Declaration"), preserves all objections, Westport understands that the Court has stated that it ruled on the relevance of reserves in response to arguments and motions made by other insurers. For completeness, Westport wishes to preserve all of its objections here and for any appeal that might follow.

[2] If the Court were to deny Westport's Motion – and it should not – Westport alternatively requests that the Court enter an order providing that materials be produced and used for mediation purposes only, be subject to all applicable mediation and/or settlement privileges, and ordering that the Committee strictly maintain the confidentiality of all such reserve-related information.

BACKGROUND

I. The Nature and Purpose of Reserves Generally.

It is a common misconception that loss reserves reflect an insurers' acknowledgement of coverage liability for a claim or group of claims, what an insurer believes to be the claims' value, or that they are indicative of the insurer's settlement authority. This is not the case, however, as numerous courts have concluded. *See* Arg. § III, below.

As insurance and economics expert Dr. Scott Harrington[3] explains in his accompanying declaration, the "preeminent goal of insurance regulation" is to ensure insurer solvency. Harrington Decl. ¶ 13. To that end, insurance companies transacting business in California are statutorily required to maintain and provide financial records establishing their solvency and ability to pay claims by submitting periodic reports reflecting such information with the California Insurance Commissioner. *See* Cal. Ins. Code §§ 900–924. One such reporting requirement involves loss reserves, which insurers are required to establish and maintain "in an amount estimated in the aggregate to provide for the payment of all losses and claims for which the insurer may be liable." Cal. Ins. Code. § 923.5.

A loss reserve is an accounting estimate of an insurer's potential liability for claims arising out of injuries that have occurred prior to a particular date and which may lead to liability, but which have not yet been paid. *See* Harrington Decl. ¶ 14; Cal. Ins. Code § 923.5; *In re Couch*, 80 B.R. at 516 (reserves are "a sum of money, variously computed or estimated which … is set aside" for "claims accrued, but contingent and indefinite as to amount or time of payment"). An insurer must calculate reserves in accordance with state regulations, which in California provide among other things that reserves must "reflect inflation and development projected to date of the ultimate payment," and "shall include provisions for an appropriate incurred-but-not reported (IBNR) reserve based on the experience of the insurer or where experience is lacking based on reasonable actuarial assumptions applied to other experience." 10 Cal. Admin. Code § 2319.2(a)-(b).

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[3] Dr. Harrington is an insurance and economics expert at the Wharton School with over 40-years of experience studying, teaching, and publishing in the areas of insurance, risk management, and finance.

California regulations also require that insurers, "where appropriate, estimate the expected number of claims yet to be reported from accident years prior to the statement date together with the corresponding incurred amount," and that the "calculation of such expected claims shall give due consideration to changes in the exposure base." *Id.*

The process of determining reserves is subject to substantial variance and uncertainty. Harrington Decl. ¶ 17. The process typically reflects insurers' choices from ranges of potentially reasonable estimates, is applied in accordance with statutory and regulatory requirements, and is often based on privileged legal advice as well as limited and incomplete information known at the time. *Id.*; Battis Decl. ¶¶ 5-6. As a result, reported reserves are not intended to reflect the insurer's views of the merits of underlying claims, nor do they imply that the insurer is admitting liability for, believes there is coverage for, or is waiving any rights or defenses in the underlying suits or coverage disputes. Harrington Decl. ¶ 16; *see also* Battis Decl. ¶ 5.

II. Westport's Privileged and Confidential Process for Calculating Reserves Generally and for the Sexual Abuse Claims at Issue Here.

Methods used for establishing reserves with respect to a claim or group of claims vary by insurer, and typically involve a complex process that is confidential and proprietary to each insurer. Battis Decl. ¶ 3; Harrington Decl. ¶ 17. As a general matter, Westport's methodology for calculating reserves involves an internal, multi-step proprietary process that utilizes commercially confidential forecasting philosophies and protocols internally developed and kept secret by the company. Battis Decl. ¶¶ 3, 8.

The particular factors Westport takes into consideration in calculating reserves vary from case to case, but typically involve, *inter alia*, the allegations of the underlying claims at issue; potential liability or damage defenses; a preliminary analysis of coverage under the policies at issue, the terms of the policies, the potential for coverage and/or applicability of coverage defenses or exclusions; potential impairment or exhaustion of applicable limits; the jurisdiction in which the case is filed; the terms of other insurers' policies, the impact of other available insurance, if any; actuarial or stochastic statistical predictions based on similar claims or lines of business; claim and/or policy and/or loss aggregation issues; regulatory reserve requirements in the applicable

jurisdiction; and reinsurance reporting requirements, among many variables. Battis Decl. ¶ 4. Westport's reserves may be aggregated and/or modified from time-to-time as information becomes available or for other commercial business reasons, particularly when there is insufficient factual information to evaluate reserve parameters on a claim-by-claim basis. *Id.* ¶ 5. The calculations are not intended to establish the insured's liability or the settlement value of a case, and do not constitute or reflect settlement authority for a particular claim or group of claims. *Id.*

Westport's ability to investigate the facts of individual underlying claims was and continues to be limited by the discovery stay in the underlying coordinated proceeding, which has prevented it from evaluating the factual basis of the underlying claims, defenses, or alleged damages in any meaningful way. Battis Decl. ¶ 6. As a critical part of its process for setting reserves in this case, Westport retained outside legal counsel – Craig & Winkelman, LLP and Sinnott, Puebla, Campagne & Curet, APLC – to analyze and provide their legal advice and opinion regarding several issues of California tort and insurance coverage law, many of which involve issues of first-impression, relevant to RBCO's pending abuse litigation and in anticipation of the coverage litigation that followed. Battis Decl. ¶ 7. Westport set its reserves based in substantial part on its counsel's legal analysis, opinions and advice, which are inextricably intertwined with other components of the process, including the amount of the reserves ultimately established. *Id.*

III. Procedural History.

A. The Bankruptcy and Adversary Proceedings.

RBCO commenced this bankruptcy action on May 8, 2023. Dkt. No. 1. Six weeks later, on June 22, 2023, RBCO commenced an insurance coverage adversary proceeding against Westport and certain other of its insurers, *see Roman Catholic Bishop of Oakland v. Pacific Indemnity et al*., 23-40523 (Bankr. N.D. Cal. June 22, 2023) ("Coverage Action"), and on August 30, 2023, it commenced an additional adversary proceeding. *See Roman Catholic Bishop of Oakland v. Am. Home Assur. Co. et al*., 23-04037 (Bankr. N.D. Cal. Aug. 30, 2023).

The Committee moved to intervene in the Coverage Action on June 30, 2023. Adv. Dkt. No. 15. The Court granted the Committee's motion, subject to the limitation that, *inter alia*, it "shall neither propound nor be required to respond to discovery, other than any discovery that could be

served on a non-party[.]" Adv. Dkt. No. 97 at ¶ 2(a).

B. The Committee's Rule 2004 Application and Subpoena.

The Committee's Rule 2004 application included a proposed subpoena containing 37 separate document requests that far exceeded what was necessary or relevant to its stated goal of understanding RBCO's insurance coverage and facilitating a "global resolution" of the case. Dkt. No. 502., ¶ 21. The Committee's proposed requests sought, among other things, information regarding every payment made by the insurers on any sexual abuse claim under any policy issued to any policyholder during the past 30 years, the insurers' claims handling practices and procedures generally (regardless of the type of claim or coverage), the organizational structure of the insurers' underwriting and claims departments, board minutes and materials, reserves, and reinsurance. Dkt. Nos. 502, 502-2.

Several of RBCO's Insurers including Westport objected to the Committee's application on grounds that included, *inter alia*: (i) the discovery sought exceeded even the broad limits of permissible discovery under Rule 2004; (ii) the application was an improper attempt to evade the restrictions imposed by the Court's intervention order; and (iii) the Committee would be able to obtain all the information it reasonably needed regarding Debtor's insurance coverage from a far more limited number of requests. *See* Dkt. No. 571. Given the number and breadth of the Committee's requests and the issues to be addressed, the Insurers were limited in their ability to comprehensively address specific requests in their briefing; to that end, their discussion regarding discoverability of reserve information was by necessity limited to a bullet point and two accompanying footnotes. *See id.* at p. 7 & notes 19, 20.

The Court entered its order granting the Committee's application on January 18, 2024 ("January 18 Order). *See* Dkt. No. 796. The order attached each of the subpoenas the Committee intended to serve on the Insurers, including a subpoena directed to Westport. *See* Dkt. No. 796-5, Ex. 11. Each subpoena included two requests for reserves information:

> 7. Documents sufficient to show Your current reserves for each of the Abuse Claims tendered by or on behalf of RCBO to You (Dkt. No. 796-5, Ex. 11 at Request 7);

8. All Documents and Communications that relate to Your setting, calculating, analysis, adjustment, investigation, evaluation of, and decision-making process with respect to, Your reserves identified in response to Request No. 7, above, including the working papers and actuarial reports, if any, relating to the establishment of those reserves (*id.* at Request 8).[4]

The Court's January 18 Order expressly provides without limitation that "Insurers' rights to object to the Subpoenas as permitted under Rule 45 of the Federal Rules of Civil Procedure, incorporated into this bankruptcy case by Rule 9016 of the Federal Rules of Bankruptcy Procedure, are fully preserved, including, without limitation (a) any and all applicable evidentiary privileges and (b) proper scope of discovery." *See* Curet Decl., Ex. A.

C. Westport's Response to the Committee's Subpoena and the Parties' Meet and Confer Conference.

Westport timely served its responses and objections to the Committee's subpoena on February 5, 2024. *See* Curet Decl., Ex. B (Westport's Feb. 5, 2024 Responses and Objections to the Official Committee of Unsecured Creditors' Subpoena for Rule 2004 Examination ("Westport's R&Os")). Westport agreed to produce non-privileged documents in its possession, custody, or control responsive to Requests 1, 3, 5, and 6. Westport determined and informed the Committee that is has no documents responsive to Request 2 or 4.[5] Relevant to this Motion, Westport objected to producing any materials in response to Requests 7 or 8 on grounds including that reserve information is protected by the attorney-client privilege and work-product doctrine, constitutes trade secret and/or confidential commercial information that is not discoverable, is not relevant, and that requiring insurers to produce reserves information would contravene regulatory public policy. Westport's R&Os at pp. 8-9.

The Committee responded on February 14, 2024, by claiming that a number of Westport's

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[4] To the extent any of the Committee's other requests are interpreted to encompass reserves information, this Motion also applies to those requests as well.

[5] Request No. 2 sought secondary evidence with respect to any missing or incomplete Westport policies, of which there is none. Request No. 4 requested documents related to any exhaustion, erosion, or impairments of Westport's policy limits. Westport has no such documents.

objections, including its objections to the requested reserve information, were "improper." *See* Curet Decl., Ex. C (Committee's Feb. 14, 2024 Letter to Westport). Westport addressed the Committee's position by letter dated February 20, 2024, proposing that the parties meet and confer to discuss the issues raised as required by Bankruptcy Local Rule 2004-1(b) and Civil Local Rule 37-1(a). *See* Curet Decl., Ex. D (Westport's Feb. 20, 2024 Response Letter). Counsel for the Committee responded by email that the Committee would not be available to meet and confer until the week of March 4, 2024.

On March 4, 2024, Westport timely produced to the Committee over 4000 pages of documents consisting, *inter alia*, of its policies, and all non-privileged portions of its claims and underwriting files. The parties met and conferred regarding Westport's objections to the Committee's Subpoena on March 8, 2024, but were unable to reach an agreement.

ARGUMENT

I. The General Parameters of Rule 2004 Discovery.

Rule 2004 discovery "may relate only to acts, conduct, or property or to the liabilities and financial condition of the debtor, or any matter which may affect the administration of the debtor's estate, or the debtor's right to a discharge....". Fed. R. Bankr. P. 2004(b). The purpose of a Rule 2004 examination is "to show the condition of the estate and to enable the Court to discover its extent and whereabouts, and to come into possession of it, that the rights of the creditor may be preserved." *In re Coffee Cupboard, Inc.*, 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991) (quoting *Cameron v. U.S.*, 231 U.S. 710, 717 (1914)).

The Ninth Circuit has therefore cautioned that Rule 2004, while broad, "is not without limits" and cannot "stray into matters which are not relevant to the basic inquiry." *In re Mastro*, 585 B.R. 587, 597 (B.A.P. 9th Cir. 2018). Matters that have no relationship to the debtor's affairs or the administration of the bankruptcy estate are not proper subjects of Rule 2004 discovery. *In re Fin. Corp. of America*, 119 B.R. 728, 733 (Bankr. C.D. Cal. 1990) (citing *Johns-Manville Corp.*, 42 B.R. 362 (S.D.N.Y. 1984)); *see also In re Farris-Ellison*, 2015 WL 5306600, *3 (Bankr. C.D. Cal. Sept. 10, 2015) ("a Rule 2004 examination must be both relevant and reasonable."). Additionally, Rule "2004 is not a substitute for discovery authorized in either adversary

proceedings or contested matters" and therefore, requesting parties may not use Rule 2004 "to gain advantage in his adversary proceeding[.]" *Id*.

To ensure bankruptcy courts enforce these limits, Bankruptcy Rule 9016 incorporates Fed. R. Civ. Pro. 45, which in turn provides that a court "must" quash or modify a subpoena that, among other defects, "requires disclosure of privileged or other protected matter" or "subjects a person to undue burden," and "may" quash or modify a subpoena that requires disclosure of "confidential … commercial information." Fed. R. Civ. P. 45(d)(3); *see also Miller v. Ghirardelli Chocolate Co.*, No. C 12-4936 LB, 2013 WL 6774072, at *2 (N.D. Cal. Dec. 20, 2013) ("The issuing court also may quash a subpoena if it determines that the subpoena requires disclosure of 'a trade secret or other confidential research, development, or commercial information.") (citing Fed. R. Civ. P. 45(c)(3)(B)). In assessing whether a subpoena imposes an undue burden, courts consider, among other things, "relevance, the need of the party for the documents," and, "the value of the information to the issuing party." *In re Mattera*, No. 05-39171, 2007 WL 1813763, at *4 (Bankr. D.N.J. June 13, 2007).

II. Westport's Insurance Reserves Information Falls Squarely Within and is Protected from Disclosure by the Attorney-Client Privilege and Work-Product Doctrines.

A. The Attorney-Client and Work-Product Privileges Generally.

As the Court has emphasized on more than one occasion, its decision to allow the Committee Rule 2004 discovery was in no way intended to overrule objections based on privilege, which the Court's January 18, 2024 order expressly preserved. *See* January 18, 2024 Order, Dkt. No. 796 ("Insurers' rights to object to the Subpoenas … are fully preserved, including, without limitation (a) any and all applicable evidentiary privileges and (b) proper scope of discovery").

When "a subpoena is issued in connection with a Rule 2004 examination, federal common law rules of privilege will apply." *In re N. Plaza, LLC*, 395 B.R. 113, 121–22 (S.D. Cal. 2008); *see also In re Bautista*, No. 03-33714-SCTC, 2007 WL 4328802, at *1 (Bankr. N.D. Cal. Dec. 10, 2007) ("Federal privilege law supplies the rule of decision because Mr. Holt is seeking to enforce an order of examination under Bankruptcy Rule 2004").

As a general matter, "[a] party is not entitled to discovery of information protected by the

attorney-client privilege." *Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003) (citation omitted). To that end, "[t]he attorney-client privilege applies "where legal advice of any kind is sought." *Reed v. Baxter*, 134 F.3d 351, 355 (6th Cir. 1998). The work-product doctrine is even "broader" than the attorney-client privilege, *U.S. v. Nobles*, 422 U.S. 225, 238, n. 11 (1975), protecting from discovery in all but the most "rare and extraordinary circumstances" materials that contain "the mental impressions, conclusions, opinions and legal theories of an attorney" prepared in anticipation of litigation. *In re 3dfx Interactive, Inc.*, 347 B.R. 394, 402 (Bankr. N.D. Cal. 2006). The protections afforded by the doctrine are not limited to materials prepared by an attorney. Rather, Federal Rule of Civil Procedure 26(b)(3) expressly protects from disclosure materials "that are prepared in anticipation of litigation … by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." *See In re Grand Jury Subpoena (Mark Torf/Torf Env't Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004) (work-product doctrine protects documents created by non-attorneys in anticipation of litigation) (citing *Nobles*, 422 U.S. at 239).[6]

B. Courts' Application of the Attorney Client Privilege and Work Product Doctrine to Reserve Information.

Applying these principles, courts have widely concluded that reserve-related information – including the reserve figures themselves – is protected from discovery by either the attorney-client privilege, work-product doctrine, or both. *Shreib v. Am. Fam. Mut. Ins. Co*., 304 F.R.D. 282 (W.D. Wash. 2014) (precluding discovery on reserves information as attorney-client privileged and work product); *PECO Energy Co. v. Ins. Co. of N. Am*., 852 A.2d 1230, 1234 (Pa. 2004)

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[6] California law provides similarly broad protections to attorney-client communications and attorney work product. *See, e.g., Costco Wholesale Corp. v. Superior Ct*., 47 Cal. 4th 725, 732 (Cal. 2009) (the attorney-client privilege "safeguard[s] the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters … without regard to relevance"); *Zurich American Ins. Co. v. Superior Court*, 155 Cal. App. 4th 1485, 1496 (2d Dist. 2007) (communications among insurer's employees reflecting legal advice protected from discovery by attorney-client privilege); *Rico v. Mitsubishi Motors Corp*., 42 Cal. 4th 807, 814 (Cal. 2007) ("The Legislature has protected attorney work product under California Code of Civil Procedure section 2018.030, which provides, '[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.'").

("[i]nsurance reserves, by their very nature, 'are prepared in anticipation of litigation, and consequently, [are] protected from discovery as opinion work product.'") (quoting *RhonePoulenc Rorer Inc. v. Home Indem. Co.*, 139 F.R.D. 609, 613 (E.D. Pa. 1991) (reserve information privileged and protected from disclosure because they "reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim.")).

For example, much like the Committee here, the policyholder in *Shreib* sought discovery of reserve information to allegedly gain insight into how the insurer valued her claim, arguing that neither the attorney-client privilege nor work-product doctrine protected the information given that reserves are statutorily required function of an insurer's claims handling activities. *Shreib*, 304 F.R.D. at 283. The district court disagreed, concluding that "the purpose of setting the loss reserves goes beyond its ordinary course of investigating and handling claims and is a financial evaluation of the claim from the standpoint of pending or anticipated litigation." *Id.* at 287. Reserves created once an insurer anticipates litigation are entitled to protection, the court found, because "once litigation is anticipated, loss reserve documents by definition reflect the mental impressions, thoughts, and conclusions of attorneys or employees evaluating the merits and risk of a legal claim." *Id.* (citing *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401-02 (8th Cir. 1987) (case reserve figures "reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product.")).

In *Rhone-Poulenc Rorer Inc.*, the policyholder sought production of "[a]ll documents concerning [the insurer's] rationale for establishing or not establishing reserves for AIDS-related or blood derivative claims asserted against" any named-insured. 139 F.R.D. at 611. Denying the policyholder's motion to compel, that court refused all reserve-related discovery on the ground that it was not only "of very tenuous relevance, if any relevance at all," it constituted privileged work-product material. *Id.* at 613.

In reaching this conclusion, the court emphasized the "importance of an attorney's private evaluation of a claim in facilitating the bargaining process inherent in our system of justice":

> Some of the areas in which the work-product doctrine forecloses discovery are easily comprehended ... One obvious example is the need for protection against forced revelation of a party's evaluation of his case; as long as voluntary settlement is encouraged, it would be an intolerable intrusion on the bargaining process to allow one party to take advantage of the other's assessment of his prospects for victory and an acceptable settlement figure.

Id. at 614 (quoting Cooper, Edward, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269, 1283 (1969)).

Thus, where "reserves have been established based on legal input," both "the results and supporting papers" are entitled to work-product protection given that, "[b]y their very nature they are prepared in anticipation of litigation." *Id.* at 614 ("[R]eserve figures reveal the mental impressions, thoughts, and conclusions of any attorney in evaluating a legal claim …"). Moreover, the court observed, "this is not a situation where mental impressions are merely contained within and comprise a part of another document and can easily be redacted. Instead, the aggregate and average figures are derived from and necessarily embody the protected material. They could not be formulated without the attorney's initial evaluations of specific legal claims. Thus, it is impossible to protect the mental impressions underlying the specific case reserves without also protecting the aggregate figures." *Id.* at 614-15.

The *Rhone-Poulenc* court further concluded that the work product doctrine protected from discovery not only materials prepared by the insurer's attorney, but also those reflecting the mental impressions of agents or employees of the insurer "concerning an aggregate reserve necessary for the underlying litigation." *Id.* at 615. Fed. R. Civ. Pro. 26(b)(3), the court noted, does not confine "protective work product … to information or materials gathered or assembled by a lawyer," but instead "includes materials gathered by any consultant, surety, indemnitor, insurer, agent, or even the party itself." *Id.* Thus, the "only question is whether the mental impressions were documented, by either a lawyer or non-lawyer in anticipation of litigation." *Id.*

Numerous cases are in accord. *See, e.g., Nicholas v. Bituminous Cas. Corp.*, 235 F.R.D. 325, 332 (N.D. W. Va. 2006) (reserve information protected work product because "the purpose for setting the loss reserves [goes] beyond [the] ordinary course of investigating and handling claims and [is] a financial evaluation of the claim from the standpoint of pending or anticipated

litigation."); *Barge v. State Farm Mut. Ins. Co.*, 2016 WL 6601643, *4-6 (W.D. Wash. Nov. 8, 2016) (refusing discovery of reserve-related information "based on opinions and evaluation of [insurer] personnel after [the insurer] reasonably contemplated litigation in this case"); *Certain Underwriters at Lloyds, London v. Fidelity & Cas. Ins. Co. of N.Y.*, 1998 WL 142409, *2 (N.D. Ill. March 24, 1998) (holding that reserve recommendations protected from discovery because "they reveal attorney mental impressions, thoughts and conclusions"); *Guaranty Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 1992 WL 365330, *8 (E.D. La. Nov. 23, 1992) (holding that reserve information subject to attorney-client and/or work product privileges and finding that magistrate judge's order that such information be produced was clearly erroneous); *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 283, 288 (D.D.C. 1986) ("Where the reserves have been established based on legal input, the results and the supporting papers most likely will be work product and may also reflect attorney-client privilege communications.").

The case law thus articulates several principles that are applicable here, including: (1) By their very definition, reserves are prepared in anticipation of litigation and thus are either attorney-client privileged or protected work product if established with input from counsel; (2) Such reserve information is protected from discovery even though it may also serve business-related and/or regulatory purposes in addition to litigation-related purposes; (3) Because they are imbued with and necessarily embody legal opinions and advice, all reserve-related materials, including the aggregate reserve figures themselves, are privileged and entitled to protection; and (4) The work product doctrine covers not only reserve-related materials prepared by the insurer's attorney, but any related material prepared by agents or employees.

C. Westport's Reserves Were Prepared in Anticipation of Litigation, Reflect the Advice and Opinions of its Counsel, and Are Therefore Privileged.

Applying these principles, the information the Committee requests is plainly entitled to protection from discovery under both privileges. Indeed, the Committee seeks production of not only Westport's reserve figures themselves, but all documents relating to its "setting, calculating, analysis, adjustment, investigation, evaluation of, and decision-making process." Dkt. No. 796-5, Ex. 11 at Request 8. These requests go to the very heart of the work-product doctrine and/or

attorney-client privilege by seeking disclosure of the very types of information both privileges are intended to protect. The Court therefore "must" protect Westport's reserves information from disclosure. *See* Fed. R. Civ. P. 45(d)(3)(A)(iii).

As Westport's Ken Battis testifies in his declaration, Westport established its reserves in consultation with and based on the analysis, evaluation, and advice of outside counsel regarding both the underlying claims pending against RBCO and in anticipation of the coverage litigation that soon followed. Battis Decl. ¶ 7. Both the reserve figures themselves, as well as all supporting materials the Committee seeks – whether prepared by outside counsel, Mr. Battis, or another Westport agent or employee – thus embody the legal advice and mental impressions of Westport's counsel regarding the company's risk of potential liability for RBCO's sexual abuse claims. *See Rhone-Poulenc*, 139 F.R.D. at 615 (work-product doctrine protected from disclosure reserve-related information prepared not only by outside counsel but the insurers' internal risk management department).

Requiring Westport to produce reserve information would thus be equivalent to imposing on it a continuing obligation to disclose to the Committee the analyses, opinions and mental impressions of its outside counsel on which its reserves are based – no different than if the Committee were required to produce to the insurers its own counsel's evaluations, mental impressions and opinions regarding their assessment of their clients' underlying claims. The result would be to give the Committee the very type of undue settlement and/or litigation advantage both privileges are intended to avoid, at the expense of Westport's ability to forecast its potential risks and accurately set reserves in accordance with and as required by California law.[7] The

[7] Indeed, as the court explained in *Rhone-Poulenc*, and for the reasons further discussed in Arg. § IV, below, requiring the production of reserve information – even that which "only indirectly reflect[s]" an attorney's mental impressions, or which "might have been created for business planning purposes" – would have a chilling effect on an insurer's ability to properly and accurately set reserves. *Id.* ("Were I to hold that the documents are discoverable as only indirectly reflecting the attorneys' impressions because they might be created for business planning purposes, such a holding would make it extremely hazardous for a business to finance and plan its defense. The incidental effect of such a ruling could be the failure of litigants to properly document and consider all the factors that bear upon the decision to try or settle lawsuits") (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (were attorney work product "open to opposing counsel on mere demand,

Committee's Request Nos. 7 and 8 should therefore be denied in their entirety.

III. Reserve Information Will Not Further the Mediation Process or Otherwise Facilitate the Global Resolution the Committee Claims.

Westport is mindful of the Court's ruling regarding the relevancy objections Insurers have raised to producing reserve information, as well as the Court's statement that the production of reserve information may facilitate the mediation process by getting "everybody into the mediation with the optimum amount of information." Curet Decl., Ex. E (2/12/24 Hearing Tr.) at 12:6–9; *see also id.* at 14:11–14 ("it was my theory that having the insurance companies provide this information was going to help that process and was going to get everybody into the mediation with the optimum amount of information."). Westport respectfully disagrees, however, that requiring insurers to disclose their otherwise privileged and confidential reserve information will facilitate or otherwise benefit the mediation process. To the contrary, disclosure of the insurers' reserves is more likely to impede the process because of common misconceptions about the purpose and function of reserves, how they are set, and what they represent. This makes it less likely, not more, that a global resolution involving the Insurers can be reached. Indeed, an order requiring production of such materials will only lead to acrimony, litigation, and appeals – not a consensual resolution of this case.

The reason lies in the fundamental misunderstanding of the nature and purpose of reserves. Reserves are ***not*** evidence of an insurer's valuation of a particular claim, the insurers' settlement authority, or acknowledgment of either underlying or coverage liability. *See* Harrington Decl. ¶ 16; Battis Decl. ¶ 5; *see also, e.g.*, *In re Couch*, 80 B.R. at 517 (reversing bankruptcy court's order compelling production of reserves because "[t]he legislature and Insurance Commissioner establish reserve policy. For this reason alone, a reserve cannot be accurately or fairly equated with an admission of liability or the value of any particular claim."); *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1189 (Colo. 2002) (en banc) (observing that loss reserves are not "the same as settlement authority" and vacating lower court's order compelling their discovery).

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much of what is now put down in writing would remain unwritten.").

Respectfully, it is therefore not the case that Westport's reserve information is "the other side of the ledger" from the Debtor's claims information, as the Court stated during the February 12, 2024, status conference. 2/12/24 Hearing Tr. at 13:5. "The other side of the ledger" would be *plaintiffs' counsel's* evaluation of their clients' claims, and no one has suggested that the Committee should be required to turn over this information in mediation or otherwise. While Westport is mindful of the distinction the Court drew during the February 12 hearing between the administration of the bankruptcy and "litigation issues" to be dealt with in the coverage litigation, Westport submits that the conclusions to be drawn regarding the relevance and discoverability of reserve information is the same in both contexts. Because reserves cannot be "accurately or fairly equated with … the value of a particular claim," *In re Couch*, 80 B.R. at 517, by definition they provide no insight into the extent of RBCO's insurance assets or the value of the claims against it.

With this understanding in mind, bankruptcy courts have repeatedly ruled that reserves information is not within the proper scope of discovery because such information does not assist with moving a bankruptcy toward a confirmable plan or mediated settlement. *See In re Boy Scouts of America and Delaware BSA, LLC*, Case No. 20-10343 (LSS), 11/19/21 Hearing Tr. (attached as Exhibit A to the accompanying Declaration of Todd C. Jacobs ("Jacobs Declaration")) at 134:4-7 (The Court: granting motion to quash discovery and stating, "to say that there's some relevance here to [reserves information], I don't see it, I just don't see it."); *In re Imerys Talc America, Inc., et al.*, Case No. 19-10289 (Bankr. D. Del.), 6/22/21 Hearing Tr. (Jacobs Decl., Ex. B) at 239:21 (The Court: "Internal to the insurance companies, their setting reserves, like a prudent businessperson might or they're regulatorily required, I don't understand how that's relevant to confirmation."); *see also In re Diocese of Camden, New Jersey*, Case No. 20-21257 (Bankr. D.N.J.) 2/18/22 Hearing Tr. (Jacobs Decl., Ex. C) at 11:15-16 (The Court: "insurer's opinions on litigation risks and how they set their reserves are decisions that will not impact" the Bankruptcy Court's analysis of whether the Debtor's plan is confirmable); *The Diocese of Buffalo, N.Y.*, Case No. 20-10322-CLB (Bankr. W.D.N.Y.), November 14, 2023 Order, Dkt. No. 2649 (denying

Committee's Rule 2004 discovery, including requests for reserve related information).[8]

The recent decisions of these bankruptcy courts are consistent with the long history of courts denying requests for reserve information in insurance coverage matters as nonprobative of underlying liability and/or claims values – particularly where, as here, they are based on only limited information and without the benefit of specific facts and circumstances regarding the underlying claims. *See, e.g.*, *Mirarchi v. Seneca Spec. Ins. Co.*, 564 Fed. Appx. 652, 655 (3d Cir. 2014) (ruling that an insurer's reserves are not "an evaluation of coverage based upon a thorough factual and legal consideration" and hence were not discoverable); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 A.2d 1099, 1109-10 (Del. Super. Ct. 1991) ("Reserves do not represent an admission or evaluation of liability and are irrelevant to the issues between insurer and insured."); *Estate of Mali*, 2011 WL 2516246, at *2 ("loss reserve information … may create the erroneous perception that the defendant had conclusively determined the value of the Plaintiffs' claim"); *Fint v. Brayman Constr. Corp.*, No. 5:17-CV-04043, 2019 WL 1549697, at *1 (S.D. W. Va. Apr. 9, 2019) (reserves information not probative of claims values where based on limited information and specific facts of claims are unknown); *Trinity E. Energy, LLC v. St. Paul Surplus Lines Ins. Co.*, No. 4:11-CV-814-Y, 2013 WL 12124022, at *2 (N.D. Tex. Mar. 8, 2013) (ruling that evidence regarding the insurer's loss reserves is not within proper scope of discovery "if it lacks any tendency to show that [the insurer] knew or should have known that its liability was reasonably clear"); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Stauffer Chem. Co.*, 558 A.2d 1091, 1097-98 (Del. Super. Ct. 1989) (reserves not within proper scope of discovery

[8] One outlier, the Bankruptcy Court of the Southern District of New York's decision compelling reserves information from Arrowood Indemnity Company in *The Roman Diocese of Rockville Centre* matter, is entirely distinguishable. *See* Corrected Order Compelling Rule 2004 Discovery from Arrowood Indemnity Company, *The Roman Catholic Diocese of Rockville Centre, New York*, Case No. 20-12345 (MG), Dkt. 2518 (Bankr. S.D.N.Y. Sept. 27, 2023). The Bankruptcy Court there compelled production of information related to Arrowood's financial condition, including reserves information, because of Arrowood's imminent insolvency – a basis for requiring such discovery that does not apply here given that Westport's solvency and ability to pay claims is not in question. It was well known at the time of the *Rockville Centre* ruling that Arrowood was in financial peril and Arrowood has since been placed into liquidation. *See* Curet Decl., Ex. F (Arrowood Liquidation and Injunction Order). No party here has claimed, nor could it, that Westport is in financial peril.

because they relate to internal conclusions and opinions of insurers which are equivalent to "hypothetical questions").[9]

Because it is not probative of claims values or coverage liability, and thus does not constitute evidence of how an insurer is "adjusting" the claims, requiring the production of the Insurers' reserve information will ***not*** introduce to the mediation process the sort of relevant information the Committee has told the Court will help facilitate a deal. To the contrary, the production of reserve information would be more likely to hinder than help settlement negotiations by, among other things, creating a false understanding of claims values, settlement authority, and coverage liability. See Estate of Mali, 2011 WL 2516246, at *2 ("[S]etting loss reserves is not an exact science and is a highly variable task primarily because loss reserves are designed to protect against *potential* losses … loss reserve information is minimally probative, and may create the erroneous perception that the [insurer] had conclusively determined the value of the [] claim." (emphasis in original)); Harrington Decl. ¶ 20 (observing that if disclosed claimants are likely to argue in settlement negotiations, "incorrectly, that the reserve information reflects the insurer's assessment of liability or the settlement value of individual claims or groups of claims"). As one international court explained:

> Disclosure of the insurer's reserves … would confuse the trial process and also affect any potential settlement discussions and prospects for resolution. The ability of an insurer to negotiate a settlement could be impaired because knowledge of the reserve might well create a feeling of entitlement in the claimant to a settlement in that amount, whereas the reserve is nothing more than an intelligent estimate of the risk as a whole by the insurer, based upon the facts as known at the time.

Kanani v. Economical Ins. Co., 2020 ONSC 7201, ¶ 24 (*see* Curet Decl., Ex. G).

Accordingly, the Committee is unable to establish "good cause" for the production of Westport's reserves given their lack of probative or even informational value with respect to issues

[9] In most of these decisions, the courts denied the requests of policyholders for discovery of reserves information relating to their own policies. Denying the Committee's request for reserves information makes even more sense here, where the underlying claimants are adverse to the policyholder and also plainly not in privity with the Insurers.

that might facilitate mediation, let alone the compelling need it must show to overcome the work product and/or trade secret privileges (see below). Its request for Westport's reserves information must therefore be denied.

IV. Requiring Production of Reserves Information Also Contravenes Public Policy

Requiring the production of reserve information in the context of litigation would also contravene the important public policies state law insurance regulations are intended to promote. As noted above, state law reserving requirements serve the fundamental goal of ensuring insurer solvency, which "is the preeminent goal of insurance regulation." Harrington Decl. ¶ 13; *see also Messer v. Universal Underwriters Ins. Co., 598 S.W.3d 578, 589* (Ky. App. 2019) ("Reserves play a critical role in accounting practices that assure regulators of the solvency of an insurance company for the protection of all its shareholders and insureds."). "Conservative reserving" – i.e., selecting higher reserve values within a range of reasonable estimates – can provide an insurer with a "safety margin" in the event of adverse claims experience or decline in asset values. Harrington Decl. ¶ 18. Less conservative reserving practices, conversely, increases an insurer's chances of financial distress and insolvency. *Id.*

Public policy, therefore, is best served by promoting sound reserving practices, free from external factors that might undermine the true purpose of reserves. *See Messer*, 598 S.W.3d at 590 ("The purpose [] of insurance statutes and regulations is to discourage insurers from understating reserves."); Harrington Decl. ¶ 21 (creating incentives for insurers to be less conservative in their reserving practices "would directly conflict with insurance regulation's emphasis on reserve adequacy and solvency"). As discussed above, and as Dr. Harrington observes, requiring Westport to produce reserve information would frustrate, rather than facilitate, settlement negotiations and the mediation process (Arg. § III, *supra*) by requiring the disclosure of information embodying attorney mental impressions and advice, an undue litigation advantage (Arg. § II, *supra*). Harrington Decl. ¶ 20 ("Requiring insurers to disclose current and/or historical reserve information for claims asserted against the debtor under policies issued to the debtor(s) or related entities in bankruptcy proceedings would plausibly increase debtor and claimant representatives' leverage in settlement negotiations and any coverage litigation with insurers."). Insurers with a more

conservative approach to reserving would be especially prejudiced in this regard, while the prospect of being required to produce reserve figures and related information and analysis in litigation would incentivize insurers to be less conservative in their reserving practices, given the detrimental impact it could have on them in settlement negotiations and litigation. *Id.* at ¶ 21.

For these reasons, a ruling that would create an incentive for insurers to consider the possibility, when setting reserves, that it could be required to disclose to an adverse litigation party otherwise privileged and confidential processes, evaluations, analyses, or decision-making in litigation would be in direct conflict with public policy emphasizing reserve adequacy and insurer solvency. *Id.* at ¶ 21; *Messer*, 598 S.W.3d at 590 (requiring production of reserves "would *encourage* insurers to understate reserves – a goal contrary to Kentucky insurance laws. We would be complicit in jeopardizing the integrity of regulatory compliance across the entire insurance industry" (emphasis in original).); *cf. Diamondrock Hospitality Co. v. Certain Underwriters at Lloyd's of London*, 2019 WL 883540, *4-6 (V.I. Sup. Ct. Dec. 5, 2019) (public policy "implications for permitting discovery of reserves information [are] far more detrimental" given such information often reflects "the mental inclinations, conclusions, opinions, legal theories or advice of counsel," and "permitting reserve information exposes privileged and confidential information and opens the door to extraneous issues and extrinsic evidence that may be at odds with litigation"). The Court should reject the Committee's invitation to open this Pandora's box, and instead quash the reserves-related discovery it seeks.

V. The Reserve Information Sought is Also Protected Trade Secret and/or Confidential Commercial Information.

Finally, Fed. R. Civ. Pro. 45(d)(3)(B)(i) provides that a court may quash or modify a subpoena that requires the disclosure of "a trade secret or other confidential research, development, or commercial information." As Mr. Battis explains in his declaration, Westport's methodology for setting loss and expense reserves involves a multi-step, proprietary process integrating its own internally developed forecasting philosophies and protocols that it protects from public disclosure. Battis Decl. at ¶ 3. The process incorporates and reflects fiscal and actuarial information that is commercially confidential and kept secret from its competitors, which include the other insurers

in this action. *Id.*

To compel Westport to explain or produce the actual basis of and process for setting its reserve figures would thus require it to disclose confidential and proprietary business information. *Id.* at ¶ 8. As one California court has found, this places Westport's reserve information well outside the proper scope of discovery. *See Dobson v. Twin City Fire Ins. Co.*, No. SACV 11-0192-DOC, 2011 WL 6288103, at *3 (C.D. Cal. Dec. 14, 2011) ("The Court finds that Defendants have shown that the reserves information qualifies as trade secret or other confidential research, development, or commercial information"). Other courts have agreed. *See, e.g., Estate of Mali v. Fed. Ins. Co.,* 2011 WL 2516246, at *1 (D. Conn. June 17, 2011) ("[i]f evidence regarding the Defendant[-insurer]'s loss reserves is admitted, the trial will be diverted from the central issues in the case to a complicated inquiry into the nature, statutory and regulatory requirements for, and proprietary methods of establishing loss reserves."); *Aspen Specialty Ins. Co. v. Nucor Corp.*, 2022 WL 1197396, at *3 (N.C. Super. Apr. 22, 2022) (noting "the confidential, proprietary, and varying nature of [insurers'] reserve philosophies"). The Court should quash the Committee's requests for reserve information for this reason as well.

CONCLUSION

For each of the foregoing reasons, Westport respectfully requests that the Court grant its Motion for Protective Order and to quash and order that Westport is not required to provide reserves related documents or information in response to Requests 7 or 8 in the Committee's Subpoena.

Dated: March 18, 2024

By: */s/ Blaise S. Curet*

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: The Roman Catholic Bishop of Oakland, Debtor in Possession.	Chapter 11 Case No. 23-40523-WJL Hon. William J. Lafferty **DECLARATION OF BLAISE S. CURET IN SUPPORT OF MOTION FOR PROTECTIVE ORDER** Adversary Case No.: 23-04028

I, Blaise S. Curet, pursuant to 28 U.S.C. § 1746 and B.L.R. 9013-1(d), hereby declare as follows:

1. I am over twenty-one years of age, under no disabilities, and fully competent to give this Declaration.

2. I am a partner at Sinnott, Puebla, Campagne & Curet, APLC, co-counsel to Westport Insurance Corporation, formerly known as Employers Reinsurance Corporation ("Westport"), a defendant in the above-captioned proceeding.

3. I respectfully submit this Declaration to provide the Court with copies of documents listed below that are referenced in Westport's Motion for Protective Order, which is filed simultaneously herewith.

4. Attached as Exhibit A is copy of the Court's January 18, 2024 Order Granting the Official Committee of Unsecured Creditors' (the "Committee") Ex Parte Application for Federal Rule of Bankruptcy Procedure 2004 Examination of Insurers.

5. Attached as Exhibit B is a copy of Westport's February 5, 2024 Responses and Objections to the Committee's Subpoena for Rule 2004 Examination.

6. Attached as Exhibit C is a copy of the Committee's February 14, 2024 Letter to Westport.

7. Attached as Exhibit D is a copy of Westport's February 20, 2024 Letter to the Committee.

8. Attached as Exhibit E is a copy of the transcript of the hearing held before the Court in these proceedings on February 12, 2024.

9. Attached as Exhibit F is a copy of the November 8, 2023 Liquidation and Injunction Order with Bar Date entered by the Court of Chancery of the State of Delaware in *State of Delaware ex. rel. the Hon. Trinidad Navarro v. Arrowood Indem. Co*., Case No. 2023-1126-LLW.

10. Attached as Exhibit G is a copy of the January 17, 2020 decision of the Superior Court of Justice in Ontario, Canada in the case captioned *Kanani v. Economical Insurance*, Case No. CV-15-6199.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 18, 2024

By: */s/ Blaise S. Curet*

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Exhibit A

to Declaration of Blaise S. Curet
in Support of
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole, Debtor.	Case No. 23-40523 WJL Chapter 11 **ORDER GRANTING THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EX PARTE APPLICATION FOR FEDERAL RULE OF BANKRUPTCY PROCEDURE 2004 EXAMINATION OF INSURERS**

THIS MATTER having been brought before the Court upon the *Official Committee of Unsecured Creditors Ex Parte Application for Federal Rule of Bankruptcy Procedure 2004 Examination of Insurers* filed October 5, 2023 [Dkt. 502] (the "**Motion**") of the Official Committee of Unsecured Creditors (the "**Committee**") for The Roman Catholic Bishop of Oakland (the "**Debtor**"), by and through its attorneys, Lowenstein Sandler LLP, Burns Bair LLP, and Keller Benvenutti Kim LLP, for entry of an order pursuant to Federal Rule of Bankruptcy Procedure 2004 and Bankruptcy Local Rule for the Northern District of California 2004-1; and the Debtor having requested a copy of all documents produced to the Committee in response to the Subpoenas (defined below); and due notice having been provided; and the Court having considered the papers submitted and the arguments presented; and for good cause shown,

IT IS HEREBY ORDERED THAT:

1. The Committee's Motion is granted as set forth herein.

2. The Insurers shall furnish all documents requested in subpoenas in a form substantially as those attached hereto as Exhibits 1 through 11 (the "Subpoenas"), and shall produce same to the Committee's counsel and the Debtor's counsel within forty-five (45) days of entry of this Order.

3. This Order is without prejudice to the Committee's or the Debtor's right to request additional documents and information, including but not limited to the information sought in the subpoenas attached to the Motion, at a later date.

4. The Insurers' rights to object to the Subpoenas as permitted under Rule 45 of the Federal Rules of Civil Procedure, incorporated into this bankruptcy case by Rule 9016 of the Federal Rules of Bankruptcy Procedure, are fully preserved, including, without limitation (a) any and all applicable evidentiary privileges and (b) proper scope of discovery.

END OF ORDER

Court Service List

All Registered ECF Participants.

Exhibit B

to Declaration of Blaise S. Curet
in Support of
Westport's Motion for Protective Order

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole, Debtor.	Case No. 23-40523-WJL Chapter 11

WESTPORT INSURANCE CORPORATION'S RESPONSES AND OBJECTIONS TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' SUBPOENA FOR RULE 2004 EXAMINATION

Pursuant to Federal Rules of Civil Procedure 45, made applicable to this matter by Federal Rules of Bankruptcy Procedure 9016, and pursuant to the Bankruptcy Local Rules for the Northern District of California, Westport Insurance Corporation, formerly known as Employers Reinsurance Corporation ("Westport") hereby responds to the Subpoena for Rule 2004 Examination (the "Subpoena") served by The Official Committee of Unsecured Creditors (the "Committee") for The Roman Catholic Bishop of Oakland (the "Debtor") as follows:

GENERAL OBJECTIONS

1. The following General Objections apply to and are incorporated in Westport's responses and objections to each of the Requests for Production (the "Responses") below, whether or not expressly incorporated by reference in each such Response. The failure to specify any General Objection in the Responses is not intended to waive that General Objection. Any additional objections provided in the Responses should be construed as supplementing, and not superseding, these General Objections.

2. The specific Responses set forth below are based upon information presently available to Westport. Westport expressly reserves the right to revise, correct, add to, clarify, amend, or supplement these Responses as necessary. Failure to object herein shall not constitute a waiver of any objection that Westport may later interpose, including as to future supplemental Responses.

3. Westport objects to the Requests for Production to the extent that they seek documents that are not in Westport's possession, custody, or control.

4. Westport objects to the Requests for Production to the extent that they seek documents that the Propounding Party could obtain equally or more readily from another source, including (without limitation) the Debtor. There is no legal basis for imposing on Westport the burden and expense of producing documents that the Propounding Party can obtain from such other sources.

5. Westport objects to the Requests for Production to the extent that they seek discovery that is unduly burdensome or not proportional to the needs of the case, including (without limitation) because the Requests for Production seek communications and documents

from an extensive period of time regarding a broad and undefined subject matter.

6. Westport objects to the Requests for Production to the extent that they seek the production of "all documents" related to broadly defined subjects and therefore are not relevant to any party's assessment of the plan confirmation proceedings or proportional to the needs of the case.

7. Westport objects to the Requests for Production to the extent that they seek information that is not relevant to any party's assessment of the plan confirmation proceedings.

8. Westport objects to the Requests for Production to the extent that they purport to impose obligations on Westport beyond those imposed by the Federal Rules, the Bankruptcy Rules, the Local Rules, or any other applicable laws and rules.

9. Westport objects to the Requests for Production to the extent that they seek information that is protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege, immunity, or protection (whether based upon statute, rule, order, agreement, or common law), including (without limitation) the common interest privilege, the mediation privilege, and the settlement negotiation privilege. Westport does not intend to produce information or documents that are privileged or otherwise protected from discovery. Any inadvertent production of such information or documents shall not be deemed to be a waiver of any applicable privilege or protection of Westport, nor shall it be deemed to waive any objection to the admissibility of such information or documents.

10. Westport objects to the Requests for Production to the extent that they require Westport to search for responsive information and materials in places, locations, and files, or from custodians other than those where responsive information, materials, and documents would be expected to be retained in the ordinary course of business, to the extent that such information, materials, and documents exists, on the grounds that such a search would be oppressive and/or cause unreasonable expense or burden.

11. Westport objects to the Requests for Production to the extent that they require unreasonably costly or time-consuming measures to locate and produce responsive documents, to the extent that such documents exist. Westport will construe the Requests for Production to

require only a search for reasonably accessible documents, including by using search terms, in locations where Westport would reasonably expect to find documents responsive to the Requests for Production, to the extent that such documents exist.

12. Westport objects to the Requests for Production to the extent they call for the production of documents or information related to third-party insureds' policies, claims, claim files, claims valuations, settlements, coverage evaluations, reservations of rights, coverage denials, and/or coverage payments.

13. If Westport agrees to produce any non-privileged documents responsive to the Requests for Production, Westport will meet and confer with the Committee regarding appropriate date ranges, custodians, and search terms for document collection.

14. Any statement that Westport will produce non-privileged documents responsive to a particular Request for Production is not a representation that such documents exist and/or are in the possession, custody, or control of Westport, but rather that such documents will be produced if they are located in the course of a reasonable search.

15. Westport's disclosure of information or production of documents in response to the Requests for Production does not constitute an admission by Westport that such information or documents are relevant or admissible and is without prejudice to Westport's right to contend at any trial or hearing, or any other proceeding, that the information and documents are inadmissible, irrelevant, immaterial, privileged, or otherwise objectionable.

16. Westport objects to any factual assumptions, implications, and explicit or implicit characterizations of facts, events, circumstances, or issues in the Requests for Production. Westport's Responses and any productions shall not be construed as admissions of or agreements with any such assumption, implication, or characterization.

17. Westport objects to the place of production of documents, listed as "One Lowenstein Drive, Roseland, New Jersey 07068" as violating the 100-mile rule for production of documents, pursuant to Rule 45(c)(2)(A).

18. Westport specifically objects to instruction 4, which states that, "[u]nless otherwise stated in a specific Request herein, the relevant time period for the discovery being

sought shall be the period from the inception of RCBO to the present" as vague, ambiguous, and uncertain by failing to identify to Westport when the "inception date" of the RCBO is and on that ground is burdensome and oppressive.

19. Westport is willing to meet and confer regarding the responses and objections contained herein.

SPECIFIC RESPONSES AND OBJECTIONS

REQUEST FOR PRODUCTION NO. 1:

Copies of all Your Insurance Policies issued to, or insuring, RCBO, including any endorsements or attachments to those policies.

RESPONSE:

In addition to and without waiving the foregoing General Objections, which are incorporated herein, Westport objects to this Request to the extent that it seeks documents that are protected by the attorney-client privilege, the attorney work product doctrine, the mediation privilege, or any other applicable privilege. Westport further objects to this Request as unduly burdensome in seeking documents that are equally available from the Debtor. Westport further objects to this Request to the extent that it calls for the production of documents or information related to third-party insureds' policies, claims, claims files, claims valuation, settlements, coverage evaluations, reservation of rights, coverage denials, and/or coverage payments.

Subject to and without waiving the foregoing objections, Westport will produce non-privileged documents responsive to this Request that are within its possession, custody, or control and can be located by it in the course of a reasonable search.

REQUEST FOR PRODUCTION NO. 2:

All Secondary Evidence of Your Insurance Policies issued to, or insuring, RCBO, but only with respect to any of Your Insurance Policies that are missing or incomplete.

RESPONSE:

In addition to and without waiving the foregoing General Objections, which are incorporated herein, Westport objects to this Request to the extent that it seeks documents that are protected by the attorney-client privilege, the attorney work product doctrine, the mediation

privilege, or any other applicable privilege. Westport further objects to this Request insofar as the term "incomplete," as used therein, is vague. Westport further objects to this Request as unduly burdensome in seeking documents that are equally available from the Debtor. Westport further objects to the Request to the extent that it calls for the production of documents or information related to third-party insureds' policies, claims, claims files, claims valuation, settlements, coverage evaluations, reservation of rights, coverage denials, and/or coverage payments.

Subject to and without waiving the foregoing objections, Westport is presently unaware of any alleged missing or incomplete policies that Westport issued to or which would insure RCBO.

REQUEST FOR PRODUCTION NO. 3:

All coverage position letters, including reservations of rights or denials of coverage, that You or anyone acting on Your behalf sent to RCBO Concerning insurance coverage for any Abuse Claim tendered by or on behalf of RCBO to You.

RESPONSE:

In addition to and without waiving the foregoing General Objections, which are incorporated herein, Westport objects to this Request to the extent that it seeks documents that are protected by the attorney-client privilege, the attorney work product doctrine, the mediation privilege, or any other applicable privilege. Westport further objects to this Request as beyond the scope of permissible discovery in that it is overly broad, unreasonably burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks documents and information concerning the interpretation and application of the terms and conditions of the policies and other insurance coverage issues that are not relevant to plan confirmation. *See In re Boy Scouts of America and Delaware BSA, LLC, Case No. 20-10343 (LSS)*, May 19, 2021 Hr'g Tr. at 241:22 ("no coverage issue is going to be adjudicated."); 242:10-11 ("I can tell everyone right now that I can't imagine I would decide a coverage issue."); *Diocese of Rochester v. Cont'l Ins. Co. (In re Diocese of Rochester)*, Nos. 19-20905-PRW, 19-2021-PRW, 2023 Bankr. LEXIS 1114, at *10 (Bankr. W.D.N.Y. Apr. 25, 2023) ("It is now time for the insurance coverage issues to be fully and fairly adjudicated in this Adversary Proceeding, and not as a backdoor adjunct to the plan confirmation process."). Westport further objects to this

Request as unduly burdensome in seeking documents that are equally available from the Debtor. Westport further objects to the Request to the extent that it calls for the production of documents or information related to third-party insureds' policies, claims, claims files, claims valuation, settlements, coverage evaluations, reservation of rights, coverage denials, and/or coverage payments.

Subject to and without waiving the foregoing objections, Westport will produce non-privileged letters showing its coverage position with respect to the Abuse Claims asserted against the Debtor.

REQUEST FOR PRODUCTION NO. 4:

Documents sufficient to show any exhaustion, erosion, or impairment of the limits of liability of each of Your Insurance Policies, such as loss runs, loss history reports, and/or claims reports.

RESPONSE:

In addition to and without waiving the foregoing General Objections, which are incorporated herein, Westport objects to this Request to the extent that it seeks documents that are protected by the attorney-client privilege, the attorney work product doctrine, the mediation privilege, or any other applicable privilege. Westport further objects to this Request as beyond the scope of permissible discovery in that it is vague, ambiguous, overly broad, unreasonably burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks documents and information containing confidential, proprietary, and/or sensitive business information that is in no way relevant to plan confirmation and which would be an advantage to Defendant's competitors, who are also defendants in this action. *See In re Imerys Talc America, Inc., et al.*, Case No. 19–10289, June 22, 2021 Hr'g Tr. at 237:1-5, 237:23-25 – 238:1-2 (sustaining objections to discovery regarding insurers' claims handling practices and estimation of claims values).

REQUEST FOR PRODUCTION NO. 5:

The entire contents of Your Claim Files Relating to any Abuse Claims tendered by or on behalf of RCBO to You.

RESPONSE:

In addition to and without waiving the foregoing General Objections, which are incorporated herein, Westport objects to this Request to the extent that it seeks documents that are protected by the attorney-client privilege, the attorney work product doctrine, the mediation privilege, or any other applicable privilege. Westport further objects to this Request as beyond the scope of permissible discovery in that it is overly broad, unreasonably burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, including, but not limited, to the extent it seeks documents and information regarding the "entire contents" of Westport's Claim Files from an undefined period of time. Westport further objects to this Request as beyond the scope of permissible discovery in that it is vague, ambiguous, overly broad, unreasonably burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks documents and information containing confidential, proprietary, and/or sensitive business information that is in no way relevant to plan confirmation and which would be an advantage to Defendant's competitors, who are also defendants in this action. *See In re Imerys Talc America, Inc., et al.,* Case No. 19–10289, June 22, 2021 Hr'g Tr. at 237:1-5, 237:23-25 – 238:1-2 (sustaining objections to discovery regarding insurers' claims handling practices and estimation of claims values). Westport further objects to this Request to the extent that it calls for the production of documents or information related to third-party insureds' policies, claims, claims files, claims valuation, settlements, coverage evaluations, reservation of rights, coverage denials, and/or coverage payments.

Subject to and without waiving the foregoing objections, Westport will produce non-privileged documents responsive to this Request that are within its possession, custody, or control and can be located by it in the course of a reasonable search.

REQUEST FOR PRODUCTION NO. 6:

All Underwriting Files Relating to Your Insurance Policies concerning any Abuse Claims tendered by or on behalf of RCBO to You.

RESPONSE:

In addition to and without waiving the foregoing General Objections, which are

incorporated herein, Westport objects to this Request to the extent that it seeks documents that are protected by the attorney-client privilege, the attorney work product doctrine, the mediation privilege, or any other applicable privilege. Westport further objects to this Request as beyond the scope of permissible discovery in that it is overly broad, unreasonably burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks documents and information concerning the interpretation and application of the terms and conditions of the policies and other insurance coverage issues that are not relevant to plan confirmation. *See In re Boy Scouts of America and Delaware BSA, LLC, Case No. 20-10343 (LSS)*, May 19, 2021 Hr'g Tr. at 241:22 ("no coverage issue is going to be adjudicated."); 242:10-11 ("I can tell everyone right now that I can't imagine I would decide a coverage issue."); *Diocese of Rochester v. Cont'l Ins. Co. (In re Diocese of Rochester)*, Nos. 19-20905-PRW, 19-2021-PRW, 2023 Bankr. LEXIS 1114, at *10 (Bankr. W.D.N.Y. Apr. 25, 2023) ("It is now time for the insurance coverage issues to be fully and fairly adjudicated in this Adversary Proceeding, and not as a backdoor adjunct to the plan confirmation process."). Westport further objects to the Request to the extent that it calls for the production of documents or information related to third-party insureds' policies, claims, claims files, claims valuation, settlements, coverage evaluations, reservation of rights, coverage denials, and/or coverage payments.

Subject to and without waiving the foregoing objections, Westport will produce non-privileged documents responsive to this Request that are within its possession, custody, or control and can be located by it in the course of a reasonable search.

REQUEST FOR PRODUCTION NO. 7:

Documents sufficient to show Your current reserves for each of the Abuse Claims tendered by or on behalf of RCBO to You.

RESPONSE:

In addition to and without waiving the foregoing General Objections, which are incorporated herein, Westport objects to this Request to the extent that it seeks documents that are protected by the attorney-client privilege, the attorney work product doctrine, the mediation privilege, or any other applicable privilege. Westport further objects to this Request as beyond

the scope of permissible discovery in that it is vague, ambiguous, overly broad, unreasonably burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks documents and information containing immaterial, confidential, proprietary, and/or sensitive business information that is in no way relevant to plan confirmation. *See In re Imerys Talc America, Inc., et al.*, Case No. 19–10289, June 22, 2021 Hr'g Tr. at 239:1 (The Court: [discussing both reserves and reinsurance] "[E]ven in the coverage cases, they say this is usually irrelevant and not discoverable … So how does that have anything to do with confirmation?"); *id.* at 239:21 (The Court: "Internal to the insurance companies, their setting reserves, like a prudent businessperson might or they're regulatorily required, I don't understand how that's relevant to confirmation."); *In re Boy Scouts of America and Delaware BSA, LLC*, Case No. 20-10343 (LSS), Nov. 19, 2021 Hr'g Tr. at 134:4-7 (The Court: "[T]o say that there's some relevance here to [reserves information], I don't see it, I just don't see it."); *In re Diocese of Camden, New Jersey*, Case No. 20-21257-JNP (Bankr. D.N.J.), Feb. 18, 2022 Hr'g Tr. at 11:15-16 (The Court: "As I previously mentioned, the insurer's opinions on litigation risks and how they set their reserves are decisions that will not impact a *Martin* analysis on whether this is a deal – a deal that the Debtor should enter into."). Westport further objects to the Request to the extent that it calls for the production of documents or information related to third-party insureds' policies, claims, claims files, claims valuation, settlements, coverage evaluations, reservation of rights, coverage denials, and/or coverage payments.

REQUEST FOR PRODUCTION NO. 8:

All Documents and Communications that relate to Your setting, calculating, analysis, adjustment, investigation, evaluation of, and decision-making process with respect to, Your reserves identified in response to Request No. 7, above, including the working papers and actuarial reports, if any, relating to the establishment of those reserves.

RESPONSE:

In addition to and without waiving the foregoing General Objections, which are incorporated herein, Westport objects to this Request to the extent that it seeks documents that are protected by the attorney-client privilege, the attorney work product doctrine, the mediation

privilege, or any other applicable privilege. Westport further objects to this Request as beyond the scope of permissible discovery in that it is vague, ambiguous, overly broad, unreasonably burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks documents and information containing immaterial, confidential, proprietary, and/or sensitive business information that is in no way relevant to plan confirmation. *See In re Imerys Talc America, Inc., et al.*, Case No. 19–10289, June 22, 2021 Hr'g Tr. at 239:1 (The Court: [discussing both reserves and reinsurance] "[E]ven in the coverage cases, they say this is usually irrelevant and not discoverable … So how does that have anything to do with confirmation?"); *id.* at 239:21 (The Court: "Internal to the insurance companies, their setting reserves, like a prudent businessperson might or they're regulatorily required, I don't understand how that's relevant to confirmation."); *In re Boy Scouts of America and Delaware BSA, LLC*, Case No. 20-10343 (LSS), Nov. 19, 2021 Hr'g Tr. at 134:4-7 (The Court: "[T]o say that there's some relevance here to [reserves information], I don't see it, I just don't see it."); *In re Diocese of Camden, New Jersey*, Case No. 20-21257-JNP (Bankr. D.N.J.), Feb. 18, 2022 Hr'g Tr. at 11:15-16 (The Court: "As I previously mentioned, the insurer's opinions on litigation risks and how they set their reserves are decisions that will not impact a *Martin* analysis on whether this is a deal – a deal that the Debtor should enter into."). Westport further objects to the Request to the extent that it calls for the production of documents or information related to third-party insureds' policies, claims, claims files, claims valuation, settlements, coverage evaluations, reservation of rights, coverage denials, and/or coverage payments.

Dated: February 5, 2024

By: */s/ Todd C. Jacobs*

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Attorneys for Westport Insurance Corporation, formerly known as Employers Reinsurance Corporation

10387492

CERTIFICATE OF SERVICE

The undersigned certifies that on February 5, 2024, a copy of the above **WESTPORT INSURANCE CORPORATION'S RESPONSES AND OBJECTIONS TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' SUBPOENA FOR RULE 2004 EXAMINATION** was served via email to the following:

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/s/ *Todd C. Jacobs*
Todd C. Jacobs

Exhibit C

to Declaration of Blaise S. Curet
in Support of
Westport's Motion for Protective Order

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February 14, 2024

VIA EMAIL

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Re: *In re The Roman Catholic Bishop of Oakland*, Case No. 23-40523-WJL
Committee's Subpoena to Westport Insurance Corporation, formerly known as Employers Reinsurance Corporation ("Westport")

Counsel,

As you know, this Firm represents the Official Committee of Unsecured Creditors (the "Committee") of The Roman Catholic Bishop of Oakland (the "Debtor") in the above-referenced chapter 11 case (the "Chapter 11 Case"). We write regarding Westport's responses and objections (the "Responses and Objections"), dated February 5, 2024, to the subpoena served by the Committee on January 22, 2024.

To recap, the Committee filed an application for federal rule of bankruptcy procedure 2004 examination of the Debtor's insurers, including Westport, on October 5, 2023 [Dkt. 502]. After a lengthy hearing on November 14, 2023, the Court ruled that the Committee is permitted discovery from the insurers with respect to certain specific topics (the "Requests"). During hearings on both January 9, 2024 and February 7, 2024, the Court reinforced its ruling that the Requests seek relevant information. *See, e.g.*, Tr. of Hr'g Jan. 9, 2024, at 112:1–7 ("With respect to relevance, I think we did resolve that. And I think that the long discussion we had, I found very helpful. . . . But in my view, we thoroughly exhausted the relevance arguments. . . ."). Again on February 12,

2024, after the Responses and Objections were served, the Court reiterated that the Requests are "fair game" and that the relevance issue had already been litigated in the Committee's favor. As such, to the extent the Responses and Objections refuse to produce documents on the basis of relevance, such objections have already been overruled by the Court. *See, e.g.*, *id.*; *see also In re Mastro*, 585 B.R. 587, 597 (B.A.P. 9th Cir. 2018) (noting the scope of Rule 2004 examinations is "unfettered and broad" and has been compared to a "fishing expedition").

In addition to ignoring the Court's clear rulings regarding relevance, the Responses and Objections are improper for several reasons.

First, the objection to the Requests "to the extent they seek information that is not relevant to any party's assessment of the plan confirmation proceedings" is nonsensical and ignores the status of the Chapter 11 Case and purpose of the Requests. As the Committee made clear, the subpoena seeks information to assist the Committee in preparing for mediation and/or a potential resolution of the outstanding issues in this Chapter 11 Case. As Westport is aware, no plan has been negotiated, drafted, or filed in this Chapter 11 Case, and the discovery sought in the Requests is not related to any confirmation proceeding. As such, this objection should be withdrawn.

Second, with respect to any documents which Westport intends to withhold on the basis of privilege, Westport has the burden of proving the applicability of such privilege to each document withheld. The Committee agrees with the Court's statement at the February 12, 2024 status conference that there is nothing categorically confidential or privileged about the information sought by the Requests. To the extent Westport disagrees, Westport must provide a privilege log that is "sufficiently specific to allow a determination of whether each withheld document is or is not [in] fact privileged." *In re 3dfx Interactive, Inc.*, 347 B.R. 394, 402–03 (Bankr. N.D. Cal. 2006); *see* Fed. R. Civ. P. 45(e)(2)(A). Federal Rule of Civil Procedure 45(e)(2)(A) made applicable in bankruptcy discovery through Federal Rule of Bankruptcy Procedure 9016, provides that a party withholding information on the basis of privilege must "(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 45(e)(2)(A). As such, please confirm Westport will provide, by March 4, 2024, a detailed, line-by-line privilege log fully explaining the basis for withholding any document, in compliance with the Federal Rule 45(e)(2)(A).

Third, to the extent the Responses and Objections object to the Requests on the basis that such Requests are "unduly burdensome", such objection is improper. Federal Rule of Civil Procedure 26, made applicable in this Chapter 11 Case by Federal Rule of Bankruptcy Procedure 7026, was amended in December 2015 to remove the language that discovery be "reasonably calculated to lead to the discovery of admissible evidence" and instead focus on proportionality factors. *See* Fed R. Civ. P. 26 advisory committee's note to 2015 amendment. The scope of discovery under Federal Rule of Civil Procedure 26 is not whether the request is "unduly burdensome." The request is relevant to Committee's investigation of the Debtor's assets, proportional to the needs of the case, and its burden does not outweigh its likely benefit, as required by Federal Rule of Civil Procedure 26(b)(1). Further, requests under Bankruptcy Rule 2004 are permitted to be broader than what is permitted under the Federal Rules. *See Mastro*, 585 B.R. at 597; *see also In re*

Subpoena Duces Tecum & Ad Testificandum Pursuant to Fed. R. Bankr. P. 2004, 461 B.R. 823, 831 (Bankr. C.D. Cal. 2011) (holding conclusory statements that requests are overly broad and unduly burdensome are inadequate and insufficient objections to requests under Bankruptcy Rule 2004).

Fourth, Westport's contention that it need not produce documents that are within its possession, custody, or control because those documents can potentially be obtained from the Debtor violates the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 45. Westport cited no case law for the proposition that the documents and information must be obtained from the Debtor, where possible. As a self-proclaimed party in interest in the Chapter 11 Case, and pursuant to the Court's order, Westport is required to produce responsive documents regardless of if the Debtor, or any other party, is already in possession of that document. If the requested documents are in the possession, custody, or control of Westport, Westport must produce them.

Fifth, Westport's refusal to produce any documents in response to Request Nos. 4, 7, and 8 are improper. This Court already ruled, on several occasions, that the Requests are relevant and proper, acknowledging other courts may have elected not to require production of such documents, and overruling Westport's objections. As such, Westport must produce responsive documents in in possession, custody, and control in response to these Requests.

Finally, to the extent Westport objects to the place for production of documents, which the Committee presumes will occur electronically, the place of production shall be "Lowenstein Sandler, 390 Lytton Avenue, Palo Alto, California 94301."

Please advise us by this **Wednesday, February 20, 2024**, if Westport intends to revise its Responses and Objections, and/or will run the searches and produce responsive documents in connection with each of the Requests. If not, the Committee will file a motion to compel compliance with the subpoena and seek all other ancillary relief necessary.

Yours truly,

Michael A. Kaplan

cc: Jeffrey D. Prol, Esq.
Brent Weisenberg, Esq.
Colleen M. Restel, Esq.
Timothy Burns, Esq.
Jesse Bair, Esq.
Gabrielle Alberts, Esq.
Ann Marie Uetz, Esq.
Matthew D. Lee, Esq.

Exhibit D

to Declaration of Blaise S. Curet
in Support of
Westport's Motion for Protective Order

parker hudson

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February 20, 2024

VIA EMAIL

Michael A. Kaplan
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RE: *In re The Roman Catholic Bishop of Oakland*, Case No. 23-40523-WJL, Subpoena from Official Committee of Unsecured Creditors (the "Committee") to Westport Insurance Corporation, formerly known as Employers Reinsurance Corporation ("Westport")

Michael,

We write in response to your February 14, 2024 letter regarding Westport's Responses and Objections to the subpoena served by the Committee on January 22, 2024. While Westport disagrees with the Committee's assessment of Westport's Responses and Objections as "improper," we are hopeful the parties will be able to resolve some if not all of the issues raised in your letter in connection with their discovery dispute conference required by Bankruptcy Local Rule 2004-1(b) and Civil Local Rule 37-1(a). To facilitate the parties' conference, Westport responds below to some of the assertions in the Committee's letter. This is not intended to be an exhaustive response to the Committee's letter, and Westport reserves all rights.

First, Third and Fourth Items: Certain of Westport's objections. We will consider the issues you assert with respect to certain of Westport's objections and will be prepared to discuss them during the parties' meet and confer.

Second Item: Privilege. It is not clear from your letter what issue you are raising with regard to Westport's privilege objections. There is nothing improper about Westport's assertions of privilege and, indeed, the Court approved the Committee's 2004 subpoenas with the understanding that it did not intend "to obliterate any privilege concerns" with any of its rulings. Feb. 7, 2024 Tr. at 22:2–3. Moreover, Westport has not refused to provide the Committee a log of documents redacted or withheld on privilege grounds. While we disagree that Westport is obligated to provide a privilege log by March 4,[1] we would like to meet and confer on the timing and format of privilege logs.

[1] *See, e.g., In re Jafroodi*, No. 9:19-BK-11918-MB, 2023 WL 4289523, at *11 (Bankr. C.D. Cal. June 30, 2023) (privilege logs in connection with Rule 45 subpoenas must be provided "within a reasonable time").

Fifth Item: Exhaustion/impairment and reserves information. With respect to the Committee's request for information relating to the exhaustion/erosion/impairment of Westport's policy limits (Committee Request No. 4), we have been informed that no responsive documents exist.

With respect to reserves information (Committee's Request Nos. 7 and 8), your correspondence provides only a partial picture. Westport objects to the production of reserves information on several grounds including, *inter alia*, attorney-client privilege and work-product. Judge Lafferty made clear both with his comments in court and his January 18, 2024 order that such objections among others are preserved. *See* Dkt. No. 796 ("**Insurers' rights to object to the Subpoenas as permitted under Rule 45 of the Federal Rules of Civil Procedure**, incorporated into this bankruptcy case by Rule 9016 of the Federal Rules of Bankruptcy Procedure, **are fully preserved**, including, **without limitation** (a) **any and all applicable evidentiary privileges** and (b) **proper scope of discovery**" (emphasis added).). Other courts have routinely sustained privilege and other objections to the production of reserves information as well. *See, e.g., RhonePoulenc Rorer Inc. v. Home Indem. Co*., 139 F.R.D. 609, 610 (E.D. Pa. 1991); *In re Couch*, 80 B.R. 512, 517 (S.D. Cal. 1987); *Mirarchi v. Seneca Spec. Ins. Co*., 564 Fed. Appx. 652, 655 (3d Cir. 2014). The Committee is therefore incorrect in its unqualified assertion that Westport's refusal to produce such information is improper. Westport has no obligation to abandon well-founded objections based on "applicable evidentiary privileges" or the "proper scope of discovery" that were "fully preserved" by the Court.

***

Please provide the Committee's availability to meet and confer on these and any other issues the parties may wish to discuss. We look forward to speaking with you.

Sincerely,

Todd C. Jacobs

Cc: Jeffrey D. Prol, Esq.
Brent Weisenberg, Esq.
Colleen M. Restel, Esq.
Timothy Burns, Esq.
Jesse Bair, Esq.
Gabrielle Alberts, Esq.
Ann Marie Uetz, Esq.
Matthew D. Lee, Esq.
Blaise S. Curet, Esq.

Robin C. Craig, Esq.
Harris B. Winsberg, Esq.
Matthew M. Weiss, Esq.
John E. Bucheit, Esq.
R. David Gallo, Esq.
Matthew G. Roberts, Esq.

Exhibit E

to Declaration of Blaise S. Curet
in Support of
Westport's Motion for Protective Order

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

-oOo-

In Re:	) Case No. 4:23-bk-40523
	) Chapter 13
THE ROMAN CATHOLIC BISHOP OF OAKLAND	)
	) Oakland, California
	) Monday, February 12, 2024
Debtor.	)10:00 AM
_____	)
	ADV#: 23-04028
	THE ROMAN CATHOLIC BISHOP OF OAKLAND, ET AL. v. PACIFIC INDEMNITY, ET AL.
	SCHEDULING CONFERENCE
	STATUS CONFERENCE
	STATUS CONFERENCE

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM J. LAFFERTY
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES (All present by video or telephone):

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Proceedings recorded by electronic sound recording; transcript provided by transcription service.

OAKLAND, CALIFORNIA, MONDAY, FEBRUARY 12, 2024, 10:02 AM

-oOo-

(Call to order of the Court.)

THE CLERK: This is the United States Bankruptcy Court, Northern District of California, the Honorable William J. Lafferty presiding.

THE COURT: Okay. This is Judge Lafferty, and this is a matter that we specially set. Did you call the matter yet?

THE CLERK: No, not yet.

THE COURT: Go ahead and call the matter. Okay.

THE CLERK: Your Honor, this is your special set hearing for 10 o'clock. Line item number 1, Your Honor, the Roman Catholic Bishop of Oakland v. American Home Assurance Company.

THE COURT: Okay. Let's have appearances, please.

MS. UETZ: Good morning, Your Honor. Anne Marie Uetz of Foley & Lardner on behalf of the debtor.

THE COURT: Okay.

MS. RIDLEY: Good morning, Your Honor. Eileen Ridley, Foley & Lardner, on behalf of the debtor, particularly regarding the adversary proceeding.

THE COURT: Okay.

MR. BREALL: Good morning, Your Honor. Joseph Breall.

THE COURT: Anybody else for the -- oh, sorry.

MR. BREALL: No.

THE COURT: I interrupted you. Go ahead.

MR. BREALL: For the debtor for the advocacy proceeding.

THE COURT: Okay. Thank you.

Anybody for the committee? Let's do that next.

MR. BURNS: So good morning, Your Honor. It's Tim Burns for the committee.

THE COURT: Okay. Okay, Ms. Albert. I'm not hearing you. Yeah, you're muted somehow so --

MR. BURNS: Am I muted, Your Honor?

THE COURT: No, I heard you loud and clear. No problem at all.

MR. BURNS: Okay.

THE COURT: But Ms. Albert is muted so if she wants to -- I will assume she was saying that she's here for the committee. Okay.

All right. How about anybody else making an appearance, please?

MS. ALBERT: I believe that (indiscernible) --

THE COURT: There you go. I can hear you. There we go.

MS. ALBERT: Oh, oh, good.

THE COURT: Thank you.

MS. ALBERT: Wonderful.

THE COURT: Okay.

MS. ALBERT: I believe that Jeff Prol is also making an appearance for --

MR. PROL: Good morning, Your Honor. It's Jeff Prol.

THE COURT: Okay.

MR. PROL: I was just admitted to the Zoom --

THE COURT: Okay.

MR. PROL: -- for the committee as well. Thank you.

THE COURT: Okay. You bet. Okay.

All right. Other appearances, please.

MR. PUKLIN: Good morning, Your Honor. Bradley Puklin and Nathan Reinhardt for London Market Insurers.

THE COURT: Okay.

MR. HALL: Good morning, Your Honor. Frederick Hall for the defendant California Insurance Guarantee Association in the adversary proceeding.

THE COURT: Okay. Anybody else?

MS. KLIE: Good morning, Your Honor. Amy Klie --

THE COURT: Who else do we have? Go ahead.

MS. KLIE: -- for American home.

THE COURT: Okay. Thank you.

MR. PLEVIN: Good morning, Your Honor. Mark Plevin for Continental Casualty Company.

THE COURT: Okay. Thank you.

MR. CURET: Good morning. Blaise Curet for Westport Insurance Corporation.

THE COURT: Okay. Thank you.

Is that it? Any other appearances? Anybody else?

Okay. Well, let me put a couple of ideas out there, and you guys tell me how you want to proceed. We did have some argument last week about the motion for clarification, and I did promise to go back and take a look at the papers and particularly the transcript with respect to a couple of matters that were raised.

We're going to get one more appearance.

MS. DANIELS: Good morning, Your Honor, and apologies. I just got promoted to a panelist. Justine Daniels for the Pacific Insurance (indiscernible).

THE COURT: Okay. Very good. Thank you. Okay.

And Mr. Schiavoni.

MR. SCHIAVONI: Your Honor, I'm sorry. I had a problem with just figuring out how to get the computer on. I apologize.

THE COURT: That's okay. You're not the only one who's joining us a little late, but it's always nice to see you.

MR. SCHIAVONI: Thank you, Your Honor.

THE COURT: Okay. Anybody else? Is that the whole gang?

THE CLERK: One more, Your Honor.

THE COURT: Okay. We're going to start making the

last person to join here buy a round of drinks or something.

MR. POTENTE: Your Honor, this is Alex Potente, also for Pacific Indemnity. Clyde & Co.

THE COURT: Okay. Okay. Very good. Is that everyone?

THE CLERK: That's correct, Your Honor.

THE COURT: Okay. I started to remark before we had a couple of the last folks join us that at the last hearing, I promised to -- although I don't think we have Mr. Rubin here, I promised to respond to some of his comments by going back and looking at the papers and in particular looking again at the transcript, which I had done before. And I'm prepared to give you some thoughts/rule on the clarification motion.

And then the matter that I think we left more obviously untied up with some questions about scheduling with respect to the APs. And in connection with that, I did take a more systemic look at the motions to withdraw the reference and went back then, of course, to the complaints to kind of make sure I was understanding the arguments. And I have some thoughts about that if they would be helpful.

So if you got -- if you have something to suggest to me or there's an update, I'm delighted to hear it. Otherwise I'm inclined to give you thoughts about the motion for clarification, and I'm inclined to give you some thoughts that would track what I would -- what I suspect I would be likely to

write as a comment under my opportunity under our Local Rule 5011, with respect to the motion to withdraw the reference. So I will defer -- why don't I start with Ms. Uetz and see if there's anything she wants to tell me right -- organization or how we proceed?

MS. UETZ: Your Honor, I like the organization that you just suggested. I think that we'll have some comments following Your Honor's statements, but they may inform what I would otherwise say. So if you wouldn't mind proceeding as you've outlined, I think that makes perfect sense.

THE COURT: Yeah, I'm happy to.

MS. UETZ: Thank you.

THE COURT: Well, do we have anybody else from Duane Morris here because they really were the principal --

MR. REINHARDT: That's me, Your Honor. Nate Reinhardt. I'll be Mr. Rubin's eyes and ears, I guess, for this, but anything you say, I'll relay to him as well.

THE COURT: Okay. Okay. All right. Well, let me proceed in two fashions. I think what I heard from Mr. Rubin last week was that the extent the motion for clarification was concerned about matters that were truly matters of privilege, whether they be attorney-client or work product, that that was no longer an issue, that the parties had discussed privilege issues. And I don't know if the parties literally agreed that nothing in the 2004 exam request was meant to obliterate any

privilege, but I can tell you right now, it was not my intent to obliterate any privileges. So to the extent that's an issue that's off the table, that's appropriate for all purposes.

Having said that, I probably made a comment or two about what might be the proper scope of privileges or work product, and I'll circle back to that when I get into what my thinking was in giving the ruling that I believe I gave on November 14th. So number one, I'm glad that privilege issues are being dealt with responsibly by the parties. That's terrific.

To the extent that what Mr. Rubin was telling me was he was genuinely uncertain what my ruling was, I find that very difficult to accept, having read the transcript. We had lengthy argument about the categories that were being requested. I will give you this -- and Mr. Plevin, I think in particular was helpful in focusing us on this particular aspect of the motion. It was arguably, from the insurance company's perspective, a moving target in that the initial request was not exactly the same thing as the request as articulated in the reply brief, where I think Mr. Plevin identified six categories, and the committee, I think, identified basically six categories of documents.

But we certainly moved, I thought quite, adeptly into that discussion, and it was a long standing discussion. And everybody except Mr. Schiavoni got to make their thoughts

known. I'll come back to Mr. Schiavoni's characterization of that in a few minutes, with which I thoroughly disagree. And I'll tell you why.

But what I was trying to articulate through my questions and through my ruling was that I thought there was a difference between a 2004 exam, which is meant to get information about the debtor's assets, liabilities, financial condition, and the matters necessary to administer the case and do what you need to do in the course of a bankruptcy case, and litigation issues, which are going to be dealt with differently in the AP.

And if I was not clear about that, I'm not sure how I could have made myself any clearer. That was a theme throughout my comments and my questions. And that was how I approached the decision that I made at the end of the hearing, which I think is articulated at pages 175 and 176 of the transcript, to not require that there be, at least for now, any production or disclosure of matters having to do with the resolution of claims in prior cases. In my view, that was much more of a sort of a litigation-type posture. I didn't think it was necessary or appropriate to get into that.

I did think that there were three categories that, while I think they might in some ways arguably have been litigation-related rather than 2004-related, and those are, as I said, the current claims files, the reserve working papers,

and the underwriting information. I thought those were all fair game for a discovery because in my view, they were in some ways the mirror image of the claim information. The claim information is one side of the ledger. What the insurance companies are doing about it is the other side of the ledger. So that was my thinking in making that ruling, and I thought it was quite clear.

Where I left a little bit of room for you folks to discuss was being more precise than I probably was being about what those categories mean because you know that better than I do. So what I did say is, please get in a room and talk about these categories so that you're talking about the same thing and that you're defining them the same way and that we can get closure on this. And that was the point of my ruling and that was my ruling. So to the extent there's an argument that it wasn't clear, I simply can't accept that.

So to the extent this is a motion for clarification, I'm going to deny it. I don't think clarification was necessary. And I think the party filing the motion for clarification could simply have done what everybody else did, which was try to get in the same room and talk about these categories. But rather than do that, they up with a motion for clarification, which I just don't think really makes any sense.

To the extent there's an argument that the relevancy concerns were not fully articulated and these materials weren't

relevant, again, for the reasons I set forth during my ruling, I believe they were. And I'll go a little bit further and say something that I think was probably implicit in my ruling, but I'll say it more directly. One cannot survey the scattered history of mediations in these types of cases and come up with the idea that anybody has figured out how to do them perfectly. Far from it. I don't think you can pull any rule from those experiences, as far as I can tell, as to what's the perfect way to get a mediation or get people the information they need.

So I think we need to be sensitive to possibly doing things a little bit differently. And it was my theory that having the insurance companies provide this information was going to help that process and was going to get everybody into the mediation with the optimum amount of information. On the debtor to committee side, that's the claim information produced to the insurers. From the insurers, that is a snapshot of where they are with their evaluations. And in my view, those are simply mirror images of each other. I did not think there was anything necessarily categorically confidential or privileged about that information. To the extent something truly is privileged, I was not intending to obliterate that, and the parties can work through that.

So that was my ruling. I stand by it. I continue to think for those reasons that there was relevancy established, at least for the limited purposes of a 2004 exam, which again,

I'm contrasting with litigation theories. Okay. Litigation is a whole other story, and you're going to get into that in the AP. That is different. So for all those reasons, I'm going to deny the motion for clarification and/or for reconsideration. I will not get into whether it's really a motion for reconsideration. Arguably it isn't, but that's really neither here nor there.

I do want to make one other point. Mr. Schiavoni was perceptive enough, I guess, at the last hearing to attempt to remind me that we had a very long hearing and that at one point he asked to speak and was not permitted to do so. That's true. But when I went back and looked at the transcript, I reminded myself that the reason that that wasn't true was because Mr. Schiavoni had not filed papers with respect to that issue. And I turned to the other side, and I said, do you have any objection to one more person arguing this from the insurers' side? The answer was yes. And I said, okay, I'm sustaining that objection.

So let me just say this and leave it at that. Far from that being a result of everybody being tired or me being arguably discourteous, there was a very good reason why in that instance Mr. Schiavoni didn't add to what Mr. Plevin had already said with great articulation. So that point is -- that's all I want to say about that, and I want to leave it at that.

So I would ask the committee, who I think was the principal responding party with respect to the motion for clarification, to prepare an order that is simply for the reasons stated on the record, the motion is denied. And I would move off to the APs and some thoughts about the withdrawal of the reference.

Anything else?

No? Okay. Would it be -- let me begin this discussion this way. Obviously, a motion to withdraw the reference is not directed to me. I will not decide it. And it would not be appropriate for me to support or oppose it necessarily. I do have this right in our Local Rules to comment on it. And I realized that on the one hand, I don't think we have any opposition papers yet on the motions to withdraw the reference; is that correct?

MS. UETZ: Correct, Your Honor.

THE COURT: Okay. Having said that, there are a couple of -- if it's going to be helpful, there are a couple comments I would make. So if you want to tell me where you are before I say anything, I'm delighted to hear it. If you're ready to hear some thoughts from me, I'm happy to give you them.

MS. UETZ: Your Honor, we'd prefer to hear your thoughts again, just because for the debtor --

THE COURT: Okay.

MS. UETZ: -- it may inform our position --

THE COURT: Okay.

MS. UETZ: -- which we will swiftly share with you, following your thoughts.

THE COURT: Okay. Well, well, look, putting aside brilliant arguments I'm sure I'd see in the oppositions to the motions to withdraw the reference, putting that aside for a second, I have some initial thoughts here. When I have commented on a motion to withdraw the reference, it's usually fallen into one of three categories.

Either somebody is completely mistaken about a jurisdictional point or a judicial power point in the motion to withdraw the reference, and it's my opportunity to tell the district court, respectfully, I think the argument that you're seeing here simply isn't consistent with my understanding of the jurisdictional and judicial power points that I think are -- and efficiency points that are relevant to a motion to withdraw the reference. That's number one.

Number two, there are times such as the NH Investment case, which was somebody reminding me about where there's kind of a funny hook and the motion to withdraw the reference, which is almost always about something that looks like an AP, is connected to a case that is extremely troubled, as was the NH Investment case. So my comment there to the district court was really, you might want to let me dispose of the main case, if

I'm going to, because then that may affect the viability or whatever you want to call it of the APs one way or the other, which in that case had been removed.

The third area where this comes up and where the rubber meets the road here is in those areas where there is, for example, a jury trial right but the subject matter of the AP is something that the bankruptcy courts do day in and day out. The primary example of that for me is fraudulent transfers, where because of the holding in Granfinanciera v. Nordberg, it was the Supreme Court's ruling that fraudulent transfer matters, if they proceeded all the way to trial, could be tried to a jury. And if that's the case, then the ruling was that that would be something that I wouldn't do without consent of the parties.

Having said that, I have adjudicated fraudulent transfer matters even in the face of somebody telling me they would decline to have me either come to jury trial or to the extent they're reserving the right, have me "enter" a "final order" on the theory that the judicial power infirmity in me entering a "final order" goes to the deference that my factual findings would be entitled to, were I to be making them undisputed questions of fact, where I am not making a ruling on a disputed question of fact, as in a 12(b)(6) motion by definition, where it's purely a legal issue, or to be perfectly blunt, even a summary judgment motion, where it's purely a

legal issue and/or there are no disputed issues of fact.

I have taken the position on the United States v. Phattey, which is 943 F.3d 1277, that I have the ability to enter what you might otherwise call a "final order". So while I appreciate the arguments in the motions to withdraw the reference that I lack the judicial power to enter a final order here, that's true in only the most generic and sort of blunderbuss of ways. I think I probably would have the ability here to enter an order on what's basically a 12(b)(6) motion. And the question then becomes, should I. And here is where I think this is a little bit different scenario.

There's, I think, a good reason for me to continue to have before me and potentially rule on those kinds of motions in a subject where, to be perfectly blunt, the bankruptcy courts are making the law every day, fraudulent transfers, and where the district courts, frankly, if they get involved, that's lovely, but the law is emanating from the bankruptcy courts. I think I can be helpful there.

That's just not the case here. I'm delighted to help you folks any way I can with an insurance coverage matter. I have absolutely no special expertise in that at all, period. End of story. There is simply no benefit to having me make a decision about those issues as opposed to having the district court make a decision about those issues, particularly where if there are jury trial rights, and honestly, from what I can

tell, there are likely to be significant and numerous questions of disputed fact, I'm not going to be determining those with anything that looks like a final order.

So my instinct, were I to be writing a recommendation right now, would be to tell the district court something they already know, which is I'm happy to do anything you'd like me to do, anything I can do that would be helpful to the process, but I don't think I'm adding a whole lot here that is otherwise particularly likely to advance the ball. So and I think Judge Corley knows that, so I'm not sure I even need to say that in a recommendation.

But my instinct is that you've now filed motions to withdraw the reference. You had (audio interference) DJ assigned. My instinct would be to -- if you guys want to finish up the briefing, just because that would sort of be fair to have everybody deal with the deadlines you had, that's fine. But my strong instinct would be to let Judge Corley first rule on the motions to withdraw the reference. And if she wants to leave something for me to do, I'm happy to do it. If she doesn't, then I think you just have the whole matter before Judge Corley.

So those are my thoughts. And now I'll turn to Ms. Uetz and listen to anybody else's thoughts or observations.

MS. UETZ: Your Honor, thank you, as always, for providing your comments and your thoughts about this. I think

that, for the debtor's part, when we got the motions in last week and there was a third motion filed Friday, we spent time even on Super Bowl Sunday with San Francisco in the game with our client --

THE COURT: Um-hum.

MS. UETZ: -- trying to assess our position with respect to the motions. It remains a key objective for the debtor to obtain coverage from the insurers. It remains a key objective of the debtor to achieve, if possible, a settlement which would form the basis for a plan of reorganization that this Court could confirm. And it remains a goal of the debtors to include the insurers in that mediation and hoping to get to that goal.

In light of that, Your Honor, the debtor is determined that it will not oppose the relief sought in terms of withdrawing the reference. We think --

THE COURT: Right. Okay.

MS. UETZ: -- estate's resources are much better spent on getting to the merits of the insurance claims and moving swiftly toward mediation. So --

THE COURT: Okay.

MS. UETZ: -- we would intend to file something, certainly with the district court, making plain our position.

THE COURT: Um-hum.

MS. UETZ: Two of the three motions have now been

transferred to the district court --

THE COURT: Okay.

MS. UETZ: -- by my count. The third one --

THE COURT: Okay.

MS. UETZ: -- is still on its way.

THE COURT: Okay.

MS. UETZ: But the debtor intends to swiftly file with the district court its position with respect to those motions. Again, just in light of the goals of the debtor in this Chapter 11 case, as well as the goals of the debtor with respect to its claims against the insurers. And we appreciate the Court's position, comments regarding the motion. It does reinforce and help us as we --

THE COURT: Okay.

MS. UETZ: -- file with the district court. So --

THE COURT: Okay.

MS. UETZ: -- I'm happy to answer any questions, but thank you.

THE COURT: No, I'll make one other comment, and it's a little out of left field, but Ms. Albert may remember this. About a year and a half ago, I had the privilege of addressing the Bar Association of San Francisco Commercial Law and Bankruptcy Section on Bankruptcy Appeals with Judge Corley and with Judge Daniel Bress of the Ninth Circuit. And we got into a lot of scenarios, including motions to withdraw the reference

or everything that I just said. She may not remember it, but she heard me say it once already. So I don't think that any of this is likely to be terribly surprising to Judge Corley.

And if anybody else needs to be heard on the issue, it sounds like with a nonopposition from the debtor, you have a path forward. And I think that's -- my instinct is that's well chosen. It's not for me to say one way or the other, but there you are. If anybody else needs to be heard on that issue, I'm happy to hear you, but it sounds like that's a resolution about to occur.

MS. UETZ: And Your Honor, may I just, if I may, clarify one thing with this Court. I think implicit in this Court's comments, and perhaps even in all of this procedure, is that this Court will not proceed on the pending motions to dismiss? I'm just --

THE COURT: That's the idea. Yeah, I think that's --

MS. UETZ: At least for now?

THE COURT: No, absent Judge Corley asking me to do something that I've not yet been asked to do, yes. I think it is eminently more sensible to have one judge dealing with this and not more than one so --

MS. UETZ: That will help inform our approach and the briefing schedule and such.

THE COURT: Okay. Now -- yeah, I mean, whatever you guys want to agree on to a briefing schedule, I don't know that

that's my business, but I think that's an open question for you folks.

MS. UETZ: Thanks, Your Honor. I have nothing further --

THE COURT: Sure.

MS. UETZ: -- on this right now.

THE COURT: Okay. Anybody else?

MR. PROL: Your Honor, this is Jeff Prol. May I be heard on behalf of the committee briefly?

THE COURT: Yeah. Uh-huh.

MR. PROL: Thank you, Your Honor. We, too, appreciate your comments. That's always very helpful to understand where Your Honor is coming from as we develop our positions. We've discussed the motions to withdraw the reference with the committee. And just to take Your Honor back a bit, I think when we started this case, we had indicated to Your Honor that it was really important to the committee to get through this case in an expeditious manner.

THE COURT: Sure.

MR. PROL: And to that end, we supported the debtor's goal of bringing this insurance adversary proceeding in the hopes that we'd be able to file motions for partial summary judgment on the issues --

THE COURT: Um-hum.

MR. PROL: -- that we think were important to the case

and to driving the case forward. But here we are, more than seven months into this case, and we haven't even joined any issue in the adversary proceeding. And so in the interest of moving the case forward, we're not as concerned about where these issues are decided --

THE COURT: Sure.

MR. PROL: -- or about how and when they'll be decided.

THE COURT: Um-hum.

MR. PROL: And so we agree with the debtor that it's not judicious to expend resources fighting this motion.

THE COURT: Sure. Sure.

MR. PROL: And so the committee has also determined that it will not object to the motions to withdraw the reference either, and we hope that they'll move forward expeditiously in the district court --

THE COURT: Okay.

MR. PROL: -- if the motions are granted.

THE COURT: Okay. Very good. Thank you so much. Anybody else need to be heard?

MR. SCHIAVONI: Yes, Your Honor. Tanc Schiavoni. Just two things. The first is a point of just guidance from Your Honor. Do you want us to forward the transcript of today or -- I kind of take the comments you made were meant sort of you -- I'm not sure, that it was sort of in the way of

guidance. And it's appreciated. And this is not a transcript we would pass on --

THE COURT: Um-hum.

MR. SCHIAVONI: -- unless you asked us to or unless you said that was fine. I'm not quite certain about your own practice here, whether you would typically write a short paragraph or if you're telling us that you're not going to write anything and just leave it or if you want us to send the transcript or -- but I'm not going to send the transcript, to be clear, unless Your Honor -- because I think Your Honor (indiscernible) --

THE COURT: No, yeah. Well, let me restate -- let me restate where I was coming from and then see where you think this can be helpful. This is not a situation where I think that -- I want this to come out the right way. I don't need to explain anything to the district court here. There is no aspect of this that will not be a hundred percent clear to Judge Corley. There is no aspect of this case, as opposed to the APs, that requires somebody to think about staging or choreography or anything else you want to call it. That I think she will understand thoroughly, and we can do what we do in these situations with you keeping both courts apprised of progress. And we'll go from there.

There is nothing in the subject matter of the AP that implicates my particular expertise in such a way that I would

be suggesting to Judge Corley that I need to be involved in this. And that leaves me with a -- were I to file a comment, it would be, I'm delighted to do whatever I can do to help the process and whatever Judge Corley asks me to do. I mean, I don't know that -- I think she already knows that, so I don't know that a separate comment is necessary. I would have no problem with you sharing the transcript with her if you think it would be helpful. But I think everything that I'm saying here, she already knows, and if it is of any aid or assistance, it's fine with me.

Anybody have a problem with any of that? I mean, I don't know that filing something is really going to be all that -- it's not going to add much.

MR. SCHIAVONI: Your Honor, I'm inclined to think it's probably unnecessary unless she asks us what (indiscernible) --

THE COURT: No, if she does, then by all means, I would give her a written response. But I mean, there's just so little -- there's just almost no there there to what I'm saying. It's just what goes with the territory. I'm at her and your disposal, okay, which is always the case.

MR. SCHIAVONI: Thank you, Your Honor. Just --

THE COURT: Sure.

MR. SCHIAVONI: -- the other point, Your Honor, with the adversary going forward, at least to the motion to dismiss, I just wanted to sort of flag for you that it puts us now in

real peril with the order that limits our experts from not knowing who the claimants are. And they're on a different footing from the experts of the committee and the debtor, especially if there's somehow going to be bringing summary judgment motions promptly. We're going to need to get a motion -- if we can't reach agreement with them over the next two or three days on this, we're going to need to get a motion in front of you pronto and maybe ask for it to be heard on shortened notice to -- I think, Your Honor, when you entered the expert order limiting the experts to not knowing who the claimants were, it was without -- it was without prejudice to (indiscernible).

THE COURT: Yep. Yeah.

MR. SCHIAVONI: I mean, so this sort of puts a real urgency on me to get that -- to get that issue resolved. So I'm going to work first with the committee and the debtor to meet and confer. Hopefully, a motion won't be necessary, but otherwise, we're going to try to get a motion on as quickly as we can draft it.

THE COURT: Well, look, that's fine. You can ask me for an order shortening time. Maybe I'm just -- maybe my experience with how these things play out at the district court is different from yours, but it'll be done on Judge Corley's time frame, and I'm not sure it's -- well, I mean, I'm not sure that expedition is required on this issue, but I'll certainly

hear you when you file the motion. Okay.

MR. SCHIAVONI: Thank you, Your Honor, very much.

THE COURT: You're welcome.

Anybody else?

MS. UETZ: Your Honor, if I may, I forgot to just mention, and again, just to be clear on our position, while we don't oppose the -- we won't oppose the relief sought to withdraw the reference, we view that position as not affecting other orders of this Court in the Chapter 11 case. And in fact --

THE COURT: Yeah.

MS. UETZ: -- I guess Mr. Schiavoni maybe just highlighted that for all of us as well. So I --

THE COURT: Okay.

MS. UETZ: -- just wanted to mention that.

THE COURT: All right. I appreciate it. Thank you.

MS. UETZ: Thank you.

THE COURT: Okay. Anything else?

No? Okay.

MS. UETZ: Nothing from the debtor, Your Honor.

MR. BREALL: Your Honor --

THE COURT: All right. Yes.

MR. BREALL: When we were in front of you on Wednesday, we were at our adversary status conference, and we talked about the fact that there was a motion to dismiss in the

American Home case.

THE COURT: Um-hum.

MR. BREALL: And that was set for the 27th and --

THE COURT: Right.

MR. BREALL: -- then this all came up about scheduling and other issues.

THE COURT: Yep.

MR. BREALL: Assuming we're going to keep to the schedule we had on the 27th for that one motion to dismiss, unless --

THE COURT: Well, I'm not going to hear it. Okay.

MR. BREALL: There is no -- that case is still in the court.

THE COURT: I'm not going to hear it then. I mean, unless I'm wrong, my sense is that there will be motions -- if there is not already a motion to withdraw the reference on that, there will be one; is that right or wrong?

MR. BREALL: I don't know but --

THE COURT: Well, because I -- okay, but --

MS. KLIE: Your Honor, yeah --

THE COURT: -- if I had a wrong impression of that, somebody correct me.

MS. KLIE: Yeah. No, we'll certainly be consulting with our client and advising them of what's happened at today's hearing. I can't say right now that I have authority to file

anything but --

THE COURT: Okay. All right. We're talking about March 27, right? Correct?

MR. BREALL: Correct.

THE COURT: Okay. Well, look, I mean, all right. I'm not going to move anything now, but to the extent that somebody moves to withdraw the reference with respect to that AP, it's going to be the same -- I'm going to be going in the same direction. Okay.

MR. BREALL: Understood.

THE COURT: Okay. Thank you.

Anything else?

MS. UETZ: Nothing for the debtor, Your Honor. Thank you.

THE COURT: Okay. All right. Thanks, everybody.

(Whereupon these proceedings were concluded at 10:38 AM)

I N D E X

C E R T I F I C A T I O N

I, River Wolfe, certify that the foregoing transcript is a true and accurate record of the proceedings.

/s/ RIVER WOLFE, CDLT-265

eScribers
7227 N. 16th Street, Suite #207
Phoenix, AZ 85020

Date: February 14, 2024

D

E

F

Exhibit F

to Declaration of Blaise S. Curet
in Support of
Westport's Motion for Protective Order

EXHIBIT 1

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STATE OF DELAWARE ex rel. THE HONORABLE TRINIDAD NAVARRO, Insurance Commissioner of the State of Delaware,	)	
Plaintiff,	)	
v.	)	C.A. No. _____
ARROWOOD INDEMNITY COMPANY, a Delaware Domestic Property & Casualty Insurance Company,	)	
Defendant.	)	

LIQUIDATION AND INJUNCTION ORDER WITH BAR DATE

WHEREAS, the Honorable Trinidad Navarro, Insurance Commissioner of the State of Delaware (the "Commissioner"), has filed a verified complaint (the "Complaint") and Motion seeking the entry of a Liquidation and Injunction Order with Bar Date (the "Motion") concerning Arrowood Indemnity Company ("Arrowood"), pursuant to 18 *Del. C.* § 5901, *et seq.*;

WHEREAS, the Receiver has provided the Court with evidence sufficient to support the conclusion that Arrowood is insolvent, in an unsound condition, a condition that renders its further transaction of insurance presently or prospectively hazardous to its policyholders, and has consented to the entry of a Liquidation and Injunction Order with

Bar Date through a majority of the directors of the corporation;

WHEREAS, this Court finds that sufficient cause exists for the liquidation of Arrowood, pursuant to 18 *Del. C.* §§ 5905 and 5906 and for the entry of a Liquidation and Injunction Order with Bar Date ("Liquidation Order") concerning Arrowood; and

WHEREAS, a formal hearing on the Commissioner's Motion is not necessary due to Arrowood's consent to the relief requested by the Motion and Arrowood's waiver of formal service of process and a formal hearing on the Motion;

NOW, THEREFORE, THE COURT FINDS AND ORDERS AS FOLLOWS:

1. The verified Complaint, including the exhibits thereto, contain sufficient evidence to support the conclusion that Arrowood is insolvent, in an unsound condition, and a condition that renders its further transaction of insurance presently or prospectively hazardous to its policyholders. Because Arrowood has not contested the Complaint or the Motion and has consented to entry of the Liquidation Order, the allegations of the Complaint are deemed admitted as against Arrowood for purposes of this proceeding.

2. These allegations are also supported by the exhibits to the Complaint filed contemporaneously with the Motion.

3. As a separate and independent basis for entry of the Liquidation Order, evidence that all of the directors of Arrowood to the entry of the Liquidation Order has been attached to the Complaint and submitted in support of the Motion.

4. Given the determination set forth above, a formal hearing on the Motion is

not necessary.

5. Consequently, it is hereby declared that: Arrowood is insolvent, in an unsound condition, and in a condition that renders its further transaction of insurance presently or prospectively hazardous to its policyholders. Therefore, sufficient cause exists for the liquidation of Arrowood pursuant to 18 *Del. C.* §§ 5905, 5906, and 18 *Del. C.* ch. 59 and for the entry of a Liquidation Order concerning Arrowood.

6. Pursuant to 18 *Del. C.* § 5913(a), the Commissioner and his successors in office are hereby appointed as the receiver (hereinafter the "Receiver") of Arrowood.

7. Pursuant to 18 *Del. C.* §§ 5911 and 5913, the Receiver shall forthwith take exclusive possession and control of the property of Arrowood, liquidate its business, and deal with Arrowood's property and business in the name of the Receiver or in the name of Arrowood. Further, the Receiver shall be vested with all right, title, and interest in, of, and to the property of Arrowood including, without limitation, all of Arrowood's assets, contracts, rights of action, books, records, bank accounts, certificates of deposits, collateral securing obligations to, or for the benefit of, Arrowood or any trustee, bailee, or any agent acting for or on behalf of Arrowood (collectively, the "Trustees"), securities or other funds, and all real or personal property of any nature of Arrowood including, without limitation, furniture, equipment, fixtures, and office supplies, wherever located, and including such property of Arrowood or collateral securing obligations to, or for the benefit of, Arrowood or any Trustee thereof that may be discovered hereafter, and all proceeds of or accessions

to any of the foregoing, wherever located, in the possession, custody, or control of Arrowood or any Trustee therefore (collectively, the "Assets").

8. The Receiver may, at his election, change to his own name as Receiver, the name of any of Arrowood's accounts, funds, or other Assets held with any bank, savings and loan association, or other financial institution, and may withdraw such funds, accounts, and other Assets from such institutions or take any other action necessary for the proper conduct of this liquidation.

9. The Receiver is further authorized to take such actions as the nature of this cause and interests of the policyholders, creditors, and stockholder of Arrowood and the public may require in accordance with 18 *Del. C.* ch. 59.

10. The Receiver is hereby authorized to deal with the Assets, business, and affairs of Arrowood including, without limitation, the right to sue, defend, and continue to prosecute suits or actions already commenced by or for Arrowood, or for the benefit of Arrowood's policyholders, creditors, and shareholders in the courts, tribunals, agencies, or arbitration panels for this State and other states and jurisdictions in his name as Receiver of Arrowood, or in the name of Arrowood.

11. The Receiver is hereby authorized to continue to make payments for medical expenses and indemnity for workers compensation claimants and for medical expenses and wage/income loss for motor vehicle claimants, and for medical expense and wage/income loss payments under similar programs, including but not limited to the Federal Black Lung

program, until such time as the claims files are transferred to the applicable guaranty association and the guaranty association begins making payments to the claimant.

12. The Receiver is hereby vested with the right, title, and interest in and to all funds recoverable under treaties and agreements of reinsurance heretofore entered into by Arrowood as the ceding insurer or as the assuming insurer, and all reinsurance companies involved with Arrowood are enjoined and restrained from making any settlements with any claimant or policyholder of Arrowood other than with the express written consent of the Commissioner as Receiver, except as permitted by cut-through agreements or endorsements which were issued to the policyholder, which were properly executed before the date of this Order, which comply in all respects with 18 *Del. C.* § 914, as amended by 72 Del. Laws c. 405, and which were approved by the Delaware Insurance Department if such approval was required. The amounts recoverable by the Receiver from any reinsurer of Arrowood shall not be reduced or diminished as a result of this receivership proceeding or by reason of any partial payment or distribution on a reinsured policy, contract, or claim, and each such reinsurer of Arrowood is hereby enjoined and restrained from terminating, canceling, failing to extend or renew, or reducing or changing coverage under any reinsurance policy, reinsurance contract, or letter of credit. The Receiver may terminate or rescind any reinsurance policy or contract that is contrary to the best interests of the receivership.

13. All persons or entities (other than the Receiver or persons acting on behalf of

Arrowood with the consent of the Receiver) that have in their possession or control Assets or possible Assets and/or have notice of these proceedings or of this Order are hereby enjoined and restrained from transacting any business of, or on behalf of, Arrowood or selling, transferring, destroying, wasting, encumbering, or disposing of any of the Assets, without the prior written permission of the Receiver or until further Order of this Court. This prohibition includes, without limitation, Assets or possible Assets pertaining to any business transaction between Arrowood and any of said parties. No actions concerning, involving, or relating to such Assets or possible Assets may be taken by any of the aforesaid persons or entities enumerated herein, without the express written consent of the Receiver, or until further Order of this Court.

14. All persons or entities having notice of these proceedings or of the Liquidation Order are hereby enjoined and restrained from exercising or relying upon any contractual right which would permit such third party or parties from withholding, failing to pay, setting-off or netting, except pursuant to 18 *Del. C.* § 5927, or taking similar action with respect to any obligations owed to Arrowood.

15. All persons or entities having notice of these proceedings or of the Liquidation Order are hereby enjoined and restrained from commutating, terminating, accelerating or modifying any policy of insurance, agreement of reinsurance, or other contract or agreement, or asserting a default or event of default or otherwise exercising, asserting or relying upon any other right or remedy, based upon: (1) the filing of the Complaint for Entry

of Liquidation and Injunction Order with Bar Date, (2) the entry of this Liquidation Order, (3) the unsound or hazardous condition of Arrowood, (4) the impairment or insolvency of Arrowood; or (5) the facts and circumstances set forth in the Complaint for Entry of Liquidation and Injunction Order with Bar Date, without the prior written permission of the Receiver or until further Order of this Court.

16. Except as otherwise indicated elsewhere in this Order or except as excluded by express written notice provided by the Receiver, all persons or entities holding Assets or possible Assets of, or on behalf of, Arrowood shall file with the Receiver within ten (10) calendar days of the entry of this Order an accounting of those Assets and possible Assets, regardless of whether such persons or entities dispute the Receiver's entitlement to such Assets.

17. Except as otherwise indicated elsewhere in this Order or except as excluded by express written notice provided by the Receiver, all persons or entities holding Assets or possible Assets of, or on behalf of, Arrowood, shall within ten (10) calendar days of the entry of this Order turn those Assets or possible Assets over to the Receiver, regardless of whether such persons or entities dispute the Receiver's entitlement to such Assets or possible Assets.

18. All persons and entities that have notice of these proceedings or of this Order are hereby prohibited from instituting or further prosecuting any action at law or in equity or in other proceedings against Arrowood, the Receiver, the Deputy Receiver(s), or the Designees in connection with their duties as such, or from obtaining preferences, judgments,

attachments, or other like liens or encumbrances, or foreclosing upon or making any levy against Arrowood or the Assets, or exercising any right adverse to the right of Arrowood to or in the Assets, or in any way interfering with the Receiver, the Deputy Receiver(s), or the Designees either in their possession and control of the Assets or in the discharge of their duties hereunder.

19. All persons and entities are hereby enjoined and restrained from asserting any claim against the Commissioner as Receiver of Arrowood, the Deputy Receiver(s), or the Designees in connection with their duties as such, or against the Assets, except insofar as such claims are brought in the liquidation proceedings of Arrowood and in a manner otherwise compliant with this Order.

20. All persons or entities that have notice of these proceedings or of this Order are hereby enjoined and restrained from instituting or further prosecuting any action at law or in equity, or proceeding with any pretrial conference, trial, application for judgment, or proceedings on judgment or settlements and such action at law, in equity, special, or other proceedings in which Arrowood is obligated to defend a party insured or any other person it is legally obligated to defend by virtue of its insurance contract for a period of 180 days from the date hereof. Notwithstanding the foregoing injunction, at any time during the 180-day period, the Receiver may at his discretion, when he deems it appropriate and in the best interest of the Arrowood estate, its policyholders or creditors, consent to allow any such proceeding or proceedings so enjoined to proceed.

21. All insurance policies, surety bonds, and contracts of insurance issued by Arrowood, whether issued in the State of Delaware or elsewhere, in effect as of the date of this Liquidation Order shall only continue in force until the earlier of the following events: (i) the stated expiration or termination date and time of the insurance policy, surety bond, or contract of insurance; (ii) the effective date and time of a replacement insurance policy, surety bond, or contract of insurance of the same type issued by another insurer regardless of whether the coverage is identical coverage; (iii) the effective date and time that the Arrowood insurance policy, surety bond, or contract of insurance obligation is transferred to another insurer or entity authorized by law to assume such obligation; or (iv) the cancellation and termination for all purposes of the insurance policy, surety bond, or contract of insurance at 12:01 a.m. on the thirtieth (30th) calendar day from the date of this Order pursuant to Paragraph 22 below.

22. Except for those insurance policies, surety bonds, or contracts of insurance which expire or are cancelled, terminated, or transferred earlier as set forth in Paragraph 21(i) through (iii) above, all insurance policies, surety bonds, or contracts of insurance issued by Arrowood, whether issued in the State of Delaware or elsewhere, in effect as of the date of this Liquidation Order, are hereby cancelled and terminated for all purposes as of 12:01 a.m. on the thirtieth (30th) calendar day following the date of this Liquidation Order. For purposes of this paragraph, even if the thirtieth (30th) calendar day following the date of this Liquidation Order is a Saturday, Sunday, or holiday, the insurance policy,

surety bond, or contract of insurance shall be cancelled and terminated as of 12:01 a.m. on the thirtieth (30th) calendar day following the date of this Liquidation Order. The Receiver shall notify promptly all policyholders, principals, or obligees as applicable of such policy, surety bond, or contract cancellation and termination by United States first class mail at the last known address of such policyholders, principals or obliges.

23. Pursuant to 18 *Del. C.* § 5924, the rights and liabilities of Arrowood and of its creditors, policyholders, principals, obligees, claimants, stockholders, members, subscribers, and all other persons interested in its estate shall, unless otherwise directed by the Court, be fixed as of the date of this Liquidation Order, subject to the provisions of Chapter 59 of Title 18 of the Delaware Code with respect to the rights of claimants holding contingent claims.

24. ANY AND ALL CLAIMS NOT FILED WITH THE RECEIVER ON OR BEFORE THE CLOSE OF BUSINESS ON **JANUARY 15, 2025** (THE "BAR DATE") SHALL BE BARRED FROM CLASSES II THROUGH VI AS THOSE CLASSES ARE DEFINED IN 18 *DEL. C.* §§ 5918(e)(2) THROUGH (e)(6) AND SHALL NOT RECEIVE ANY DISTRIBUTIONS FROM THE GENERAL ASSETS OF THE ESTATE OF ARROWOOD UNLESS AND UNTIL ASSETS BECOME AVAILABLE FOR A DISTRIBUTION TO CLASS VII CLAIMANTS AS DEFINED IN 18 *DEL. C.* § 5918(e)(7). THIS BAR DATE SHALL SUPERSEDE ANY APPLICABLE STATUTES OF LIMITATIONS OR OTHER STATUTORY OR CONTRACTUAL TIME LIMITS WHICH HAVE NOT YET EXPIRED

WHETHER ARISING UNDER DELAWARE LAW, UNDER THE APPLICABLE LAWS OF ANY OTHER JURISDICTION, OR UNDER A CONTRACT WITH ARROWOOD BUT SHALL ONLY APPLY TO CLAIMS AGAINST ARROWOOD IN THE LIQUIDATION PROCEEDINGS AND DOES NOT APPLY TO, AND EXCLUDES, CLAIMS BROUGHT BY ARROWOOD. ALL CLAIMANTS SHALL ATTACH TO SUCH PROOF OF CLAIM DOCUMENTATION SUFFICIENT TO SUPPORT SUCH CLAIM. FOR NON-CONTINGENT CLAIMS, THE FILED CLAIMS SHALL NOT BE REQUIRED TO BE LIQUIDATED AND ABSOLUTE ON OR BEFORE THE BAR DATE SET FORTH HEREIN.

25. CONTINGENT AND UNLIQUIDATED CLAIMS THAT ARE PROPERLY FILED WITH THE RECEIVER IN ACCORDANCE WITH THIS ORDER SHALL ONLY BE ELIGIBLE TO SHARE IN A DISTRIBUTION OF THE ASSETS OF ARROWOOD IN ACCORDANCE WITH 18 *DEL. C.* § 5928.

26. Within sixty (60) calendar days after the date of this Order, or as soon as possible after an interested party or potential creditor subsequently becomes known to the Receiver, the Receiver shall serve a copy of this Liquidation Order, a Notice of Liquidation substantially in the form appended to the Motion as Exhibit C, a Proof of Claim Form substantially in the form appended to the Motion as Exhibit D, and the Instructions for the Proof of Claim Form substantially in the form appended to the Motion as Exhibit E, on all interested parties, all known potential creditors, all current and former

stockholders of Arrowood, all former Board members of the Arrowood, its third party adjusters, its managing general underwriters, its brokers, its agents, its reinsurer(s), and any reinsurance intermediaries, all other known vendors, all state insurance guaranty associations providing coverage for the lines of business written by Arrowood, and all State Insurance Commissioners by United States first class mail, postage prepaid, provided that in the Receiver's discretion such notice may be mailed instead by United States first class certified mail, return receipt requested, or other United States mail providing proof of mailing, to such interested party or potential creditor's last known address in the company's files.

27. Within thirty (30) calendar days after the date of this Order, the Receiver shall also publish this Liquidation Order, the Notice of Liquidation, Proof of Claim Form, and the Instructions to the Proof of Claim Form on the Delaware Department of Insurance website at the link referred to in Exhibit "E" to the Motion.

28. Pursuant to the provisions of 18 *Del. C.* §§ 5904(b) and 5928(c), no judgment against Arrowood and/or one or more of its insureds taken after the date of this Liquidation Order shall be considered in the liquidation proceedings as evidence of liability or of the amount of damages, and no judgment against Arrowood and/or one or more of its insureds taken by default or by collusion prior to the effective date of the Liquidation Order shall be considered as conclusive evidence in the liquidation proceedings, either of the liability of Arrowood and/or one or more of its insureds to such

person or entity upon such cause of action or of the amount of damages to which such person or entity is therein entitled.

29. The Receiver shall submit claim Recommendation Reports to the Court within a reasonable time after the Receiver's investigation concerning all claims submitted by a particular claimant has been completed.

30. The Receiver will file reports of receipts and disbursements with the Court on an annual basis in a form consistent with past practice in receiverships.

31. The filing or recording of this Order or a certified copy hereof with the Register in Chancery and with the recorder of deeds of the jurisdiction in which Arrowood's corporate and administrative offices are located or, in the case of real estate or other recorded property interests, with the recorder of deeds of the jurisdictions where the property is located, shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded with that recorder of deeds. Without limiting the foregoing, the filing of this Order with the Register in Chancery also constitutes notice to all sureties and fidelity bondholders of Arrowood of all potential claims against Arrowood under such policies and shall constitute the perfection of a lien in favor of Arrowood under the Uniform Commercial Code or any like Federal or state law, regulation, or order dealing with the priority of claims.

32. The Receiver is hereby authorized to transfer some or all of Arrowood's Assets and liabilities to a separate affiliate or subsidiary for the overall benefit of

Arrowood's policyholders, creditors, and shareholders, subject to approval by this Court.

33. The Receiver may, in his discretion, reject any executory contract to which Arrowood is a party.

34. The Receiver may, in his discretion, appoint one or more consultants or other persons to serve as Deputy Receiver to assist the Receiver in accomplishing the directives of this Order. The Deputy Receiver(s) shall serve at the pleasure of the Receiver and, subject to the approval of the Receiver, shall be entitled to exercise all of the powers and authorities vested in the Receiver pursuant to this Order and applicable law.

35. The Receiver may employ or continue to employ and fix the compensation of such deputies, counsel, clerks, employees, accountants, actuaries, consultants, assistants and other personnel (collectively, the "Designees") as considered necessary, and all compensation and expenses of the Receiver, the Deputy Receiver(s) and the Designees and of taking possession of Arrowood and conducting this proceeding shall be paid out of the funds and assets of Arrowood as administrative expenses. The Receiver may also retain those of Arrowood's current management personnel and other employees as Designees as he in his discretion determines would facilitate the liquidation of Arrowood. All such Designees shall be deemed to have agreed to submit disputes concerning their rights, obligations, and compensation in their capacity as Designees to this Court.

36. The Receiver, the Deputy Receiver(s), and the Designees (collectively, the "Indemnitees") shall have no personal liability for their acts or omissions in connection with

their duties, provided that such acts or omissions are or were undertaken in good faith and without willful misconduct, gross negligence, or criminal intent. All expenses, costs, and attorneys' fees incurred by the Indemnitees in connection with any lawsuit brought against them in their representative capacities shall be subject to the approval of the Receiver, except that in the event that the Receiver is the Indemnitee, this Court's approval shall be required, and such expenses, costs, and attorneys' fees shall be exclusively paid out of the funds and assets of Arrowood. The Indemnitees in their capacities as such shall not be deemed to be employees of the State of Delaware.

37. Hereafter the caption of this cause and all pleadings in this matter shall read as:

"IN THE MATTER OF THE LIQUIDATION
OF ARROWOOD INDEMNITY COMPANY."

38. This Court shall retain jurisdiction in this cause for the purpose of granting such other and further relief as this cause, the interests of the policyholders, creditors, stockholder of Arrowood, and the public may require. The Receiver, or any interested party

upon notice to the Receiver, may at any time make application for such other and further relief as either sees fit.

SO ORDERED this _____ day of _____, 2023.

_____
Vice Chancellor

This document constitutes a ruling of the court and should be treated as such.

Court: DE Court of Chancery Civil Action

Judge: Lori W. Will

File & Serve Transaction ID: 71343102

Current Date: Nov 08, 2023

Case Number: 2023-1126-LWW

Case Name: State of Delaware ex rel. The Honorable Trinidad Navarro v. Arrowood Indemnity Company

Court Authorizer: Lori W. Will

Court Authorizer Comments:

As set forth in the stipulation at docket entry 8, the relief sought in the motion and the facts supporting the motion are uncontested. The directors of the defendant have agreed to the relief sought in this liquidation order. Accordingly, the order is granted as unopposed.

/s/ Judge Lori W. Will

Exhibit G

to Declaration of Blaise S. Curet
in Support of
Westport's Motion for Protective Order

Kanani v. Economical Insurance, 2020 ONSC 7201 (CanLII)

Date: 2020-01-17
File number: CV-15-6199
Citation: Kanani v. Economical Insurance, 2020 ONSC 7201 (CanLII), <https://canlii.ca/t/j4q4q>, retrieved on 2024-03-11

ONTARIO

COURT FILE NO.
CV-15-6199

CITATION:
Kanani v. Econom
ical Insurance, 20
20 ONSC 7201

PERIOR COURT OF JUSTICE

ENDORSEMENT

PLAINTIFFS: ALYKHAN KANANI A PERSON UNDER A DISABILITY BY HIS LITIGATION GUARDIAN GISELE KANANI, GISELE KANANI, LITIGATION ADMINISTRATOR FOR THE ESTATE OF AZADALI KANANI, GISELE KANANI AND SHAHEEDKHAN KANANI

COUNSEL: ALMEDA WALBRIDGE

DEFENDANTS: ECONOMICAL INSURANCE COMPANY, BRIAN CLIFFORD, TRACY BROSS, PEGGY KNOX, HELEN BAILEY, LINDA WATT, MARIE YEE, ACCLAIM DISABILITY MANAGEMENT INC., ANNE DESJARDINS, CATHY PRIOR, CATHY TAIT, THE PUBLIC GUARDIAN AND TRUSTEE, VANI SANTI, ELIZABETH PROBIZANSKI, ROXANNE MAYER VARCOSE, ANDREA WATSON, DAN SKWAROK, MURRAY MISKIN, and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTRY OF THE ATTORNEY GENERAL

COUNSEL FOR ECONOMICAL MUTUAL INSURANCE COMPANY:

HELEN D. K. FRIEDMAN

HEARD: September 23 and 24, 2019

[1] These motions by the Plaintiffs in this action seek various relief in which they claim entitled to the redacted notes and reserve information of Economical Mutual Insurance Company ("Economical"), and production from Economical of documents related to the Facility Association.

[2] Specifically, the Plaintiffs seek the following relief from Economical:

(a) Production of the Claims Notes and records pertaining to reserves, unredacted.

(b) Production of the Facility Association documents pertaining to reserves, unredacted.

(c) Production of the reserve reports in the records of the independent adjuster, Mark Schledewitz, unredacted.

(d) Production of the 30 reserve documents removed and segregated from the Kanani file as identified in the letter from Defence Counsel dated June 5, 2019.

(e) Answers to refusals on questions at Examinations for Discovery of the Accident Benefit Specialists, Brian Clifford, Tracy Bross, Peggy Knox, Helen Bailey, Linda Watt and Marie Yee, pertaining to reserves.

[3] The principal claims in this action against Economical are;

i. the breach of its duty to act in utmost good faith.

ii. retroactive and ongoing Attendant Care at the maximum level for two attendant caregivers.

iii. statutory interest at a rate of 2% per month, compounded monthly under Bill 164 from the accident date.

[4] The Plaintiffs state that Economical have simply claimed that the reserve information is not relevant as to how it assessed or failed to assess the Kanani claims or how it reported those claims, and therefore it is submitted that is the issue in these motions. The Plaintiffs essentially submit that this is a rare, exceptional and extraordinary action in which the internal activities and operations of Economical have been impugned requiring full disclosure of the complete internal file, including reserves. The Plaintiffs position is that Economical had sufficient information to be able to determine that the benefit should have been assessed and paid, therefore production and review of the reserves would indicate exactly what Economical considered with respect to the present and future benefit for attendant care needs, and that Economical's duty to act in utmost good faith extends through the litigation.

[5] Economical denies that any information related to reserves, either amounts or rationale, is relevant to the Plaintiffs action and takes the position that partial or full production of reserves should not be ordered. Furthermore, Economical submits that the Facility Association documentation is not relevant to the action and that Economical is not required to list it in an Affidavit of Documents.

[6] In addition to the submissions made by Counsel for these motions on September 23 and 24, 2019, Counsel for the Plaintiffs has filed their 85-page Factum together with four attached Schedules and Counsel for Economical has filed their 78-page Factum together with attached Schedules. The Plaintiffs also filed a further 27-page written argument dated Friday, September 20, 2019. Both Counsel have submitted numerous case authorities for my consideration. In this decision, I have only attempted to summarize the most important of their very detailed arguments.

[7] Counsel for the Plaintiffs have submitted the issue in these motions to be; "Is the reserve documentation sought by the Plaintiffs relevant to the matters at issue in this action". Counsel for Economical submits that there are more issues, and they have broken down the main issue of "Whether Economical's reserve information is relevant".

[8] According to the Plaintiffs, the factual context to the issue is outlined in paragraphs 14 to 190 of their Factum. According to Economical, the factual context to the issues is outlined in paragraphs 18 to 55 of their Factum. Both have suggested there is incorrect or misleading evidence in the opposing party's Factum.

[9] With respect to relevance in civil actions generally, the parties agree that the scope of discovery is defined by the pleadings, and that only those things that are relevant to the matters at issue are discoverable. I agree that the proper question is whether the pleadings in the particular case define the issues in such a way that the particular question is relevant.

[10] For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter. Whether a fact is in issue will depend on the cause of action and relief claimed in a Statement of Claim or the defence raised in a Statement of Defence. In this sense, the pre-2010 analysis regarding the use of pleadings as the starting point for a party's disclosure obligation remains the same. If a document or potential answer is relevant to a disputed fact that is material to either the case of action, relief claimed or defence raised, the document should be produced and the answer given. However, in some circumstances when the relevance of a document is not clearly apparent from the face of the pleadings, the Court may require the parties to adduce evidence in addition to the pleadings to demonstrate how or why the particular document is relevant as required by the amended version of Rules 30 and 31.

[11] Dealing with the aforementioned 'pre-2010 analysis', Justice Quinn explained the following in *Blais v. Toronto Area Transit Operating Authority, 2011 ONSC 1880*:

> "[11] As of January 1, 2010, rule 31.06 was amended to remove what had become the semblance-of-relevance test, applicable to examinations for discovery, replacing the phrase "relating to any matter in issue" with "relevant to any matter in issue". The effect of this amendment, therefore, was to narrow the scope of discovery from anything with a semblance of relevance to that which is actually relevant.
>
> [12] Yet, the well-established maxim that the relevancy of questions on discovery is established by the pleadings still holds true: see, for example, Bergmann v. Amis Estate, 2011 ONSC 905 (CanLII), *[2011] O.J. No. 556*, *2011 CarswellOnt 772* (S.C.J.), at para. 5; Araujo v. Jews for Jesus, *2010 CarswellOnt 8408* (Master), at para. 17; and Tanner v. McIlveen Estate, *[2009] O.J. No. 1648*, 2009 CarswellOnt 2116 (S.C.J.), at para. 9.
>
> [13] This, however, is not the end of the inquiry. According to subrule 29.2.02, rule 29.2, which came into force as part of the January 1, 2010 amendments,

. . . applies to any determination by the court under any of the following Rules as to whether a party or other person must answer a question or produce a document:

1. Rule 30 (Discovery of Documents).

2. Rule 31 (Examination for Discovery).

3. Rule 34 (Procedure on Oral Examinations).

4. Rule 35 (Examination for Discovery by Written Questions).

Consequently, rule 29.2 applies to refusals under Rule 34.

[14] Subrule 29.2.03 introduces the concept of proportionality to examinations for discovery:

29.2.03(1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;

(b) the expense associated with answering the question or producing the document would be unjustified;

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice; [page613]

(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to the party requesting it from another source.

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

[15] In summary, when considering whether a party should be ordered to answer a question which he or she argues is irrelevant, the court must first determine whether the question is relevant by having reference to the pleadings. Even if the question is relevant, the court must be alive to the proportionality concerns now entrenched in subrule 29.2.03."

[12] As put more succinctly by Justice Perell in *Ontario v. Rothmans Inc., 2011 ONSC 2504*:

"Under the former case law, where the rules provided for questions 'relating to any matter in issue,' the scope of discovery was defined with wide latitude and a question would be proper if there is a semblance of relevancy: *Kay v. Posluns (1989),* 1989 CanLII 4297 (ON SC), *71 O.R. (2d) 238* (H.C.J.); *Air Canada v. McConnell Douglas Corp. (1995),* 1995 CanLII 7147 (ON SC), *22 O.R. (3d) 140* (Master), aff'd *(1995),* 1995 CanLII 7189 (ON SC), *23 O.R. (3d) 156* (Gen. Div.). The recently amended rule changes 'relating to any matter in issue' to 'relevant to

any matter in issue,' which suggests a modest narrowing of the scope of examinations for discovery."

[13] It therefore seems abundantly clear that I must be wary, in assessing the case authorities over the years, not to apply the overbroad and outdated semblance of relevancy test; the post-2010 analysis requires a narrower concept of relevance in production and discovery. As previously indicated, at issue in these motions is the relevance of Economical's reserve information and documentation.

[14] Much has been made in the argument on these motions, and on some of the preliminary motions, of the necessity of expert opinion evidence on this issue of the relevance and production of reserve information. Upon my review and assessment of the Affidavit and Report of Lynn Parker, I have significant concerns that she was presenting argument under the guise of expert evidence. I also have great difficulty in qualifying her as an expert in this area. Most importantly, the evidence she presented on this issue on these motions is unnecessary; it is this Court's responsibility of determining and applying the law as it relates to the relevance and production of reserve information in these specific circumstances presented. It is my view that I do not need her evidence, expert or not, to determine the issue on these motions.

[15] Economical is required, pursuant to section 667(1) and section 365(1) of the *Insurance Companies Act*, S.C. 1991, c.47, as amended, to value the actuarial and policy liabilities of the company at the end of its financial year. Pursuant to these sections, the liabilities must include, as a reserve, the value of the actuarial and other policy liabilities. Pursuant to these obligations, Economical's actuary is required to file with the Superintendent of Financial Institutions an annual return on the company's reserve. Similar obligations exist for Economical as an insurer licensed to transact business in the province of Ontario, under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. It is the reserve information and documentation under the *Insurance Act* being sought here by the Plaintiffs.

[16] An insurance company is required to maintain reserves for all claims which have an open status. This is because it takes some time for the company to determine the full indemnity amount under the policy and related expense amounts for the claim, then pay out and close the claim. While the claim is open, the company is required to set aside funds to allow them to make future payments should claims be advanced. Besides reserves for each claim, the company also carries a 'bulk provision' for reserves for the following reasons;

(a) at any point in time, there are some claims which have already occurred but have not been reported and therefore do not have any reserves on them;

(b) there will be some claims where the final payments will be greater than the reserves created for them, based on additional information on these claims as well as unforeseen developments, like health complications from an injury; or

(c) some closed claims will also re-open based on new information that comes to light.

[17] Reserves are maintained to allow for payment should claims be advanced. Each adjuster reserves an active case because they are required to under the *Insurance Act*. This applies to all claims. Both the individual claim reserve and the 'bulk provision' are required to be included within the 'liability' section of the insurer's balance sheet to provide an accurate reflection of the financial condition of the company, as required by the aforementioned legislation. Reserves are estimated amounts assigned by an insurer to account for the total possible future payout of a person's claims arising from an accident. Reserves include not only benefits but legal costs, claim expenses and

reinsurance conditions. Reserve amounts are a required prudential mechanism to set aside funds to meet future obligations. Claim reserves are an estimate of the ultimate future cost of resolution and administration of claims.

[18] Following receipt of notification of the loss, initial reserves are posted when an adjuster is assigned to a claim for lines of payment for which immediate funds may be required, pending receipt of further information. Once further information is received, additional reserves are posted and additional reserve lines are opened as required. Within 30 days of the preliminary reserves being posted, reserve lines are opened/increased for medical benefits, rehabilitation benefits, attendant care benefits, cost of examinations, and damaged clothing.

[19] At this point these parties differ and are at odds on a relatively important aspect of these motions. The Plaintiffs submission appears to be that the setting of reserves on a claim file may dictate or can impact on how the claim is adjudicated or what benefits are paid on a claim. I will later outline in greater detail what the Plaintiffs submission is in this regard. Economical maintains however that, in the adjusting of accident benefits claims, the reserving and claims adjusting function are separate functions. According to them, the reserving process is different than the adjudication, and the adjudication of a file is in accordance with the Statutory Accident Benefits Schedule (SABS) which involves looking at what is reasonable and necessary.

[20] What is relatively clear from my review of the authorities presented is that the relevance of reserve information requires a careful consideration of the particular facts and the issues arising from the particular case. The Plaintiffs submit that the facts and the issues in this case are entirely different and unique. The state of mind of Economical is their central issue in this case, in particular how the issue of attendant care was analyzed, adjusted and considered, historically, from 1996 to present. It is further submitted that Economical has put its state of mind at issue by claiming that it was unaware of the need for attendant care benefits, both in its defence against the Plaintiffs bad faith claim and with respect to the start date of overdue interest. The argument is that the Plaintiffs Statement of Claim contains particular allegations of bad faith, therefore which specifically puts Economical's knowledge in issue.

[21] The Plaintiffs claim to have impugned Economical's state of mind/knowledge and assessment of the claim and that reserves are directly relevant to Economical's internal assessments, knowledge and state of mind relating to the present and future needs for and entitlement to attendant care benefits. It is suggested that Economical admits that "reserves are created and affected by the ongoing assessment and adjustment of the claim, as new information comes in". Therefore, reserve information will necessarily reflect how Economical assessed, adjusted, what they knew and what information they had as relating to attendant care. However, the Plaintiffs are not asking the Court to find that the reserves were set in bad faith. The Plaintiffs position is that reserve information is relevant to Economical's knowledge of the present and future need for attendant care, and how Economical assessed and adjusted the claim in light of that knowledge. The reserves reflect what Economical knew or ought to have known, it is argued.

[22] On the other hand, Economical denies that it has put its state of mind in issue. I agree that the Plaintiffs statement that Economical has claimed that it "was unaware" is reductive and mischaracterizes the defence of Economical to the claim, which is set out in detail in its Statement of Defence. Economical's defence is that (i) attendant care was not required; (ii) no claim was made; (iii) and therefore, no interest is payable. Furthermore, the law is clear that interest does not start accruing until a benefit is "overdue" and that Courts have discretion on the application of interest and the appropriate rate of interest. This will be an issue for trial. Primarily, Economical denies the entitlement to the retroactive benefits claimed in the action or that any interest would be assessed. Finally, as noted, the setting of reserves will not show Economical's state of mind.

[23] The Plaintiffs rely on the statement that "reserving and adjusting are intertwined." Reserves are created and affected by the ongoing assessment adjustment of the claim, as new information comes in. However, the adjustment of the claim is not affected by the presence or quantum of reserves. This is specifically acknowledged where the Plaintiffs state: "How you adjudicate the case affects the reserve, what information you get." However, that reserves and adjusting may be "intertwined" does not necessarily make reserves relevant to this litigation. Similarly, the Plaintiffs concede this is not a case where the setting of reserves is alleged to have influenced the conduct of Economical.

[24] Economical submits that the allegations demonstrate the potential for misuses of reserves information. Reserves are not the equivalent to entitlement. Entitlement is established under the SABS by submission of a claim for attendant care and adjustment of that claim to determine entitlement. The Plaintiffs confuse reserves and entitlement and seek to eradicate the separate spheres between adjusting and reserves, it is argued.

[25] *Osborne v. Non-Marine Underwriters, Lloyd's London*, 2003 CanLII 7000 (ON SC), *[2003] O.J. No. 5500* (S.C.J.) was an appeal of a pleadings motion alleging that the insurer set its reserves 'at an arbitrarily low figure'. The insurer sought to strike this allegation and other relief. The motion was dismissed by Master Brott. Justice Blair allowed the insurer's appeal with respect to striking the allegation on the reserves. While *Osborne* is a pleadings motion rather than a discovery motion, the Court specifically engages in a detailed analysis of the relevant case law. In my review, this pleadings decision is relevant since pleadings are intimately related to the scope of discovery in an action.

[26] In *Osborne*, the following analysis was conducted by Justice Blair under "The Reserve Information Issue":

> **"9** The question whether the pleading regarding the defendant insurer's reserve figures should be struck is a more difficult one, however.
>
> **10** Whether an insurer's reserve figures are relevant to a plea of bad faith is a question of law, and therefore the Master's decision is entitled to less deference that one made in the exercise of discretion: *McEvenue v. Robin Hood Multifoods Inc. (1997),* 1997 CanLII 12131 (ON SC), *33 O.R. (3d) 315* (Gen. Div.); *CMLQ Investors Co. v. 759418 Ontario Ltd., [1997] O.J. No. 2890* (Gen. Div.); *Trigg v. MI Movers International Transport Services Ltd., [1986] O.J. No. 1034* (H.C.J.). See also *Equity Waste Management of Canada et al. v. Halton Hills (Town) (1997),* 1997 CanLII 2742 (ON CA), *35 O.R. (3d) 321* (C.A.); *[1997] O.J. No. 3921.*
>
> **...**
>
> **13** In my view, the principles established by Riddell J., in *Duryea v. Kaufman*[1], as cited with approval by Craig J. in Page 3 of 5 *Osborne v. Non-Marine Underwriters, Lloyd's of London*, 2003 CanLII 7000 (ON SC), [2003] O.J. No. 5500
>
> Guaranty Trust Co. of Canada v. Public Trustee et al.2 still apply to a motion to strike a portion of a pleading under Rule 25.11. Riddell J. said:
>
> > Anything which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded -- but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result. (emphasis added)

14 That is the case here. In the absence of unusual circumstances, supported by the existence of sufficient facts -- which are not alleged here -- the level of the reserves set by an insurer is, in my opinion, immaterial to the bad faith claim and can have no effect upon the result of the action. It is therefore not properly pleaded.

15 The issue has arisen before, in the context of the discovery obligation of disclosure and production. It has not been dealt with in the context of a specific pleading such as that contained in paragraph 13(j) of the statement of claim in this action. When dealing with the question of the production of information respecting reserves, the courts have generally been cautious in ordering such production, although in some cases it has been required. In *Rex v. General Accident Assurance Co. of Canada [2001] O.J. No. 348*, (Ont. Sup. Ct.) Master MacLeod observed -- correctly, in my view -- that "the setting of reserves per se does not have a semblance of relevance" (para. 9). Master Dash referred to this comment in *Contos v. Kingsway General Insurance Co. [2001] O.J. No. 1327* (Ont. Sup. Ct.), where he declined to order an insurer to produce documents relating to its reserves notwithstanding a bad faith claim. In a passage that the Plaintiff in this case may well have taken as his inspiration for the paragraph 13(j) pleading, Master Dash said:

> With respect to the reserve documents requested in paragraph (a)(x) of the notice of motion I concur with the reasoning of Master MacLeod in Rex at page 2 where he states "the setting of reserves per se does not have a semblance of relevance." Master MacLeod was not persuaded on the evidence before him that reserve documentation was relevant to the issues in that case, nor am I persuaded of such in the evidence before me. I note that there is no pleading that reserves were set inappropriately or that such constituted an act of bad faith, nor has there been evidence presented of such. I would grant such order in only the clearest of cases, as it is equivalent to asking a party or its representative what it believes its case is worth. (emphasis added)

16 Sachs J. adopted the foregoing passage in allowing an appeal from a Master's order requiring the production of reserve documentation in a bad faith insurance claim, in *Correa v. CIBC General Insurance Co. [2001] O.J. No. 3599* (Ont. Sup. Ct.) at para. 22. On the other hand, Brockenshire J. ordered the production of information respecting an insurer's reserves -- as well as information regarding the general financial worth of the company and its defence costs -- in *Somoila v. Prudential of America General Insurance Co. (Canada) (2000),* 2000 CanLII 22690 (ON SC), *50 O.R. (3d) 65*, *[2000] O.J. No. 2746* (Ont. Sup. Ct.).3 At paragraphs 14 and 15 Brockenshire J. said:

> In *Whiten v. Pilot Insurance Co. (1999),* 1999 CanLII 3051 (ON CA), *42 O.R. (3d) 641*, *[1999] O.J. No. 237* (C.A.), p. 666 O.R., para. 67, Finlayson J.A. for the majority quoted with approval Mr. Justice Blackmun of the United States Supreme Court, who listed factors to consider in evaluating a punitive damage award for bad faith. That list included, "(c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of the litigation ..."

17 Respectfully, however, while I understand the basis for ordering the production of financial statements and information and particulars regarding defense costs, I do not see anything in the factors cited from Whiten that mandates the production, or suggests the relevance, of information relating to the setting of reserves. Moreover, the Court in Whiten was considering the factors cited for purposes of evaluating damages and not as factors related to the finding of bad faith itself.

...

19 The level at which reserves are set by insurers is a function of many factors, and is perhaps more multi-faceted than suggested in the materials filed in connection with this appeal. However, it does not relate to "the manner in which the insurer assesses the claim", in the sense that I understand is contemplated in Lloyd's London, Non-Marine Underwriters, supra. There, the Court was dealing with the manner in which an insurance company conducts its dealings with the insured in terms of assessing the claim of the insured. The fairness aspect of the duty of good faith relates to the manner in which the insurance company conducts its dealings with the insured in investigating, assessing and responding to the insured's claim. It does not relate to the insurer's internal task of setting a reserve following its consideration of the risk as a whole, including not only its assessment of the claim itself but also the other factors the insurer must take into account in estimating its exposure (e.g., legal costs, the cost of experts, the likelihood of success, reinsurance considerations, etc.).

20 Accordingly, while there may be a possible connection between the level at which a reserve is set and the insurer's assessment of the claim, the setting of the reserve does not relate to the process or manner in which the claim is gauged or weighed -- i.e., assessed -- in the first place. It is therefore several steps removed from the process of dealing with the insured and " [assessing] the claim in a balanced and reasonable manner", as Lloyd's London, Non-Marine Underwriters indicates is called for in carrying out the duty of good faith.

21 Absent exceptional circumstances, therefore, an insurer's internal estimation of its monetary exposure regarding the risk is not pertinent to the insurer's conduct in assessing and responding to the claim of an insured. I do not suggest that the connection between the setting of a reserve and bad faith conduct on the part of an insurer can never be made. In my view, however, it would only be in the rare and exceptional bad faith case, where there exist specific unusual facts sufficient to support such an allegation, that such a plea would be tenable.

22 Such is not the case here. A bald plea that the insurer has "set its reserve figures at an arbitrarily low figure which has impaired appropriate management of the claim", unsupported by even the barest allegation of fact, is "immaterial" to the bad faith claim and "can have no effect upon the result" of the action: *Duryea v. Kaufman*, *supra*. It is therefore properly struck from the statement of claim under Rule 25.11(b).

23 There is another reason for striking paragraph 13(j) as well. Its prejudicial affect outweighs any probative value proof of the alleged fact could have.

24 Reserves can be changed at any time and are continually updated. If paragraph 13(j) remains in the pleading the Defendant will not only be required to disclose the existence of the reserve level at the time of delivering its affidavit of documents and at oral discovery, but it will have a continuing obligation to advise the Plaintiff of changes in the reserve level up to the time of trial. As Master Dash noted in Contos, supra -- and others have as well – this "is equivalent to asking a party or its representative what it believes its case is worth". I would be very reluctant to place on a defendant a continuing obligation at law to tell the plaintiff how much it estimates the claim is worth. The plaintiff would be provided with an unfair, and unnecessary, advantage in the lawsuit. At the same time, the ability of the defendant to negotiate a settlement would be impaired because knowledge of the reserve might well create a feeling of entitlement in the plaintiff to a settlement in that amount, whereas the reserve is nothing more than an intelligent estimate of the risk as a whole by the insurer and its solicitor, based upon the facts as known at the time.

> **25** While I can understand why a plaintiff would like to obtain such information, a plaintiff's desire to improve its tactical position in the lawsuit does not justify the unfairness to a defendant of leaving this immaterial allegation in the pleading. In my opinion it is "prejudicial" within the meaning of Rule 25.11(a), and should be struck."

[27] In *Osborne*, the reserves were not relevant as the Court found that there was no evidence to suggest that the setting of a reserve itself influenced or dictated the ongoing assessment of the claim. It is my view that the same analysis as in *Osborne* applies directly to this case. The Plaintiffs here have not adduced sufficient evidence of "specific unusual facts" that makes the insurer's reserves pertinent in this action. There is no evidence in this case, as was the case in *Osborne*, that the setting of reserves influenced or dictated the ongoing assessment of the claim. Furthermore, this is not a case like *Osborne*, where the setting of the reserve itself is alleged to have influenced the conduct of Economical resulting in bad faith. In fact, this has never been alleged by the Plaintiffs. And although I fully appreciate that Justice Blair in *Osborne* was only dealing with the particular case before him and not all bad faith claims, his analysis of the case authorities until 2003, before the narrowing of the 'semblance of relevance' test, remains sound in my view for this assessment of what is actually relevant here in this action. On the facts presented in these motions, the requested reserve information will not show how Economical assessed attendant care; it will only show how Economical reserved for attendant care.

[28] Upon extremely close analysis of the manner in which the Plaintiffs have characterized the factual context and its relationship to the issues in this action, including the allegations and claims made in their Statement of Claim and also Economical's defence to these claims as outlined in their Statement of Defence, I do find that the Plaintiffs have conflated the setting of reserves with the knowledge, awareness, analysis and assessment or adjudication of the insurer with the suggestion that these are intertwined, making the reserve information relevant to the matters at issue in this action. It is clear from the weight of the authorities presented that reserves do not relate to the process or manner in which the claim is assessed or adjudicated; these are a separate process and have very separate considerations. I do agree with Justice Blair that the setting of the reserve is "several steps removed from the process of dealing with the insured and [assessing] the claim in a balanced and reasonable manner." The Plaintiffs also rely upon the reasoning in *Samoila*, in which reserves were ordered to be produced. However, as aptly noted by Justice Blair, nothing in the factors cited from *Whiten v. Pilot* mandate the production under the 'semblance of relevance' test of information relating to the setting of reserves; *Whiten* "was considering the factors cited for purposes of evaluating damages and not as factors relating to the finding of bad faith itself". I fail to see how such an analysis as in *Samoila* assists in my post-2010 relevancy determination for this action.

[29] The reasoning in *Osborne* establishes that the setting of reserves does not relate to the manner in which the insurer adjudicated the claim. Without there being allegations of misconduct in the setting of the reserves it appears to me that disclosure of the reserve information is generally not relevant. I also find here that the prejudicial effect will outweigh its minimal, if any, probative value in this case. As indicated in paragraph 24 and 25 of *Osborne*, allowing such a litigation tactical position in these circumstances does not properly reflect the separate spheres in which claims adjusting and the obligation to set reserves operate, and would also provide the Plaintiffs with an unfair, and unnecessary on these facts, advantage in this action.

[30] These motions do appear designed to create a very prejudicial situation for Economical. If reserves were set, then Economical was aware of the exposure for attendant care and did not advise the Plaintiffs. If no reserves were set for attendant care, it would be argued that Economical never intended to pay. I am also therefore quite concerned that disclosure of Economical's reserves, with a

continuing objection to disclose up to the time for trial, would certainly confuse this trial process and also affect any potential settlement discussions and prospects for resolution.

[31] I have therefore not been satisfied that there is relevance, or even semblance of relevance, of Economical's reserve information to any matter in issue in this action, and I will not order their production in these circumstances. These motions by the Plaintiffs are therefore dismissed.

[32] If these parties cannot agree on the issue of costs for these motions, and as well for the three preliminary motions costs determinations (Endorsements dated December 10, 2018, May 6, 2018 as amended on May 21, 2019, and July 29, 2019), which I am already reserved upon until after I made this decision, I will entertain written submissions dealing with all aspects of each of these awards of costs. Any party claiming costs for these motions and for the preliminary motions shall serve and file written submissions and a bill of costs no later than 30 days from the date of this Endorsement. Any responding submissions shall be served and filed within 30 days thereafter.

Released: January 17, 2020

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The Honourable Mr. Justice David J. Nadeau

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: The Roman Catholic Bishop of Oakland, Debtor in Possession.	Chapter 11 Case No. 23-40523-WJL Hon. William J. Lafferty **DECLARATION OF TODD C. JACOBS IN SUPPORT OF MOTION FOR PROTECTIVE ORDER** Adversary Case No.: 23-04028

I, Todd. C. Jacobs, pursuant to 28 U.S.C. § 1746 and B.L.R. 9013-1(d), hereby declare as follows:

1. I am over twenty-one years of age, under no disabilities, and fully competent to give this Declaration.

2. I am a partner at Parker Hudson Rainer & Dobbs LLP, co-counsel to Westport Insurance Corporation, formerly known as Employers Reinsurance Corporation ("Westport"), a defendant in the above-captioned proceeding.

3. I respectfully submit this Declaration to provide the Court with copies of documents listed below that are referenced in Westport's Motion for Protective Order, which is filed simultaneously herewith.

4. Attached as Exhibit A is copy of the transcript of the hearing held on November 19, 2021 before the United States Bankruptcy Court for the District of Delaware in *In re Boy Scouts of America and Delaware BSA, LLC*, Case No. 20-10343.

5. Attached as Exhibit B is copy of the transcript of the hearing held on June 22, 2021 before the United States Bankruptcy Court for the District of Delaware in *In re Imerys Talc America, Inc., et al.*, Case No. 19-10289.

6. Attached as Exhibit C is copy of the transcript of the hearing held on February 18, 2022 before the United States Bankruptcy Court for the District of New Jersey in *In re the Diocese of Camden, New Jersey*, Case No. 20-10573.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 18, 2024

By: */s/ Todd C. Jacobs*

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Exhibit A

to Declaration of Todd C. Jacobs
in Support of
Westport's Motion for Protective Order

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	Case No. 20-10343 (LSS)
BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,	.	
	.	Courtroom No. 2
	.	824 North Market Street
	.	Wilmington, Delaware 19801
Debtors.	.	Friday, November 19, 2021
. . . . .	.	10:00 A.M.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

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MATTERS GOING FORWARD:

2. Motion of Marc J. Bern & Partners LLC to Quash Subpoena to Produce Documents Issued to KLS Legal Solutions LLC (D.I. 6380, filed 9/27/21)

Court's Ruling: Matter Moved to November 29th.

5. Letter to the Honorable Chief Judge Laurie Selber Silverstein from Certain Insurers' to Respectfully Request this Court Compel the Boy Scouts of America and Delaware BSA, LLC to Comply with Court' October 25, 2021 Order (D.I. 7198, filed 11/12/21)

Court's Ruling: 44

6. Letter to the Honorable Chief Judge Laurie Selber Silverstein from American Zurich Insurance Company Regarding Certain Insurers' Motion to Quash Notices of Deposition for Individual Witnesses (D.I. 7205, filed 11/14/21)

7. Letter to the Honorable Chief Judge Laurie Selber Silverstein from Mark D. Plevin Regarding Certain Insurers' Motion to Quash and/or Limit Rule 30(b)(6) Deposition Notices to Insurers (D.I. 7206, filed 11/14/21)

Court's Ruling: 130

8. Letter to the Honorable Chief Judge Laurie Selber Silverstein from Kelly T. Currie Regarding Insurers' Omnibus Motion to Compel Kosnoff Law PLLC, AVA Law Group, Napoli Shkolnik, PLLC, Krause & Kinsman Law Firm, Andrews & Thornton, Attorneys at Law, and ASK LLP to Respond to Document Requests and Interrogatories (D.I. 7239, filed 11/15/21)

9. Letter to the Honorable Chief Judge Laurie Selber Silverstein from Kelly T. Currie Regarding Certain Insurers' Motion to Compel Compliance with the Subpoena to Produce Responsive Documents Served on Slater Schulman LLP (D.I. 7240, filed 11/15/21)

10. Letter to the Honorable Chief Judge Laurie Selber Silverstein form K. Currie Regarding Insurers Motion to Compel Compliance with the Subpoena to Produce Responsive Documents Served on Eisenberg, Rothweiler, Winkler, Eisenberg & Jeck, P.C. (D.I. 7241, filed 11/15/21)

11. Letter to the Honorable Chief Judge Laurie Selber Silverstein from Jeffrey Schulman Regarding TCC and Certain Insurers' Discovery (D.I. 7253, filed 11/16/21)

Court's Ruling: Motions Continued

(Proceedings commence at 10:02 a.m.)

THE COURT: Good morning, counsel. This is Judge Silverstein. We're here in the Boy Scouts of America bankruptcy, Case 20-10343.

I will turn this over to debtors' counsel.

MR. O'NEILL: Your Honor, sorry to interrupt, its James O'Neill.

THE COURT: Mr. O'Neill.

MR. O'NEILL: Can you hear me okay?

THE COURT: Yes.

MR. O'NEILL: Your Honor, good morning. James O'Neill, Pachulski Stang Ziehl & Jones, on behalf of the tort claimants committee.

Your Honor, I am sorry to interrupt this morning, but I am joined today by my partner, Richard Pachulski, who would like to address the court. So I would like to turn it over to Mr. Pachulski.

THE COURT: Mr. Pachulski.

MR. PACHULSKI: Thank you so much, Your Honor. I apologize, I was not intending to attend today's hearing, at least not until about 6:45 Pacific this morning, 9:45 your time. And I did ask Mr. O'Neill if he could introduce me first. As I said, I did not intend to join, but I would like to explain why I did if that would be okay with Your Honor.

Again, Your Honor, just for the record Richard

Pachulski of Pachulski Stang Ziehl & Jones on behalf of the creditors committee in the BSA case. If that is okay with Your Honor I would like to make a short presentation.

THE COURT: You may.

MR. PACHULSKI: Thank you, Your Honor.

For background, Your Honor, as to why I am here yesterday I sent an email to the major players in this case that I was going to be lead counsel for this matter going forward. And I sent it as part of an email that had originally been sent in the morning, basically, to all of those parties asking that all future correspondence and pleadings be served on myself and my partner, Alan Kornfeld, who is going to lead the litigation in the matter.

That that was how the matter was going to go forward; that I had spoken to the committee, that was the committee's determination, and that I would go forward, and I would rearrange my schedule so that I could provide virtually full time to this case which was not the easiest thing for my calendar, but I thought it was critical.

In that respect, Your Honor, I wanted to make it very clear at the beginning that I sincerely apologize on behalf of the firm for what has happened. I am not here to make any excuses for it. We will deal with it another day, but simply put it should not have happened. And as the person who helped start the firm I am the one who needs to take

responsibility even though I was not -- I have not, to my recollection, billed a single minute to the case.

So the reason that I am actually here is that Mr. Molton, this morning, had sent an email to me and to the other parties who had gotten my email and asked two questions. The second question, frankly, was, was I going to appear today. And since I really don't think it's a great idea just to appear at hearings when it's not on the agenda. I had decided yesterday, and Mr. Kornfeld is on and he knew the position that to try to bring the temperature down, because the temperature is up which is one of the major reasons that I am joining this and that the TCC, which, frankly, is not responsible for any of this in my view, that if this issue came up that Mr. Kornfeld would respond to it.

Mr. Molton asked if I would attend and, frankly, I sent an email saying I wasn't going to attend. I had spoken to Mr. Kornfeld to confirm what we were going to do, that he would be prepared if came up and realized that that was wrong, that I should appear before Your Honor. So I changed my mind and decided to appear.

The second question, Your Honor, frankly, which is why I didn't want this to turn into -- go in a different direction is Mr. Molton asked what Mr. Stang and Mr. Lucas, if they were going to be walled off in the case. I said they are not going to be walled off because, frankly, as someone who

hasn't spent a minute on this case and did not have their historical knowledge would just not work. I don't think it would be fair for the TCC. Whether parties decided to simply seek a disqualification, and assuming Your Honor granted the disqualification, that without Mr. Lucas's and Mr. Stang's knowledge, and because of an extraordinarily serious error that was made, that they were going to have to be involved. That is just the reality of the situation. I informed them of that. And if people want to disagree with the decision that was made by the TCC and myself then they have every right to file whatever motion.

What I am here for, effectively, Your Honor, and why I agreed to go forward and lead the representation is aside from the gravity of the case in general and the gravity of what we have done, I hope that I can bring the temperature down and find a remedy for what has happened or, at least, assist in a remedy. I don't have any history in this case. I know that the party's emotions are really high. And I have done this for a really long time, and I hope I can bring some help to this case to either get it resolved or, at least, litigate it in a courteous and thoughtful way.

I get why everybody has high emotions. I have watched it and, frankly, I made a decision years ago, Your Honor, that this was the type of case that was so emotionally charged that it was better I work on other matters, but that

is just not an option at this point. And I intend to give it my all to try to get it resolved and to demonstrate to the court and to the parties that we are doing the right thing. We have built a reputation on doing the right thing and we're going to fix it in this case.

So if people want to file motions they should file them. I think it would be best, in terms of bringing the temperature down, to wait on some of it until the end of the case to see where we are at. I think the status conferences, based on what I have seen from innumerable emails from survivors and others, is not helping the voting situation, but that is Your Honor's and other parties determination.

The press has made this a (indiscernible) which I certainly understand, but I don't think having multiple status conferences for things that aren't changing will be that helpful, but, obviously, Your Honor, that is Your Honor's determination.

So I wanted to, at least, after first saying no, explain to Your Honor and not find out that Your Honor was upset because I didn't show-up now that I'm leading the case. So I changed other plans. I had a conflict, but it didn't matter, this is more important than any other matter at this point. I am happy to answer any of Your Honor's questions. I can assure, Your Honor, I am not tone deaf to what is going on in this case. I am -- I have very good hearing as to what is

going on. I have appeared many times before Your Honor. And I understand how Your Honor operates and what your expectations are. And I intend to meet those expectations. I intend that everyone in our firm and the TCC all meet the expectations.

This is on us. This is not on the TCC. And I want to make that very clear. And if Your Honor has any other questions for me I would be happy to answer them. I apologize in advance, at some point I will have to step off. Frankly, I know very little about what is going on at today's hearing because this is really more Mr. Kornfeld then others to understand it in terms of dividing up responsibilities, but even if Your Honor said I'd like you to stay on the entire time I would do that and make some other arrangements.

Again, I am happy to answer any questions. I apologize for having Mr. O'Neill interrupt, but I thought it was important that you knew that a change had been made and what the intentions of the firm are.

THE COURT: Thank you very much. No, I do not have any questions for you, Mr. Pachulski. And, certainly, you can attend or not consistent with your schedule and your duties. So on my account you do not need to stay at the hearing for the entire time.

MR. PACHULSKI: Well, thank you. If I thought that I was going to have to attend today I assure, Your Honor, I would not have made -- well I would have had a board meeting

take place at another time which is what it is, it's a conflict in that respect. I did want to be on and wanted to, at least, present to Your Honor as to what my intentions and the firm's intentions are.

THE COURT: Okay. Thank you.

Let me remind people, I'm hearing some open mics. So, please, everyone check your audio and make certain that it's muted. If we do have difficulties with your particular audio you may find that you get disconnected from the hearing. So, please, check that your audio is muted.

Mr. Abbott.

MR. ABBOTT: Thank you, Your Honor. Obviously, not troubled at all by Mr. O'Neill's interruption and Mr. Pachulski's discussion, but I do think it warrants a little response, if I may. So I am just going to turn it over to Ms. Lauria, if I might, Your Honor.

MS. LAURIA: Thank you, Mr. Abbott.

This is Jessica Lauria, White & Case. Your Honor, I will be brief. I just wanted to assure the court and Mr. Pachulski that we were actually not intending to discuss the issues pertaining to the Pachulski firm today. I also was not planning to appear because we have many other very important issues before the court today.

As Your Honor knows from Wednesday we've got discovery that is ongoing with respect to that matter. So

that is all I wanted to assure yourself, Your Honor, as well as Mr. Pachulski.

THE COURT: Okay. Thank you.

Let me say to Ms. Lauria and any other counsel that are on the hearing, at the hearing, if you do not need to be here for purposes of what is going forward today do not feel constrained to be here, okay.

Mr. Abbott, let's get to the agenda.

MR. ABBOTT: Thank you, Your Honor. Again, Derek Abbott, Morris Nichols, for the debtors.

Your Honor, we had sent over, I believe, a second amended agenda to run through today. I wanted to make sure the court had that.

THE COURT: I do.

MR. ABBOTT: Thank you, Your Honor.

Your Honor, I think the first matters to address are items two and three. Those, we understand, have been agreed by the parties to be adjourned to sometime next week, subject to the court's availability. We have heard that the 23rd is available for some of these matters. So with the court's permission we will just put those on the agenda for the 23rd if that is acceptable to the court.

THE COURT: That is and I don't recall if we provided a time.

MR. SULLIVAN: Your Honor, may I be heard on this?

Bill Sullivan.

THE COURT: Mr. Sullivan.

MR. SULLIVAN: Your Honor, for the record Bill Sullivan on behalf of Marc Bern & Partners.

Our motion to quash is item two on the agenda. I did speak with counsel to Century about this that it was not going forward and that we are waiting on dates yesterday. That is as far as it got, but my client, who has provided a declaration, is not available on Tuesday the 23rd, but the 29th, I understand, is being scheduled at two o'clock for, at least, one matter.

So I would request that our matter be moved to the 29th as well. I think there is a matter involving ADA. There was a letter exchanged yesterday and that is being moved to the 29th. So unless anyone has an objection to that I think that would be appropriate for us because of the conflict with the 23rd.

THE COURT: It's okay with me. Is that an issue for Century?

MR. SCHIAVONI: That's fine, Your Honor. Thank you.

THE COURT: Then item number two, the motion of Marc J. Bern & Partners, will be continued until the 29th at 2.

MR. ABBOTT: Thank you, Your Honor.

I believe the next item going forward on the agenda is agenda item number five which is Docket No. 7198. That is a letter from certain insurers. So I will turn it over to their counsel, Your Honor.

THE COURT: Okay.

MS. MARRKAND: Good morning, Your Honor.

THE COURT: Good morning.

MS. MARRKAND: This is Kim Marrkand for Liberty Mutual and certain insurers. Thank you very much, Your Honor, for the opportunity to be heard.

First, Your Honor, I would like to address the context and circumstances that led to our filing the motion to compel. Your Honor, that is Docket No. 7198. Second, I would like to address the scope of the court's October 25th ruling on the mediation privilege.

Turning, Your Honor, first, to what brought us here, as the court will recall, debtors' filed their motion for a protective order on September 17th and that is Docket No. 6288. Among other things, Your Honor, debtors urged the court to, in effect, call the balls and strikes on debtors' claim that the mediation privilege foreclose the insurers from seeking discovery on communications debtors denominated as mediation privilege.

In that motion, Your Honor, the debtors urged the court to address the scope of the mediation privilege not on a

document by document basis, but broadly so that all parties would have a road map for what was or was not appropriate for discovery. The court, as early as July, at the July 27th hearing, and as recently, Your Honor, as a few days ago, on Wednesday, urged the parties to bring disputes before the court promptly especially given, that is as recently as Wednesday, Your Honor, you stated that the January 24th confirmation date remains in place.

While we accepted the court and the debtors' invitation to do just that, which is to bring disputes promptly before the court, we have declined the debtors' proposal to, in effect, police the debtors' productions for compliance with their discovery obligations and then bring a series of piecemeal document by document disputes before the court with all the delay that entails.

As the court is aware, the debtors sought to protect from disclosure all documents either on mediation privilege or attorney/client privilege three general topics; board related communications, communications among mediation parties regarding the Hartford settlement agreement, the TCJ settlement agreement, the restructuring support agreement, the plan, the TDP's and other documents filed with the plan, and, the third category, drafts of settlement proposals exchanged between mediation parties including the plan, TDP's and other documents filed with the plan. That is all set forth, Your

Honor, in Paragraph 9 of their motion, Docket No. 6288.

After briefing and oral argument the court issued its ruling on October 25th. Your Honor declined to grant the debtors the sweeping immunity they sought based on the mediation privilege and explicitly addressed "issues surrounding the trust distribution procedures" because, as Your Honor noted, "Discovery disputes related to the TDP's had crystallized."

As set forth in our motion, Your Honor, discovery disputes have crystallized not only regarding drafts of the TDP's, but particularly regarding the plan and related plan documents. As set forth in the debtors' opposition, the debtors have forthrightly told the court that they are redacting plan term sheets to exclude information that does not relate to the TDP's.

As set forth in our motion, Your Honor, as early as February 2nd, 2021, Mr. Molton sent an email to Ms. Lauria, Mr. Andolina and Mr. Linder attaching a term sheet describing, in his words -- and this is the cover email set forth in our motion, Your Honor. In his email, Mr. Molton says that -- Mr. Snow, I think you're not muted. The proposed modifications in his email addressing the proposed modification to the debtors' plan, the initial terms of the TDP's, the terms of the settlement trust and the coalitions proposed claim valuation matrix.

Most importantly, however, Mr. Molton instructed the debtors not to file their proposed plan and that the debtors were to engage on the coalition's plan. In other words we, the coalition, not the debtors, are now in charge.

As the court will recall, at Paragraph 21 of debtors' motion for protective order, the debtors said "The debtors are not withholding any such information" and as such, Your Honor, refer to regarding to what the debtors considered when they considered it or what they decided, "Other then, this is in their motion, the back and forth of mediation."

Mr. Molton's directive to the debtors not to go ahead with filing their plan without the coalition's approval is certainly more than the breezy back and forth debtors describe to the court. This instruction, Your Honor, goes to the heart of Section 129(a)(3)'s requirement that the plan be proposed in good faith and not by any means forbidden by law.

The debtors also told the court, in their motion, that the insurers were incorrect that the plaintiffs or claimants' counsel had drafted the TDP's and that "The debtors drafted them." That is in Paragraph 40, Your Honor, of Docket No. 6288. The debtors also referenced in that same paragraph the May to June timeframe thereby implying that no drafts had been created or exchanged beforehand.

This statement, Your Honor, follows what the debtors said in Paragraph 37 that the debtors have nothing to

hide. Had Your Honor not denied debtors' motion to withhold Mr. Molton's email neither the court nor the insurers would ever have seen this document which shows that the coalition drafted, as Mr. Molton admitted, the initial terms of the TDP's as early as February.

This is the context, Your Honor, in which we filed our motion which brings me to the scope of Your Honor's October 25th ruling. In all candor, Your Honor, Your Honor knows what Your Honor ruled, but you let the parties -- you explained your rationale.

First, you focused on the Section 1129(a)(3) standard that for confirmation a plan must be proposed in good faith and not by any means forbidden by law. It must be proposed with honesty and good intentions. Your Honor then explained that for plan confirmation you will look at the totality of the circumstances including whether a plan is proposed with ulterior motives.

Your Honor cited to the Third Circuit's decision in Combustion Engineering as did the debtors which, among other things, noted at the very beginning that it was trying to address how "An injured person with a legitimate claim (where a liability and injury can be proven) obtains appropriate compensation." Absent proof of liability and injury, standards missing in the TDP's, how can anyone be paid.

Combustion Engineering, as the court is well

familiar, also raised good faith under Section 1126 regarding stub claims and allegations of vote buying. This is an issue that the court has recently had to focus on, but it's not an issue that has not been raised previously.

Your Honor then responded to debtors' argument that for plan approval the debtors need only put in evidence regarding the process of a mediation. As Your Honor explained,

"Debtors motivation in proposing the plan, others participation in drafting the plan, as well as the requirement that the plan fairly achieve results consistent with the purposes of the bankruptcy code permit in an appropriate case evidence beyond what the Boy Scouts characterizes as process."

You then turned, Your Honor, to findings R, S and T where you pointed out that those findings "Clearly open up discovery related to the correctness of the findings." Your Honor, you reiterated that point later when you said discovery regarding these findings is appropriate.

Your Honor then stated you were denying debtors' motion to shield discovery communications, oral or written, regarding the TDP's based on the mediation privilege as the court concluded that that was the sole issue that it crystallized or was right at that point in time. Now, Your Honor, finding R is specifically tied to the plan as it seeks a finding that the TDP's procedures and criteria are

appropriate and provide adequate and proper means for implementation of the plan in compliance with Section 1123 and, otherwise, comply with the bankruptcy code and applicable law.

Finding T, Your Honor, is likewise tied to the plan as it seeks a finding that the plan, the plan and the TDP's, were proposed in good faith and satisfy Section 129(a)(3). Mr. Molton's email and its attachment have squarely put at issue the plan, drafts of the plan, the TDP's and drafts of the TDP's, the terms and drafts of the settlement trust, and the claims valuation matrix, and who was in control of the plan and when.

The term sheet, Your Honor, which you do not have in front of you, but I will make this representation, is quite lengthy. It was produced to the insurers in February of 2021. I will note, just for a minute, that that was when the debtors thought it was in their interest to provide us with that, but now that the debtors' strategy has changed it actually took the position that it did not have to produce the term sheet and redacted over 90 percent of it.

Be that as it may, Your Honor, the important point isn't how the debtors chose to designate this document. What is important here, Your Honor, is that in February of 2021 the coalition directed the debtors, and this is a quote, Your Honor, "No insurance neutrality provision shall be included in

the plan or related documents." The term sheet also said the coalition and the FCR would control any settlement the debtors could make with the insurers. Another provision, the debtors "shall" consent to the coalition and the FCR's intervention and any coverage action. The last one I have chosen, Your Honor, to illustrate is that the plan, the disclosure statement, the trust agreement, the TDP's and other plan documents shall be acceptable to the coalition in all respects.

There are, at least, six other terms, Your Honor, that show who controlled the pen. Going back, Your Honor, to the selective production, this term sheet, the debtors cannot produce the term sheet in February when they thought it was to their advantage and now take the position nine months later that they don't want the insurers to have the term sheet, but much more importantly, Your Honor, they want to wall off everything that happened after the term sheet was circulated.

The debtors' opposition, Your Honor, was surprising in that it appeared to chastise the insurers for doing exactly what the debtors did when they moved for a protective order. They brought an issue, an important issue, before you to set the boundaries for discovery. That is exactly what we have done, Your Honor.

This late date, Your Honor, no depositions have gone forward on our end, Your Honor, it's for the simple

reason that were not going to start depositions or impose on any witness to testify twice until we have all the responsive documents. It's noteworthy too, Your Honor, that in their opposition the debtors even withheld certain documents regarding the TDP's.

When the debtors moved, Your Honor, for their order, their protective order, on September 17th they had already logged 112 documents on a chart labeled BSA Chart of Email Correspondence, Re TDP's. That chart, Your Honor, is attached as Exhibit 12 to their motion.

We quickly determined that the attachments from the first two entries on that log were missing from the debtors' production. Because we have no idea what other materials might have withheld, we asked debtors to certify that their production was complete which they declined to do. After we filed our motion, Your Honor, debtors produced 426 documents regarding the TDP's. This is significant, Your Honor, because debtors' admit the total number of TDP documents that they produced is 783 meaning that over 50 percent of the TDP related documents were produced after we filed our motion.

This all has to be looked at, I think, Your Honor, in the context of the debtors' overall productions. By November 5th, Your Honor, the date by when debtors' production should have been substantially complete, they had produced approximately 679,000 pages. Between November 5th and

yesterday debtors' produced approximately 15 more volumes of documents comprised of 695,000 pages. Thus, the debtors' production has doubled since November 5th.

Turning briefly, Your Honor, to the coalitions response it tries to decouple production of the claim valuation matrixes from the TDP's, but the values are central to the TDP's. Indeed, finding R specifically seeks a finding that the claims matrixes are appropriate and fair and equitable.

The coalition makes one argument the debtors rightly did not make that settlement related communications are immune from disclosure, but as Your Honor well knows Federal Rule 408 governs admissibility not discoverability of settlement related communications. Simply put, Your Honor, the parties are at an impasse regarding the scope of Your Honor's ruling. We believe Your Honor was crystal clear that we are entitled to discovery regarding the plan under Section 1129(a)(3) and particularly given the findings R, S and T, and that the debtors are not entitled to wall off that discovery, that material on the basis of the mediation privilege.

Given the volume of the debtors rolling productions, which right now I think total approximately 23 volumes, and their withholding of documents that should have been produced under any reading of Your Honor's ruling. We respectfully request, Your Honor, that the debtors be ordered

to complete their production forthwith and certify that they have produced all responsive documents.

Thank you very much, Your Honor, for your consideration and naturally I welcome any questions.

THE COURT: Thank you.

I guess I want to make sure exactly I understand the last request that the debtors complete their production and they certify that they have done so by some date.

MS. MARRKAND: Right.

THE COURT: I want to make sure that I understand. I do understand that there were documents that were not produced related to the TDP's.

MS. MARRKAND: Correct.

THE COURT: I assume the debtors is going to tell me that was, as they did in their response, inadvertent and they will produce, if they haven't already, all TDP -- communications, documents related to the TDP's.

The second area is the claim matrixes. So I am just trying to divide them into areas. So we have the TDP's, the claim matrixes, I think the settlement trust document and the plan. Do I have the four areas correct?

MS. MARRKAND: Yes, Your Honor.

THE COURT: Okay. I hear the argument being on the breadth of my ruling which, by the way, that was even more cringing then hearing one of my cases being talked about by a

panel, but thank you for running through that. That is an experience.

(Laughter)

THE COURT: So it's the breadth of my ruling, but I didn't hear you say that attorney/client or that you believe you are entitled to anything that is protected by attorney/client or work product privilege, is that correct?

MS. MARRKAND: That is correct, Your Honor. This is solely on the scope regarding the mediation privilege.

THE COURT: Okay that is what I thought, but you had an extensive presentation. So I wanted to make sure I am hearing it correctly. Thank you.

Let me hear from the debtors.

MR. KURTZ: Good morning, Your Honor.

Glenn Kurtz from White & Case, on behalf of the debtors. Thank you.

Let me start with many -- a couple of introductory remarks here, which is I think we were characterized as chastising counsel for raising an issue promptly with respect to discovery. That's not actually right.

We're happy to have all the discovery issues raised as promptly as possible. Our problem is we've agreed to produce everything at issue and they've refused to identify anything that we haven't produced, and I'm going to address that.

The second introductory comment I would make is that very little of what was said today is either raised in the motion and certainly was not raised at meet-and-confers. And it's not well taken for us to be sort of blindsided with issues in front of the Court, instead of working to resolve things, as is required prior to getting to court.

And I think it's worth giving some context to something else which is not part of this motion, which is *seriatim* criticisms about the debtors' productions. And I don't want to give a lot of detail, because it's not before the Court. I will tell you, Your Honor, that we produced, we substantially completed our productions on the dates that they were due. There was a big swap of documents that went out that were purely local council charters of nominal, if any -- of nominal or any relevance. And we also had to wait to produce the documents that had the survivor names and identifiers until after we got through the hearing and we promptly produced after that. Other documents have largely been requests for information that weren't included in the original requests, but that we accommodated anyway.

And in terms of a comparison, because we keep getting these insurer suggestions that somehow the debtors aren't doing what they need to do in contrast to the insurers, I will say that Ms. Marrkand's client Liberty Mutual produced 30 pages when due on November 5, which turns out to be 1

percent of their production. They've continued to make productions, including as of last night.

Indian Harbor, Munich Reinsurance, and Old Republic, the other moving insurers, none of them produced anything when due on November 5th. Some of them were producing as recently as of last night. So, they had not small failures, but 100 percent failures. We have not brought that to the Court. That's the way these cases work when you're moving on the schedule that you're moving on.

But I am getting a little weary of hearing that while the debtors produced hundreds of thousands of documents when due and others produced nothing, that somehow it's the debtors that are not following the schedule.

Now, as I think I tried to indicate in the letter, we were a little surprised that this was filed, not because it's not appropriate to get prompt resolutions of cases and disputes, but rather, because we're not withholding any documents that any moving insurer has identified. And most of today you heard, and most of the motion you read, related to two documents that were inadvertently withheld.

We pointed out that -- well, I should first say that they brought that to our attention and that very same day, we said, that's inadvertent and we'll produce it, and we did.

We then subsequently learned and pointed out to the

Court in our opposition that one of those documents had already been produced. So, it was in the files of the insurer before they even came to us. Now, they've flipped that on its head to make a completely reckless and false assertion that some of the drivers of the debtors' representation had gone and reviewed documents, had decided they were changing stories and theories, and then redacted something that had already been provided. That is completely false. It is an inadvertent failure to produce two documents out of over 1.3 million pages, which is not demonstrating any systemic problem and it certainly was not strategic and there's no basis for asserting that it was.

It would have been, I think, a little bit more palatable to us if counsel had just said, Right, we didn't notice that we had already gotten one, rather than trying to find nefarious intent on the part of the debtors when they know that none exists. So, what dispute do we have, because all the briefing and most of the argument relates to two documents that have already been produced and were produced before the motion was filed.

So, there's three categories the way we read it. One is the TDPs. And the insurers are arguing that the debtors were failing to produce draft TDPs and that is completely and utterly incorrect.

Starting on November 2nd, the debtors -- which is

before the date for substantial completion -- the debtors began producing all of their draft TDPs and numerous other TDP-related documents. We have produced more than 150 drafts of the TDPs among more than 750 TDP-related documents that have been produced. The debtors are not withholding any TDPs and we're not withholding any TDP-related materials, as far as we know.

And we have repeatedly confirmed that to the insurers and they have not identified anything we haven't provided. So, all the arguments about what we're not providing are inaccurate.

Something that was not raised today, as least I don't think I heard as raised today, was that the debtors were redacting drafts of the TPD. That is untrue and the insurers know that's untrue, because they had the TDPs and they can confirm there are zero redactions. The debtors have never said that they were redacting the TDPs.

So, the TDP piece, which was really the thrust of almost all of this, is a non-issue and I believe we have completed our production on that.

The second category were claim matrices, and as far as we know, we have produced all the claim matrices. Certainly, the insurers have not identified anything that we have withheld, nor have they identified any related deficiency in our productions. So, that wasn't an issue and it wasn't an

issue before the motion got filed.

And then we have the third category, which is really the category that I thought we had a dispute, simply not a legitimate dispute, and that is what was charged in the letter as "related plan documents." Now, initially, there is no document request to the debtors for "related plan documents," so there is nothing to move on today. And that, alone, is a fatal deficiency in the motion.

The debtors, however, have been extremely cooperative in trying to get everybody information they want to the extent it's reasonable, and I think we have gone beyond proportionality in doing so. And so we asked on a meet-and-confer what are you referring to?

And they were unable to tell us. They either wouldn't or couldn't name a single document or a single category of documents that would fall under this big term, phrase "related plan documents." And because they refuse to provide us with any information or explanation whatsoever, we are unable to identify those documents, discuss them, and consider whether or not they would be appropriate for production.

This not only makes it impossible to resolve a dispute, but also violates meet-and-confer rules, which are designed to prevent the exercise of burdening the Court with disputes that may or may not be resolvable without judicial

intervention.

It is probably not lost on Your Honor that the parties have repeatedly raised meet-and-confer violations in connection with a number of disputes here, but those typically have a live dispute and the fight really revolved around some kind of timing issue, while parties said that there was no meet-and-confer, while simultaneously arguing that they didn't actually have to produce the information at issue.

Here, we haven't refused to produce any information that's been identified to us. And I'll give you an example of how a meet-and-confer works when it's appropriate, and that example is the identical meet-and-confer conference that we had preceding this motion. So, when we were getting off the phone, because we couldn't get any answers from the moving counsel as to what was meant by "related plan documents," counsel to AIG said, Well, they're looking for settlement trust agreements.

We had no request for production addressing settlement trust agreements. Settlement trust agreements wasn't raised in the preconference letter seeking a meet-and-confer and it wasn't raised during the meet-and-confer until the very end. And we responded that day that we would provide those documents and we then did provide those documents.

So, there's no dispute -- we have -- what I will say is that the two instances in which the insurers identified

what they wanted, the two inadvertent documents, the two documents that were inadvertently withheld, which turns out there's only been one inadvertent document that was inadvertently withheld and the settlement trust agreements, which hadn't even before asked for, were all provided.

So, the motion should be denied.

But let me speak a little to the mediation issue because that was not a discussion that we had either. And let me correct the facts, because we filed the motion for a protective order with respect to mediation. The insurers did not look to expand beyond what was ultimately addressed. The insurers, themselves, are continuing to invoke mediation privilege and withholding their documents.

So, the issue comes up, what got addressed by Your Honor on mediation privilege?

We think that your decision is unambiguous in addressing the TDPs and we have withheld none of those documents on the basis of mediation privilege. We have gone another step. We -- I, personally, have repeatedly stated to any number of plan objectors that if they have documents that they believe they should be receiving that are not specifically addressed by Your Honor's decision, because they're not TDP documents, but that otherwise would seem to be covered by Your Honor's reason that we were prepared to have a conversation about that to ensure that we don't have

unnecessary motion practice, if we were comfortable that Your Honor would come out the say way on that category of documents.

And not one party, not one party has told us that there's a particular set of documents that they want or documents in a particular area. So, I don't know what we're being asked to produce. They didn't tell us. They didn't put it in their motion. I'm not sure I heard about it today.

I will say that Your Honor has not abrogated the mediation privilege in its entirety. Not a single party in this case has taken the position that Your Honor abrogated the mediation privilege in its entirety and we're at a complete loss as to know why we're arguing today about documents that they won't even identify to us.

THE COURT: Thank you.

Mr. Moxley?

MR. MOXLEY: Thank you, Your Honor. Good morning.

Cameron Moxley of Brown Rudnick, on behalf of the Coalition. Your Honor, I'd like to make a brief presentation and then also address some of the comments that Ms. Marrkand made in her presentation.

Your Honor, the Court's October 25th ruling was very focused and Your Honor I would quote from that hearing transcript at page 15, beginning at line 4, and I'm reading from the transcript, Judge. Your Honor said:

"I denied debtors' motion to the extent that debtors seek to shield discovery communications, oral and written, regarding the trust issue distribution procedures based on the mediation privilege."

The relief sought in the motion, Your Honor, is for, "all drafts of the trust distribution procedures, claim valuation matrices, and related plan documents and communications."

That is an extension, Your Honor, of the Court's ruling of October 25th. And it is an extension that was clear from Ms. Marrkand's presentation that the insurers are asking this Court to broaden the October 25th ruling.

We note that many of the documents, Your Honor -- we note this in our letter -- that are sought to be discovered by this motion to compel were exchanged among mediating parties while physically in mediation with the mediators, and at times, at their direction. We note further, Your Honor, that the Coalition has not waived the mediation privilege and, frankly, to our understanding, neither have the insurers or any other party.

The only mediation privilege that has been not waived, but has been addressed is Your Honor's October 25th ...

Your Honor, as Mr. Kurtz explained and as the debtors explained in their letters to the Court, we understand

that the debtors have complied and produced hundreds of TDP-related documents, including more than 150 drafts of the TDPs, themselves. The insurers are seeking here to bootstrap from the Court's prior, very specific mediation ruling to a much broader extension of that ruling to cover a very vague and unclear category that Mr. Kurtz laid out from what was discussed in the course of the mediation.

The alleged basis for this, Judge, in terms of the letter that the insurers actually submitted was that the debtors can't be trusted somehow to draw appropriate lines as to what the Court's order meant. We disagree with that strongly.

But, Judge, Ms. Marrkand's presentation, I think, took things a bit further. To this point that and this argument that somehow the Coalition has been in charge since February and was taking the pen on certain documents since that time, let's just discuss quickly, if we could, Judge, what we all know, all of us who have lived this case and have seen the items on the docket and have been at these hearings.

The email the insurers referenced in their argument and letter was sent in February of 2021. We know, Your Honor, that subsequent to that email, the debtors entered into a settlement with Hartford that the Coalition did not support.

We know the debtors filed TDPs in April and May on the docket that the Coalition did not support. Those TDPs, we

know from discussion in open court by Hartford's counsel, were reviewed by Hartford before they were filed.

We are at a loss, Your Honor, as a Coalition, to understand how the Coalition could have been said to have been in charge (indiscernible) when the debtors were doing everything that we didn't want them to do after this email that is highlighted in the insurers' letter.

It is an argument, Your Honor, that is really based -- this extension of the Court's mediation ruling on October 25th is really based on this type of very vague *innuendo* that is just not supported by the facts of what has actually happened in this case, that we all know from what's publicly available, Your Honor.

And, finally, Judge, I'll just note that the reference to Rule 408 in our submission, we of course, understand that's an admissibility issue, but when coupled, Your Honor, with the fact that -- and we put this in our letter, Judge -- when coupled with that these settlement communications were made in connection with mediation and in reliance on Rule 90 -- Local Rule 9019-5(b), which was incorporated, of course, as Your Honor well knows, in your mediation-referral order, it's in that context that these settlement communications were made.

And with all due respect to Ms. Marrkand, she's sort of honing in on word choice, words like "shall" to

suggest that somehow the person who wrote the word "shall" for the debtors had the ability to direct the debtors. Your Honor, you know, it's hard to pick out, sort of, you know, word choice from a particular settlement communication that's not a settlement communication.

Candidly, as Your Honor wells knows from experience, parties discuss their positions in settlement and they say, this is what we will accept. And you can phrase that in different ways, depending on the settlement communication. It's not an indication, Your Honor, that the party who's saying, this is what I demand, this is my settlement demand, has the ability to enforce that demand, require that the person receiving the demand comply with it. And the facts here, Your Honor, that we all know, what happened in the months after the email that is highlighted in the insurers' letter, belie that any such ability or power existed. That's just plain.

So, Your Honor, we think that this sort of couched as a discovery motion saying the debtors have been -- have not produced all documents that were responsive to the Court's October 25th ruling, I think it's clear now, Your Honor -- it was clear to us, Judge, from the letters, but I think it's very clear now from today's presentation by Ms. Marrkand, that it's an incredibly broad extension of the Court's October 25th ruling and we submit, respectfully, Your

Honor, that there's no basis for such an extension.

Thank you, Your Honor.

THE COURT: Ms. Marrkand?

MS. MARRKAND: Okay, Your Honor. I have to thank Mr. Moxley for actually, I think, Your Honor, proving our point. He has just raised a question of fact about when the Coalition exercised control and if it did.

Because what this Court knows from the restructuring support agreement hearing was exactly what the Coalition did several months later. So, our point, Your Honor, is the debtors have opened this door. When Mr. Moxley says the Coalition hasn't waived the mediation privilege, only he can speak for the Coalition, but the debtors waived it, Your Honor, when they produced this document to us in February of '21.

Second, Your Honor, we sought exactly what the debtors sought, and I'm a little baffled here that our request is vague. Mr. Kurtz argued before you on their motion for a protective order that three tranches of communications or documents should be protected from disclosure on the basis of mediation privilege or attorney-client work product.

And our motion couldn't be clearer, Your Honor. We're saying, you don't get to do that, debtors. You cannot do that, especially given what we've already seen, Your Honor.

And I think with your Court's indulgence, I think

you can understand how is it possible for us to identify what we don't have? How could we possibly know that?

We got lucky with the TDP log that identified attachments, but this is the ask that I noted earlier: We declined to accept that the burden shifts to us to tell the debtors when they have withheld something. How would we possibly know that, Your Honor?

I have to note, too, that when Mr. Kurtz said a few minutes ago, this is not a systemic problem, it absolutely is a systemic problem, Your Honor. And that's why I said, in all candor and respectfully, Your Honor, you know what you ruled. You know what your thinking is.

We're not here -- we're here for you to do what you have said you would do and what you have done consistently: to call balls and strikes. And all the parties live with your decision.

What I was trying to do was walk through what I thought was your rationale in the October 25th ruling. I attended the hearing. Obviously, I read your ruling several times.

But nobody -- right now, I'm not here, actually, to blame the debtors for anything. I took your remarks on Wednesday about civility, not kindness, but civility and professionalism, seriously. I always have.

I'm taken by Mr. Pachulski's remarks earlier about

turning the temperature down. That's why we're not -- if I have done anything to suggest that I am attacking the debtors, I apologize, because I'm not. What I was trying to do was bring before you the record; unvarnished, not with heated rhetoric, not with adjectives, and not with blaming.

I have every reason to believe the debtors are doing the best they can on their productions, given the extraordinary time constraints that we're all under. It's not blaming them, Your Honor; it's reporting where we sit on November 19th. So, no blame at all.

I don't want to get distracted about what someone else has or hasn't done, because that's not in front of you. What is in front of you is an extremely serious issue, Your Honor, and for the first time, we're able to put it to you not in shadows and not with opinion and not with guesswork.

We have given you a document and we can certainly provide you with the termsheet. But it cannot be that the debtors can file a motion that says, we don't have to give you any of these three buckets, Your Honor -- three buckets -- of information -- putting aside attorney-client work product -- because of the mediation privilege. And then, now, whether it's Mr. Kurtz or Mr. Moxley, accuse the insurers of being opaque.

It is perfectly clear what we are after, Your Honor, and it is all laid out in Mr. Molton's email and the

termsheet. Those are the facts, Your Honor.

And then we have the law and knowing what you're going to have to do at the confirmation hearing. You once said at one hearing -- I think it's actually -- I'm not sure which one -- where Mr. Kurtz said, Your Honor, we'll give you anything you want.

And you said, Mr. Kurtz, you're confused. It's not what I want; it's the debtors' burden. You have to put on your case.

That's true with us, Your Honor. We get to put on our evidence, but we can't do it when we have every reason to believe we're not getting all the evidence. We're not pursuing, clearly, attorney-client work product. We're not pursuing Hartford or The Church of Latter Day Saints settlement agreements, we're not after any of that. What we're after, Your Honor -- and to try and understand, do we have a basis to come before you.

Right now, it's looking like we do. So, that is -- I'm trying to go through everything here. Oh, and the very last thing, Your Honor, apparently, there is some misunderstanding of what did and didn't happen at the meet-and-confer.

What matters is we filed our motion. All the debtors had to do, or the Coalition -- happens all the time -- the motion is filed -- pick up the phone and call us.

We have the meet-and-confers.

Apparently, the debtors tried, and what they're trying to do here is say we produced the two documents, as if that's all that's at stake here, and tell us, let's do it document by document. But we have no ability to do that, Your Honor.

And I'm a little surprised. We actually -- I could set forth we did it in several exchanges with the debtors about our discovery, where we sought the very information, as far back as September, and I can easily supply that to the Court.

So, I think this whole conversation reveals why we filed our motion having followed, frankly, the practice of the debtors. They did not come before you with a single document and say, This document should be protected or that document should be protected.

And, Your Honor, respectfully, I think this case, and I'm sure there are many words to be describe it -- maybe volatile is a good one -- warrants, as you said, this is one of the cases. This is the circumstance where the mediation privilege cannot be used to wall off, shield, and deprive the insurers of critical materials and information. Thank you.

THE COURT: Thank you.

Okay. Well, I am prepared to rule on this, and I appreciate the arguments of counsel. I did review the letters

beforehand and I do think that the argument went slightly beyond the letters but let me try to refocus.

My October ruling was focused on the TDPs because that has been the insurers' focus throughout this case, that in essence -- and I don't have -- I may be the only one who doesn't have my October ruling in front of me, but I don't have it in front of me -- but my recollection is that, again, the TDPs have been the focus and has been the focus of the insurers from the inception of the case. And in that context, the argument has been made or the contention has been made that the pen was turned over to the Coalition.

And that's why the focus was on the TDPs in my ruling, and I do think, though, that the claims matrices, which are embedded in the TDPs, and even the settlement trust agreement, which is clearly the agreement that is going to be used by the trustee, if one -- if we get to -- if it's confirmed, to implement the TDPs, are all within that ambit and the debtors have seemed to recognize that by turning over claims -- documents related to the claims matrices and the settlement trust agreement. And if they had not, I would have ordered that. I do believe that's a package.

The termsheet, to the extent that it discusses the TDPs or the claims matrices or the settlement trust agreement should be produced, and, again, my understanding is it has redacted for other communications and that follows two other

documents. So if it's in the board minutes and they're talking about the TDPs or the claims matrices; again, that should be turned over, subject to appropriate redaction for information that is not in those categories.

I did not go beyond that in my October ruling and I don't see a basis in what I've read and heard to broaden that ruling to include what is somewhat of an all-encompassing and a little bit broad concept of related plan documents. And, further, I've heard there was not a request for whatever that happens to be.

Again, the insurance companies' focus has been on the TDPs. I understand that focus and I'm not going to broaden my ruling, based on what I've read.

As far as Ms. Marrkand's truism, I suppose, that you can't know what you don't have and you can't identify what you don't have, that can be said of all document productions that anyone could make. It is, you can't identify what you don't have, because you don't have it.

But what you can do, and you have done, the insurance companies have done is say, Oh, there's an attachment here and we don't have it. So, clearly, that's missing. And in response to that, the debtors have responded and produced.

And I really think that's all that can happen here. The debtors are telling me they are unaware of documents that

haven't been produced related to the TDPs and except for these couple of items that have since been remediated, there's no indication that there are further documents. So, certainly, if in its review, the insurance company comes up with other documents that appear to be missing from a review of what's been produced, I would expect that you would go to the debtors and, in fact, the debtors would produce whatever those documents are. I realize maybe that flips the burden to some extent, but two missing items out of a production can certainly be inadvertence. So, that's my ruling.

Ms. Marrkand?

MS. MARRKAND: All I was going to say, Your Honor, is thank you. I think we were all looking for clarity and calling the balls and strikes.

So, we understand your ruling and, obviously, we'll comply with it. So, thank you.

THE COURT: Of course. Thank you.

Okay.

MR. ABBOTT: Your Honor, I believe that brings -- again, Derek Abbott of Morris Nichols for the debtors -- I think that brings us to Number 6 on the agenda. Your Honor, that's Docket Item 7205.

As noted, it looks like that's not going forward with respect to the TCC. It has been withdrawn with respect to a number of the insurers but will go forward with respect

to the remaining insurers that were subject to that. So, I'll just turn it over to counsel for American Zurich, Your Honor.

THE COURT: Okay. And before that, I need five --

MS. GRIM: I'm sorry, it -- go ahead, Your Honor.

THE COURT: I said I need five --

MS. GRIM: I just wanted to clarify Mr. Abbott's statements and something on the agenda.

THE COURT: Okay. Well, give me a second. I have a chart that I made for Agenda Item 6 and it's not in my folder, so I need to get that. So, let's take five minutes and then we'll come back on the record.

We're in recess.

(Recess taken at 11:17 a.m.)

(Proceedings resumed at 11:24 a.m.)

THE COURT: Okay, this is Judge Silverstein. We can go back on the record and we're on Agenda Item 6.

MS. GRIMM: Your Honor, Emily Grimm, Gilbert LLP, for the FCR. There were two administrative issues I wanted to clear up with respect to the agenda before we get into argument. The first is that the most recent agenda seems to indicate in the status paragraph under Item 6 that the dispute as to the insurers' motion to quash is not going forward with respect to the Allianz, Century, Old Republic, and Zurich. I just wanted to clarify -- and of course Mr. Plevin can jump in if he has a different view -- that it is the FCR's cross-

motion to compel production of claims handling information that has been withdrawn with respect to the insurers.

The FCR's opposition to the insurers' motion to quash, which was filed in conjunction with the motion to compel since it involved the same underlying legal issues, has not been withdrawn, and my understanding is that the insurers have not withdrawn their own motions to quash. So that was item one.

The second issue we wanted to clarify is that the matter is also not moving forward as to Evanston. To be clear, Evanston did not join in the insurers' motion to quash and the FCR's motion to compel has been withdrawn without prejudice to them.

We confirmed this with counsel for Evanston right before the hearing, but we just didn't have time to clarify it on the agenda.

THE COURT: Okay.

MR. PLEVIN: Your Honor, that's my understanding as well. I had understood the FCR was withdrawing its cross-motion as to certain carriers, but we were not limiting our motions to quash.

MR. ABBOTT: Your Honor, my apologies if we misstated in that agenda. Obviously, these folks know way better than I do. So, apologies, again.

THE COURT: It's okay, I had already prepared. So

-- and, quite frankly, if there's some distinction that parties -- that different insurance companies are making -- and I recognize that the insurers are not a monolith in the positions that they are taking before the Court in many matters -- then you need to let me know.

Okay, so let's proceed.

MR. PLEVIN: Your Honor, Mark Plevin for the Zurich insurers. I would propose actually to take our two motions to quash together because I think they're interrelated and the debtors' opposition, for instance, covered both motions, and I think it makes sense to proceed together.

THE COURT: That's fine. Actually, as I was reading them, I thought Agenda Item 7 made a little bit more sense to go first, but we can take them together and any way you wish. But, yeah, they're related.

MR. PLEVIN: All right. Thank you.

Your Honor, these two motions seek to quash or limit 44 depositions of insurers. And that's right, 44 depositions. Of these, 35 are Rule 30(b)(6) depositions and nine are individual depositions.

What are we doing here? Or, in a single word, why? Why have 44 insurance depositions been noticed in this plan confirmation proceeding? What Section 1129 confirmation issues are all these depositions directed toward?

The answer, Your Honor, is that we are here because

the debtors and the plan supporters have decided to ask the Court to make certain findings as conditions preceding the plan confirmation. In particular, Articles 9(a)(3)(q) through (t), but especially (r), which requires the Court to find that the procedures and criteria included in the TDPs are fair and reasonable based on the evidentiary record offered to the bankruptcy code. But nothing, nothing in the bankruptcy code requires that such findings be included in a plan.

The debtors can point to no other sex abuse bankruptcy case that conditions confirmation on such findings being entered by a court. Indeed, debtors can point to no other mass tort bankruptcy in which the plan conditions confirmation on the entry of these sorts of findings.

This is why we say, Your Honor, that debtors are seeking to transform this plan confirmation proceeding into an insurance coverage lawsuit. They are seeking findings regarding the fairness and reasonableness of the TDPs that they don't need to confirm the plan, but which will short-circuit future insurance coverage litigation in their favor if the plan is confirmed. They want to use this Court and the pressure to confirm a plan to leverage their way to favorable insurance coverage findings that they can use to pretermit future insurance coverage litigation.

The debtors, the same debtors who have asked the Court for an expedited confirmation hearing and a highly

compressed confirmation litigation schedule, have created the situation. They are trying to cram a years-long coverage litigation into a few short weeks and they are doing this even though it is not something they're required to do or that the code requires for plan confirmation.

This background is significant for the Court's determination of the insurers' two motions to quash.

Rule 26(b)(1) governs the scope of discovery. Discovery is permissible only if it satisfies two requirements. The first requirement is that the discovery must be relevant to any party's claim or defense.

Here, it is fair to apply this standard by asking, what is relevant to plan confirmation under Section 1129? Discovery that is not relevant to the confirmation requirements under Section 1129 should not be permitted.

As I've explained, Section 1129 does not require findings of the sort requested by the debtors to confirm the plan. Thus, I would argue that debtors' proposed depositions of the insurers do not meet the Rule 26(b)(1) relevance standard.

Debtors seem to argue that the depositions are relevant because they may pertain to the insurers' defenses to confirmation, but nothing the insurers did or didn't do in connection with BSA abuse claims prepetition is relevant to any of the 1129 requirements. Thus, if issues extraneous to

1129 requirements are not relevant, the insurers would have no need to defend against such extraneous issues.

As our motions point out, Your Honor, BSA largely handled its own claims. The insurers were involved only in a small number of those claims. After 1986, only claims that exceeded the limits of fronting policies or self-insured retentions. And the insurers' involvement in such claims was generally limited to responding to requests from BSA, such as requests to fund portions of settlements. And I say portions because, generally, the BSA had the first $1 million.

If insurers agreed to contribute money to settle a claim at a particular level or for a particular amount, BSA knows that and has that information in its files, and its own witnesses can provide testimony about that. If what BSA is doing is hunting for admissions or contradictions, it already has access to that information too; it does not need to take 44 insurer depositions to develop that evidence.

Moreover, if the issue, as we understand it, is whether the TDPs replicate the BSA's own prepetition claims experience, as the Coalition has posited, debtors do not need to know what the insurers think or how they may have analyzed a handful of claims to prove how claims against debtors were valued and paid before bankruptcy. They can show from the debtors' own records what was paid, why debtors paid it, and how that relates to the TDPs.

We understand, Your Honor, that debtors may want depositions to find out what any insurer witnesses will say if called to testify at trial in opposition of the plan. So let me take that concern off the table. We had an insurer call yesterday and we discussed whether any insurer intended to call any of its current or former employees as witnesses during the confirmation hearing to talk about claim values or how claims were analyzed, adjusted, or handled. Not a single lawyer for any insurer said they intended to call any such witness. Accordingly, there is no need for debtors or anyone else to depose any insurer witness just to find out what that witness will testify to at trial.

The second requirement under Rule 26(b)(1), Your Honor, is that discovery must be proportional to the needs of the case. The rule goes on to identify certain considerations that a court should take into account in assessing proportionality, including the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Let me discuss some of these factors; first, importance of the issues at stake. The issues are actually not important at all since the findings driving this discovery

are not required under Section 1129 or any other provision of the bankruptcy code. How the insurers thought about BSA abuse claims pre-bankruptcy proves nothing about what BSA paid to claimants when it settled claims.

Second, the parties' relative access to relevant information. As I've suggested, debtors do not need discovery from the insurers to find out how BSA itself handled BSA abuse claims or how much BSA paid --

(Background noise)

MR. PLEVIN: Excuse me, Your Honor, I can't mute myself at the same time I'm talking. I apologize for that.

I think what I was saying is the debtors don't need discovery from the insurers to find out how BSA itself handled BSA abuse claims, or how much BSA paid for particular claims or types of claims. Debtors don't even need discovery from insurers to find out what positions the insurers took on whether to contribute to settlements of abuse claims. Debtors have that information in their own files.

Third, the parties' resources. The debtors say they are running out of money and need to get to a confirmation hearing in an expedited manner. How then can they justify the costs of preparing for and taking 44 insurance company depositions? And that doesn't even include the impact on our resources of having to prepare witnesses and defend those depositions.

Fourth, importance of the discovery in resolving the issues. I've already discussed how -- what the debtors thought -- how what the insurers thought about the resolution of abuse claims against BSA is not at all necessary for debtors to put on a case attempting to show that the TDPs mirror the way BSA abuse claims were handled and paid prepetition.

Also, when you look at what the insurers have said, nothing that happened prepetition is relevant to certain important aspects of the TDPs. No one contends that debtors paid or offered to pay claimants $3500 prepetition on a no-questions-asked, no-proof-required basis. So discovery won't illuminate that issue. Similarly, no one contends that BSA abuse claims were determined prepetition by an all-powerful settlement trustee chosen by claimants instead of in the tort system with judges, juries, rules of evidence, and appeals. So discovery is not needed on this issue either.

Fifth, whether the burden or expense of the proposed discovery outweighs its likely benefit. Here, I think it is essential that we have 44 insurance depositions that are supposed to be completed by December 1, which is the discovery cutoff. Even if they leak to the end of that week, December 3, that is 44 depositions in just eight business days from now, or an average of 5.5 insurance depositions every day.

Each deposition for the insurers takes at least two days of counsel time, one to meet with the witness and one to defend the deposition. I'm sure on the other side it takes a similar amount of time for the debtors to prepare, not to mention other people who are being paid by the estate such as the FCR.

This expenditure of time, money, and effort comes at the same time that the parties are trying to take 23 other depositions of people who need to be deposed, such as the Coalition, the debtors, and others.

The Court held that the debtors were entitled to an expedited confirmation hearing because of their financial situation, but the Court has also requested that the parties focus their discovery on what really matters. What the insurers thought about the handling of BSA abuse claims pre-bankruptcy is not something that matters here.

In the circumstances of this case on this expedited, compressed schedule, the 44 insurance company depositions that are being sought are simply not proportional to the needs of the case, and so the depositions should be quashed on that basis.

Your Honor, let me turn now briefly to the 30(b)(6) topics. I don't propose to go through them all because our motion already does that, but I did want to highlight a few points.

First, there are unquestionably improper contention topics. Our brief gives examples, debtors' topics 7 and 11, which expressly ask for testimony about the insurers' contentions. These cannot be permitted.

Another salient example is debtors' topic 8, the trust distribution procedures. The debtors say that topic asks for facts, not contentions, but everyone knows that the insurers did not draft the TDPs, did not negotiate the TDPs; indeed, had nothing at all to do with the creation of the TDPs. All our witnesses could do is restate what, if anything, they learned about the TDPs from their counsel or what they gleaned about the TDPs from reading them. In other words, the insurers have no facts about the TDPs that a 30(b)(6) witness could or should be required to testify about.

The same goes for other similar topics like the plan settlements or the BSA plan settlements. These are about contentions, not facts.

Second, prepetition claims handling. This is a major issue that pervades both motions, as well as the FCR's cross-motion. And we're not without guidance from the Court on this because the Court held in Imerys that such information should be obtained from the debtors first and would be permitted from the insurers only if the debtors didn't have the information. The debtors here don't claim that they don't have the information. That fact alone should be dispositive

in our favor on all of the claim handling topics.

The debtors and others point out that the Court noted in Imerys that discovery of insurers' prepetition claims handling would be fair game if the insurers were putting in evidence of their own treatment of the claims or their own handling of the claims. But the Court was very specific, only if the insurers were going to put their information at issue would that information be discoverable.

We are not going to put our own information at issue. I've already made that clear when I said the insurers will not call any of their own employees or former employees as witnesses. This too should be dispositive.

And the fact, Your Honor, that we are seeking discovery of the debtors on their claim handling activity and their knowledge of how the claims were resolved does not justify the discovery sought by the insurers. The debtors have all the information about all of the claims; none of the insurers do, either separately or collectively, because so many of the claims were handled within that $1 million layer, which was either fronting coverage or SIR.

The debtors and the Coalition seek to justify the TDPs on the basis that they supposedly mirror the debtors' prepetition claim results. So we need to know what that is in order to rebut it. And, as the Court ruled in Imerys, getting that information from the debtors is proper and appropriate.

Some of the topics at issue, Your Honor, are unquestionably coverage related, like those that seek to have the insurers testify about policy underwriting or the forms that insurers use to draft policies. None of that could possibly pertain to any issue properly presented in this confirmation proceeding.

I also want to note, Your Honor, that I found the debtors' position that they did not share a common interest with the insurers with respect to prepetition claims handling to be, frankly, astonishing. BSA was providing defense counsel summaries and reports to the insurers to support their requests that the insurers contribute to funding certain settlements. Those documents were and still are privileged and, to the extent our witnesses considered what BSA's defense counsel said about particular claims, they could not testify about that in a deposition without breaching privilege, which they should not be required to do. It's not clear, Your Honor, that this plan will be confirmed and it could be that we find ourselves back in the tort system, and the claimants should not have access to the defense counsel reports, period.

Otherwise, Your Honor, with respect to the 30(b)(6) depositions, I'll stand on our brief, unless the Court has questions.

THE COURT: The only question I think I have -- I heard you loud and clear on the no fact witnesses or the no

insurer employees, current or former, what about an expert witness? Are the insurers going to be providing expert witnesses on any of these -- well, let me just end it. Are you going to be proffering an expert witness?

MR. PLEVIN: I expect we will, Your Honor. The parties exchanged, I think it was earlier this week, the topics on which they might present affirmative expert testimony. I think we had five or six topics, the debtors have 24 topics. I hope that doesn't mean they're going to be calling 24 expert witnesses, but it's possible.

If we call an expert witness on these claim handling issues, it will be based on the debtors' information, not on our own information. None of us are planning to give an expert witness access to our own records. It would be the debtors' records, this is how the debtor handled claims, this is how they paid claims.

We do intend as well to take depositions of the debtors and one of their in-house people about how they handled claims because, Your Honor, that's what the debtors are putting at issue here. They want to say and the Coalition wants to say that the TDPs mirror what the debtors did prepetition, so we know what the debtors did prepetition, we don't know. My client is an excess insurer and over the course of the entirety of their involvement with the Boy Scouts paid on five claims. We don't have the full record.

We don't understand what they did. We may know what they did on respect to five claims, but that's not statistically significant.

So, yes, we may have expert witnesses, but they're going to look at the Boy Scouts' records, not ours.

THE COURT: Thank you.

Mr. Winsberg?

MR. PLEVIN: Let me move --

THE COURT: Oh, I'm sorry, go ahead.

MR. PLEVIN: Yeah, let me move Your Honor quickly to the motion to quash the individual depositions.

THE COURT: Yes, sorry.

MR. PLEVIN: This motion relates to the depositions of nine individuals who according to the debtors are the claim handlers, who the BSA interacted with in certain instances daily to evaluate and value claims. The debtors assert that these individuals are the persons with the most knowledge regarding the prepetition handling of abuse claims. Now, why did debtors want to depose these people? The debtors argue that they will have relevant evidence that may rebut the insurers' objections to the TDPs.

In other words, this is not a fact-finding effort by the debtors; this is an effort to hunt for admissions.

I've already said, Your Honor, we're not going to call any of these people as witnesses, so the debtors don't

need to prepare for that. Moreover, the testimony of these individual witnesses is not relevant. The debtors know how they handled their own claims and they know what positions the insurers took, if the insurers were asked to take a position on any claims. They don't need these depositions and they're not proportional to the needs of the case given the calendar year.

These witnesses, Your Honor, could only testify about prepetition handling of BSA claims. As I explained before, this is not a proper topic. And, even if it were and if you were to include -- if you were to conclude that the 30(b)(6) witnesses had to testify, then these depositions would be cumulative of the 30(b)(6) depositions. The insurers should not have to put up two witnesses to give the same testimony on these irrelevant, unnecessary subjects in the compressed time frame of this confirmation hearing.

The debtors' opposition introduces another false equivalence, saying that what they're trying to do is just like our asking for a BSA 30(b)(6) deposition and the deposition of their former employee Mr. Allen, and that's what I was referring to a moment ago. The distinguishing fact is that the TDPs are being justified on the basis that they mirror the debtors' claim experience and we need discovery of that experience if the findings are going to remain in the plan. In contrast, our responses to debtors' requests for

funding are not the issue. One deposition on that topic is unnecessary and non-proportional, two from the same carrier is cumulatively unnecessary and non-proportional.

And, Your Honor, that concludes my remarks, unless you have any further questions.

THE COURT: No. Thank you.

Mr. Winsberg?

MR. WINSBERG: Yes, Your Honor. Can you hear me okay?

THE COURT: I can.

MR. WINSBERG: Harris Winsberg on behalf of the Allianz insurers. Just real briefly, not to re-go over Mr. Plevin's remarks, which we concur with.

The FCR's cross-motion was dropped as to Allianz, but not as to my other two clients, National Surety and Interstate, and just briefly, I just wanted to focus Your Honor on one matter, which is the FCR's cross-motion, which is at Docket 7233, it talks about on the first page the insurers -- and the quote is, "But the insurers have put the values and claim evaluation protocols set forth in the TDPs directly at issue in these confirmation proceedings." But that just isn't true, Your Honor, as Mr. Plevin noted. It's the BSA and the Coalition and FCR that are putting these at issues with the findings and orders that we've talked about at the last hearing and in the hearings before that.

And I would note, Your Honor, that we filed a motion for stay relief, the BSA and FCR and the Coalition successfully resisted that coverage case going forward, but they're asking this Court to do what should be done in that coverage case in this court in connection with confirmation. It should also be noted that these conditions precedent, which address things, as Your Honor is aware of, like the (indiscernible) Austin issue, whether the TDPs are fair and equitable or fair and reasonable, and the like, that those are issues that are not a requirement under the bankruptcy code.

And, as Your Honor noted at the disclosure statement hearing, those conditions precedent are waiveable. And I believe Your Honor said one of the reasons why the disclosure statement -- at the hearing that why it was not patently un-confirmable is because those conditions could be waived, but these conditions precedent are driving the discovery in this case and I think Your Honor during the hearing on the motion for stay called them a disaster, and that's what they are. I mean, they are over-broad and trying to bring into this case what we view as really coverage litigation matters that have no bearing in connection with confirmation of the plan.

And the last thing I would point out, Your Honor, as further evidence of that is BSA, as Mr. Plevin talked about, they listed their expert witness topics, you asked

about that, Your Honor, and you can look at them at Docket 7238, and --

THE COURT: Go ahead. I did print that out, I just don't know what I did with it, but go ahead.

MR. WINSBERG: Number two, Your Honor, just to quote, "The allocation of each insurer's proportionate share of responsibility for the underlying claims." That's one of their expert proposed topics. That is a coverage case and that's like we're back to the binding estimation. I'm at a loss. If BSA is truly a melting ice cube and needs to exit bankruptcy quickly, then the discovery needs to be proportional to that exist. They can't have it both ways, compress the schedule and try to jam the insurers with what really is coverage maters that have nothing to do with 1129.

And, with that, Your Honor, we respectfully request that you grant the motions that are on final and deny the FCR's cross-motion.

THE COURT: Thank you.

MR. WINSBERG: Thank you, Your Honor.

THE COURT: Okay. Who's going to go first? Mr. Azer?

MR. AZER: Yes, Your Honor. Happy Friday and thank you for hearing me. Adrian Azer on behalf of the debtors from Haynes Boone.

So I want to touch on some initial points first and

then we can go specifically to the topics, and I want to start where Mr. Winsberg left off. He noted that one of our expert topics is allocation. Well, it has to be. We're having to defend the Hartford settlement, you have to determine how much Hartford would otherwise owe and you can't allocate just to one insurer, you have to allocate to the block, right?

So we're not turning this (indiscernible) but for us to defend the settlement we have to show how much Hartford would have otherwise owed to defend it's a reasonable settlement. So I don't think just because we're saying allocation we're turning this Court into a coverage court; that is not our intent, but we have to defend the settlement.

Two, I think Your Honor started by saying that the insurers are not a monolith, neither are the debtors and the plan proponents, we are not -- I'm sorry, Your Honor, are you having trouble hearing me?

THE COURT: A little bit. I'm going to put my earphones on. Go ahead.

MR. AZER: Your Honor, is this better?

THE COURT: Yes.

MR. AZER: Okay, great. Thank you.

Your Honor, you heard Mr. Plevin talk about 44 depositions. The debtors did not propound 44 30(b)(6), we propounded ten. And, if you'll notice in the insurers' motion, we propose to limit that only to insurers who actually

paid claims, which is probably going to be around five to seven. So we are certainly not seeking a huge number of depositions.

Now, Mr. Plevin also said, well, we're not going to call any witnesses and so, therefore, this is all unnecessary. Your Honor, I would love to protect witnesses that would contradict my position and that's exactly what the claim adjusters are going to do.

To the extent the insurers contend -- and we'll walk through this in more detail -- that the TDP validity criteria or scaling factors are inconsistent with prepetition practices, those claim adjusters may say directly to the contrary because, as Mr. Plevin noted -- and it's a little bit -- I think it's a little bit of doubletalk by Mr. Plevin, right? Well, you didn't really work with us on the claims, but the individual adjusters worked extensively on the claims. They worked on a daily basis on the claims. Indeed, Your Honor, when we pulled NCC records of communications with the insurers, they would communicate up to three times a day with the claim adjusters on the valuation of claims, including what makes a valid claim and how do you value the claims.

Now, we can't produce those documents because the insurers are saying, well, those are all protected by common interests. So the only avenue we have to rebut the insurers contentions is through this testimony.

THE COURT: How is that? Explain that --

MR. AZER: And to be clear, Your Honor --

THE COURT: Explain that to me. Why can't --

MR. AZER: Yes, Your Honor.

THE COURT: -- the debtor testify?

MR. AZER: Well, Your Honor, the debtors made recommendations to the insurers about whether a claim is valid and what the value would be, meaning is it worth more or less based upon certain factors, but the insurers then performed their own independent evaluation and said we either agree or disagree with the debtors in that regard.

And so we do not -- we are not the repository of how the insurers' claim adjusters looked at claims. In many instances, you are correct, they accepted what we said and that statement that they accepted what we said, to the extent the insurers challenge the TDPs, would rebut their contentions and, if they didn't, we're entitled to know why that is.

THE COURT: But don't the debtors --

MR. AZER: We're entitled to know what is --

THE COURT: -- know --

MR. AZER: I'm sorry.

THE COURT: Don't the debtors know? The debtors know whether or not the insurance company accepted their recommendation and they can testify to that, right?

MR. AZER: So, Your Honor, I think what might be

helpful a little bit is if we actually look at the TDPs for a moment. I'm hoping that you have a copy of the TDPs in hand, but I can reference -- I can also share my screen, anticipating that the Court might not have, but it's Docket Number 6443, page 145. Would it be helpful if I shared my screen, Your Honor?

THE COURT: I've got them.

MR. AZER: Okay.

THE COURT: Page 145. Okay.

MR. AZER: Yes, Your Honor. And you see under subsection (c), "Settlement trustee review procedures"?

THE COURT: Oh, wait a second.

MR. AZER: Do you see where I'm looking?

(Pause)

THE COURT: Okay. Where are you looking?

MR. AZER: Subsection (c), "Settlement trustee review procedures" --

THE COURT: Yes.

MR. AZER: -- do you see that? Great.

So, Your Honor, I think what you're relying on is the issues that arose in Imerys, right? And let's talk about Imerys for a moment.

In the Imerys transcript and if you look at page 237, when you were hearing the TCC and FCR talk about why they need these claims handling, it was as to very objective facts:

the value paid by the insurers, whether they reserved or denied coverage, right? Those are documents and information that the debtors should -- or the policyholder should have in this circumstance.

Now let's look at the TDPs. If you look at subsection (c)(2), there are criteria for evaluating claims. Does the claimant allege the abuse? Does it identify the abuser? Does it have a connection to Scouting? Date and age, location of abuse. All of those goes to whether a claim is compensable.

The debtors would basically go to the insurers and say, look, we think this claim is compensable because they satisfied these criteria. The insurers' claim adjuster then would say I agree or disagree.

So, no, the debtors don't necessarily always have, whether they agreed with all this criteria or didn't. And to the extent that the insurers basically say these are not the same criteria that was applied prepetition, the debtors should be able to know that and should be able to talk to the claim adjuster and say, no, actually, for this claim, you did look at this criteria and this is inconsistent. It would impeach their arguments as to whether these are appropriate criteria.

And then second, Your Honor, if you could turn to page --

THE COURT: What if they looked at different

criteria, would that mean the debtor is wrong? Would that mean the debtor fails in their burden of proof?

MR. AZER: Well, Your Honor -- well, one, I don't think they did look at different criteria, based upon what we know and the recommendations we gave. But, Your Honor, if they're going to argue that and they're going to say that the TDPs fail because they're not consistent with prepetition practices, because the insurers evaluated different criteria and that's how they paid or that's what the BSA did, we should know that.

So, second, Your Honor, if you look at the scaling factors, which are actually on page 151, it's the same concept. Once you determine a claim is compensable, you determine whether a claim should be valued for more or less given certain factors. The aggravating factors here include instances of abuse, abuser profile, impact of the abuse. Again, we would make recommendations to the carriers and say, look, we think this is the appropriate thing.

If the insurers basically contend that this is not consistent with prepetition practices, two facts come from 30(b)(6) witnesses, right? One is, no, actually, the claim adjuster did do that and they agreed with the BSA in saying this is correct; or, two, if they considered something else, we -- again, we need to know that. If their contention is, no, the BSA actually considered all these other factors, then

we should be entitled to elicit that testimony from the claim adjuster to say, okay, what did you consider? Why did you consider that? Why didn't you articulate that to the BSA when you were settling claims or paying for claims?

THE COURT: But that's not your argument. Your argument isn't that why the insurers considered or didn't consider certain things, that's not your argument, and why is that relevant to your argument that you have to prove that these are appropriate -- I don't know, what are you calling them -- fair and reasonable, whatever that means?

MR. AZER: Sure, Your Honor. I mean, I guess the point I would raise is, if the insurers are going to contest that these are inconsistent with the BSA's prepetition practices, they were part and parcel to the creation of our prepetition practices.

THE COURT: Were they?

MR. AZER: So I guess what I -- they were involved in the adjustment of claims. They paid claims that were part of the resolution process. And so when we consulted with them and said, hey, insurer, here's a claim, this is why we think you should pay, if they somehow are now taking the position and be like, no, we actually didn't consider any of those factors, then that's certainly -- the testimony of the claim adjuster certainly would undermine that.

THE COURT: Okay.

MR. AZER: Your Honor, I'm pausing because it looks like you have a question.

THE COURT: No. I'm thinking, yeah --

MR. AZER: So, Your Honor --

THE COURT: -- no, that's --

MR. AZER: Yes. So, Your Honor, I mean, ultimately, the fact is that these claim adjusters actually do have relevant information that is important. And it is not like Imerys where it's just some objective piece of information that we have or don't have, it's not a settlement payment, it's not a reservation of right or denial payment, it is actually trying to understand what the insurers considered and whether they were in line with us in what they considered --

THE COURT: What difference --

MR. AZER: -- because that certainly would contradict some of their arguments.

THE COURT: -- I still don't understand what difference that makes. I don't understand what difference it makes whether the insurers are in line with what the Boy Scouts thought, because the Boy Scouts are putting on what they believe -- what it believes are the relevant factors. It developed the TDPs, perhaps with input, and maybe it didn't develop it, whatever, but we know the insurance companies didn't develop them.

MR. AZER: Yes, Your Honor, I appreciate that. Let me try to -- try a different tack.

If the insurers comes in and say this is inconsistent with your prepetition practices, yet the insurers consented to those practices prepetition as to how to evaluate claims, wouldn't that directly rebut the arguments they're making to the Court?

THE COURT: I don't know, did they -- I don't know, because I don't know that I think that's relevant, but I'll ask Mr. Plevin that question.

And I suspect --

MR. AZER: I think Mr. Plevin is on mute.

THE COURT: -- the debtors -- that the debtors know -- no, I'm not asking him right now, but the debtors know --

MR. AZER: Oh, I'm sorry, I thought --

THE COURT: No.

MR. AZER: I'm sorry.

THE COURT: The debtors know whether in fact the insurers consented or didn't consent.

MR. AZER: Your Honor, we do have some communications, but, as Mr. Plevin noted, the insurers are effectively blocking us from using those communications based upon common interest issues. So we are effectively -- unless we want to come to Your Honor and basically say they put this at issue and, therefore, waived the common interest, so that

we can use those documents to impeach any arguments made by the insurers and rebut any argument made by the insurers, we are left with the testimony.

THE COURT: Okay.

MR. AZER: So, Your Honor, on the claim adjustment, we do think it's relevant. We think that it will contradict the insurers' position, we think it will basically show that they were aligned with us on how we created the TDPs.

But let's shift over to Mr. Plevin's other topics. And we can go topic by topic, Your Honor, because I think it's -- I think that's how you handled it in Imerys and I think it makes sense.

On the legal conclusions, Your Honor, you know, they object to topics 7 through 9, 11 and 12, and 20. You know, Your Honor, if you look at Imerys, I think you have to look at all of them, right?

So, Your Honor, do you have Exhibit 7 to the insurers' brief? It's at -- so it's Docket Number 7206-5, and I direct you to page 31 of 40.

(Pause)

THE COURT: Okay. What page number is that of the transcript?

MR. AZER: It is page 240-241.

THE COURT: Okay.

MR. AZER: So, Your Honor, this exact same issue

actually came up in Imerys.

If you look at Ms. Frazier's argument starting at line 15 on page 240, and I'll read, "Okay. So, number 7 and 8, this is kind of the core of the dispute. Reasons that you contend the plan is not insurance-neutral."

She goes on. And the court then states on page 241, lines 5 through 7, "I think that's fair game and, if it's limited and not legal conclusions, I think it's fair game."

Your Honor, if you look at our topic number 7, it's the exact same thing, their contentions on whether the plan is insurance-neutral. We are entitled to understand the factual predicate and only the factual predicate to their objections and contentions as to the plan. If there are factual issues, just like in Imerys, we are entitled to investigate that and that is what topics 7 through 12 seek.

Good faith is inevitably a factual issue, right? If they think we are not acting in good faith, they have to identify the facts and the policy provisions that they think we are violating. We should be completely entitled to that, consistent with Imerys.

The same thing with regard to -- I'll drop to the lack-of-information arguments, which are topics number 17 through 18, 21 through 24. So those topics, Your Honor, you can find it on -- in the Exhibit 2 to the insurers' motion, on page 14 of 16 of Docket Number 7206. 17, 18, 21 through 24

deal with the liquidation analysis and feasibility of the plan. All we're asking for is not just communications, but to the extent that the insurers have facts relating -- any analysis of the feasibility of the plan or the liquidation analysis, we should be entitled to it, just like insurance neutrality. Just like in Imerys, we should be entitled to that information.

Now, Your Honor, Mr. Plevin I think talked about Zurich, and Zurich noted it didn't have any communications. To the extent that these insurers don't have information and are willing to represent they have no independent facts, we are willing to stipulate to waiving topics. So that is -- we are not trying to create depositions for the purpose of depositions and we're happy to work with the insurers to stipulate as to certain facts if they don't have any. But, absent that stipulation, the insurers should be required to produce a witness that talks about the factual predicates for their contentions or, alternatively, if it's expert testimony, tell us it's expert testimony, and we'll go from there and see what they rely on.

For those reasons, Your Honor -- I think I've covered all the topics addressed in the motion to quash. If Your Honor has any questions, I'd be happy to answer them.

THE COURT: No, I don't think so.

MR. AZER: Thank you, Your Honor.

THE COURT: Thank you.

Okay. I'm sorry to do this but, as I announced on Wednesday, I've got a work commitment from now, then I'll be back at 1:45. So we'll take this back up at 1:45. My apologies. I would prefer not to disrupt the argument, but I have to.

So we're --

MR. PLEVIN: Your Honor, should we just pause our Zoom feeds or should we --

THE COURT: I think you can --

MR. PLEVIN: -- reconnect --

THE COURT: -- I think you can do that.

Thank you. We're in recess.

COUNSEL: Thank you, Your Honor.

(Recess taken at 12:10 p.m.)

(Proceedings resumed at 1:54 p.m.)

THE COURT: This is Judge Silverstein. We're back on the record. My apologies, my meeting lasted a little bit longer than I thought it would, but we're back.

So let's pick up from where we were. Mr. Azer, I believe that you were -- you had finished your argument, correct? Okay.

Let's go with Mr. Christian.

MR. CHRISTIAN: Yes, Your Honor. Can you hear me all right?

MR. CHRISTIAN: Thank you. I don't mean to go out of order, I just have a few remarks on behalf of my client, Great American, in response to some of the things Mr. Azer said, and I'll do that now or I'll wait until an appropriate time in the schedule.

THE COURT: Well, I also see I have Ms. Grimm. Who else will I be hearing from? And Mr. Moxley.

Well, Ms. Grimm may be interested in hearing what you have to say, so why don't you go ahead.

MR. CHRISTIAN: Okay. Thank you, Your Honor. I'll try not to be repetitive of anything that's already been said, but I do want to address the arguments you've heard from the standpoint of Great American.

We've been told by the plan supporters that they're going to prove to you at the confirmation hearing that these are a scientific TDP, they are science-based, and what I understand them to mean by that is that they're based on Boy Scouts' historical experience, that's what they're trying to prove. Now, we don't think that has anything to do with Section 1129 of the bankruptcy code; rather, they're going to try and prove that to you because it's in their insurance-related findings. We don't think that's appropriate, we don't think the Court should make those findings, but they haven't withdrawn them, they haven't waived that condition to plan confirmation, and so that's the issue that we're disputing.

Let me give you some context about how my client fits into that puzzle. We are an excess carrier that issued policies in some of the years of the early 2000s and in some of the years of the 1990s. We sit above a million dollar SIR, we sit above a primary carrier, and so we've encountered very few sex abuse-related claims against Boy Scouts over the years. There are occasions where we've been asked to contribute to a settlement of a claim that reached into our layer, but we were not, as you heard argued this morning, involved in the handling of Boy Scouts' claims. To the extent you could call anything we did as being involved in handling and maybe, if you use a broad definition, it would capture what Great American did, it was for a very small and non-representative subset of the claims.

Now, Mr. Azer's remarks about the insurers being on daily calls and so forth may or may not be true with respect to a company like Hartford that covered decades where there were lots of sex abuse claims and where it's a primary carrier, but that can't be said for my client and that can't be said for lots of the other insurers who are the subject of these 40-plus deposition notices.

So I make those remarks because I think folks in this case have tended to paint with a very broad brush. I certainly don't think the discovery sought from my client on this subject aids in the findings you're being asked to make

about the supposedly scientific TDPs based on Boy Scouts' historical experience. And even if there were some tangential relationship to those findings -- and I don't think there is, I don't even understand the logic of how the few claims that we were asked to contribute to at the excess layer would be relevant to that inquiry, but even if we're tangentially related, the idea that we're going to go through years and years of files, make a witness available and have not only our client's preparation and professional fees, but multiple estate representatives with multiple lawyers and multiple other insurers dialing in or what have you, in the midst of a very truncated and break-neck schedule -- we have lots of other witnesses to get through and we're going to turn very quickly to expert discovery -- it just strains the idea that it's proportional to the needs of the case.

And I do want to emphasize that point I just mentioned about the experts. It strikes me that the debate, if we have to have one at the confirmation hearing, about the supposedly scientific TDPs, is more of an expert case, right? I mean, there's going to be the facts about what Boy Scouts did and then there are going to be experts, probably on both sides, disagreeing with one another about how the TDPs match with that experience or do not match with that experience. We may also have expert testimony about whether it's reasonable or unreasonable. You know, we'll see how the case unfolds,

but the idea that we're doing more than 40 insurance company depositions with individual claims handlers to address what's really at the confirmation hearing going to be more of an expert issue, and we're going to take time away from our work in November and December and over the holidays where we should be focused on those issues to engage in what I regard as something of a sideshow, really doesn't make any sense to me.

So I'll just -- I'll conclude by returning to the point that we think the findings that you're being asked to make are sort of a la carte and unrelated to the requirements of Section 1129. For that reason alone, we don't think you should be allowed to make them. But, if you're going to be asked to make them, then we ought to focus on what they're arguing to you and not things about what my client contributed to in the 1990s on one particular claim.

Thank you.

THE COURT: Thank you.

Ms. Grimm?

MS. GRIMM: Thank you, Your Honor. And I see Mr. Azer has his hands up, I don't -- hand up -- I don't want to jump in front of him if he had a direct response to Mr. Christian.

THE COURT: No, that's okay. I'm going to hear from everybody once and then we'll go back.

MS. GRIMM: Great. Thank you, Your Honor.

Your Honor, Emily Grimm from Gilbert LLP, counsel for the FCR. As I noted earlier, the FCR filed an opposition to the insurers' motions to quash and a cross-motion to compel the production of claims handling materials. We filed both together since the underlying legal issues were the same and, in light of that, I think it might be most efficient to address some of the points raised by Mr. Plevin and Mr. Winsberg and Mr. Christian now, then address at the end a couple of procedural issues that the insurers raised specifically with respect to our motion, but I defer to the Court on your preferred approach.

THE COURT: No, that's fine.

MS. GRIMM: Your Honor, I heard Mr. Plevin and Mr. Winsberg raise two key points this morning in support of their motions, and the insurers raised those same arguments in their opposition to the FCR's motion to compel. They say that the debtors already have all the information they need to prove up their case and that insurer claims handling information isn't relevant to confirmation in any event.

Our response is the same with respect both to depositions and to documents. The insurers who defended and paid the abuse claims prepetition have relevant information regarding the claims evaluated by that insurer. And to the extent that insurer contends that the TDPs do not reflect prepetition practices or that they're otherwise unreasonable,

collusive, unfair, all words that the insurers have used in their disclosure statement objections and in hearings at various points in this case, documents and communications from that insurer regarding those practices are going to be crucial in rebutting their arguments.

The insurers just should not be allowed to advance arguments like this while withholding any evidence disproving their arguments and demonstrating that they either agreed with and approved of the debtors' approach, or that they independently used the same factors and approach and, therefore, by definition, viewed them as reasonable and appropriate for in-house purposes.

THE COURT: I'm not sure --

MS. GRIMM: And to be --

THE COURT: -- that correlates and that's what I'm trying to do. So let's say one -- and we just heard one of -- let's say Great American in 1990, okay, however many years ago is that, right? Twenty one -- thirty one years ago in 1990, Great American, in the context of the number of outstanding claims at that point in time decided to accept or not object to a recommendation by the debtor, what does that have anything to do with what's happening today?

MS. GRIMM: I think it has something to do with what's happening today if Great American stands up after all those years and says we don't agree with these values, we

don't agree with these scaling factors, they are unreasonable, inappropriate, unfair, call -- you know, use whatever adjective that you want. You know, we have offered with the debtors and Coalition to not take a deposition if the insurer at issue doesn't have any evidence, aren't challenging these things, but we have yet to hear assurances on that front.

I hear talk of experts, and you touched on this a little bit earlier, but what are these experts going to be relying upon? Are we going to see -- are these experts going to be relying upon documents or information, internal documents and information --

THE COURT: No.

MS. GRIMM: -- provided by insurers?

THE COURT: No, they're not. That's not --

MS. GRIMM: Then I think we need to --

THE COURT: -- going to happen. It's not going to happen that an expert is provided documents from the insurance company to make its analysis if those insurance companies have told me, which they have, that their witnesses -- that their employees and their documents are not relevant and they're not going to use them. That's not going to happen. If that were to happen, that would be different. If an insurance company were to provide an expert with internal documents, then they're clearly discoverable, but that's not going to happen.

MS. GRIMM: And I think that's going to be helpful

in continuing to narrow our dispute. I'm not sure we have received those assurances until today during this hearing, and so I am pleased to hear that.

I think another way to look at it is that the debtors have the burden to prove good faith under Section 1129(a)(3), so the debtors are preparing to put on evidence that their plan was proposed in good faith. The insurers are saying that the plan was not proposed in good faith and they are pointing to the TDPs in support of that agreement.

Now, if the evidence shows that the TDP reflects the insurer's own procedures, even if it's Great American's procedures from 15 years ago, I don't see how that insurer can credibly tell you that the plan was not proposed in good faith on that basis except with respect to --

THE COURT: From 15 years ago?

MS. GRIMM: -- (indiscernible) scaling factors.

THE COURT: I don't understand why that's relevant to anything, what an insurer thought 15 years ago about maybe five cases.

MS. GRIMM: If they are making it relevant to their arguments by challenging, then I think -- I would submit that it is relevant.

THE COURT: So let me ask you about that, because here's what I wrote down, that you say, the FCR argues that the insurers have put the values and claim evaluation

protocols in the TDP directly at issue in plan confirmation, and then you say, here's how. They say the value and evaluation protocols in the TDPs are not, quote, "fair and reasonable," unquote. But isn't that the finding that the debtors have put at issue; not the insurers, the debtors have? And, therefore, the insurers might respond, but the debtors have put that at issue.

MS. GRIMM: If you would take a look at -- I'm sure you might not have this one handy, but the insurers' disclosure statement objections, which, as an example, you could find at Docket Number 6052. They are not just arguing reactively to these findings, they spend the bulk of their brief affirmatively attacking the TDPs and arguing, for example, that the TDPs violate Section 502(a) and 502(b)(1) of the bankruptcy code because they purportedly permit payment of claims not compensable in the tort system. They argue, as we all know, that the plan and TDPs are collusive and not negotiated in good faith under Section 1129.

And, Your Honor, these are the types of arguments they've been making throughout the bankruptcy, even before the findings were referenced in the plan, and in fact that's the reason the findings are necessary to the plan. They're in defense --

THE COURT: Isn't it true -- isn't it true that these claims will not ever be adjudicated under 502? I mean,

that's just true.

MS. GRIMM: I leave that to the insurers who raised the argument. I'm getting out of my insurance mode into the bankruptcy world here, but I am just repeating the objections that the insurers have raised to date to show that they're not just saying that these confirmation findings are unnecessary or inappropriate. They are not just reacting to the findings, they have been making affirmative arguments about the validity of claims coming in. You know, they've been claiming that the proofs of claim were fraudulent from day one.

And so I don't think it's completely accurate to say that all of these arguments stem from what the debtor has done and the debtor's findings. I think that findings in fact were defensive and reactive to what the insurers have been arguing throughout the course of this case.

THE COURT: Well, maybe, but I don't -- but I don't -- well, you've heard my view on the findings, but as I'm reading -- and I've got four things that I've quoted from your filing -- that, yeah, the TDPs violate 502(a) and 502(b)(1), that's -- I'm not sure how that has anything to do with what the insurance companies did or didn't do prepetition with respect to these claims.

This, combined with the RSA's requirement that the debtors obtain a finding in any confirmation order that all allowed claim amounts and the procedures leading thereto are

fair and reasonable, amount to an attempt by the debtors and abuse claimant representatives to bind the debtors' insurers to pay over 235 million in liability for likely invalid claims that are not subject to review by anyone, ever, not even the abuse claimants' representative's hand-picked settlement trustee. That has nothing to do with what the insurance companies did pre-bankruptcy.

So that's what I'm trying to understand, as well as the arguments about proportionality, cost, expense, what we're doing here with 40-some-odd depositions when we've got a whole host of other things that have to be done in the next two months. So what's the value added -- let me ask it that way -- what's the value added by taking these depositions?

MS. GRIMM: You know, once again -- and I'm not saying that we are using these depositions to -- there are certain other arguments raised by the insurers like who should the settlement trustee be, et cetera, that obviously claims handling practices, they're not relevant to, I don't think anybody is claiming that they are.

But, again, you know, we have what the insurers have argued, the findings are in the plan, they are required for the plan to be confirmed and, if the insurers are going to stand up and make an argument that the TDP is unreasonable, then we're entitled to see what information and evidence they have to support that.

THE COURT: Okay. And you think that's going to come from their witness -- their employees who did handling 20 years ago?

MS. GRIMM: I think they have their own internal documents, communications, manuals, procedures. To the extent they have things that are not duplicative of whatever the debtor has produced, we can stipulate or do whatever we need to do to, you know, not make them duplicate such productions, unless they can tell us they don't have it, which some of them have not, I think they have to produce it.

THE COURT: Okay.

MS. GRIMM: I believe, Your Honor, those were all of my points on the merits. I'm happy to address the procedural issues with regard to our motion now or I can wait until the very end when people have had a chance to speak.

THE COURT: What are the procedural -- no, go ahead. What are the procedural issues?

MS. GRIMM: Sure. So the insurers raised two procedural issues with our motion, one was that the FCR cannot move to compel these documents because they didn't ask for them. I think the requests themselves make clear that's not quite accurate and we did file a sample of those requests as a supplemental exhibit at Docket Number 7352. Admittedly, we just did it today due to a miscommunication about the filing and I apologize for that. So I can certainly screen-share

them, pull them up, if it would be helpful for Your Honor to see, but I can also just paraphrase or describe them, if you'd prefer.

THE COURT: You can just paraphrase, but what you're telling me is you have asked for this information?

MS. GRIMM: So what you would see is that we sought interrogatories seeking targeted information regarding the insurers' evaluation of the abuse claims and our document requests seek all documents referenced in response to those interrogatories.

The reason we didn't also add another slew of document requests specifically parsing out claims handling materials is because we thought it was duplicative of the request I just described. And, frankly, we also didn't do it because the Coalition had issued exactly those requests raised that way, and so we were trying not to reissue the same requests over and over again. But if the insurers truly believe that our document requests would not have encompassed anything related to claims handling or if the Court would find it more appropriate for the Coalition to file another joinder brief to our motion, we can certainly talk to the Coalition about that, but it just seems unnecessary to us given the volume of discovery briefing the Court is already dealing with.

MR. CHRISTIAN: Your Honor, may I briefly be heard

on that specific procedural point?

THE COURT: Let me ask Ms. Grimm, do you have anything further?

MS. GRIMM: There's a second procedural point, but I can address it when Mr. Christian is finished or --

THE COURT: No --

MS. GRIMM: -- whichever way --

THE COURT: -- let's -- I'd like you to finish, Ms. Grimm.

MS. GRIMM: Okay. The second one is that the insurers argue that we did not give them appropriate opportunity to meet and confer on these issues. I can say, Your Honor, we would love to come to a global resolution on this issue, we would have preferred not to bring this dispute before you today. But, as of this morning, only four of the 22 insurers that we invited to meet and confer on Monday had even bothered to respond, which, frankly, was not that surprising because our request and our motion came on the heels of several meet-and-confers we had had with respect to depositions on claims handling where the insurers had made their position on the legal issues very clear. Our motion also came on the heels of the insurers' motion to quash with -- again, quash with respect to the same topics, claims handling.

And so, again, if the Court would find it more

appropriate, we can certainly withdraw the motion without prejudice and re-file it today or Monday, since we've given the insurers five days to respond. But, again, since the insurers filed their motions to quash on Sunday and since the Court was going to hear legal arguments on these issues today, and we had had many conversations about our views on these issues, it just seemed most efficient and appropriate to argue everything at once.

THE COURT: Thank you.

MS. GRIMM: One more note, Your Honor, I'm sorry. I do want to be clear that just by only hearing from a handful of insurers, we did affirmatively reach out to the debtors to obtain their prior communications with the insurers regarding the specific topic of claims handling manuals, and that's why we were able to unilaterally withdraw our motion as to -- I forget what the list is -- I think maybe five insurers, based on representations made in those communications.

So we have been working to narrow the scope of the dispute, but I think this is about as far as we could get and, given that depositions are scheduled to start imminently, we just couldn’t sit on our hands anymore.

That's all I have, Your Honor. Thank you.

THE COURT: Thank you.

Mr. Moxley?

MR. MOXLEY: Thank you, Your Honor. Good

afternoon, Cameron Moxley of Brown Rudnick on behalf of the Coalition.

Your Honor, we've heard a number of representations today about potential discussions that have been happening and that are ongoing. I note that the insurers' motion itself in footnote 1, that's at Docket Item 7206 at footnote 1 references their ongoing discussions. Your Honor, what I'd like to do, if it works for the Court, is just walk through a bit -- and I'll be very, very brief, Your Honor -- in terms of the way the Coalition approached the topics that it noticed for deposition and what its approach was, and then come back to the end, Your Honor, and sort of tie that together with what occurred and (indiscernible) forward.

What I -- let me just start then, Your Honor, if I could, Your Honor, with the Coalition's sort of discovery approach here. What we've sought to do is just discover facts -- and it's just facts, it's not legal conclusions or contentions -- that the insurers have that suggest that the TDPs are not consistent with the debtors' historical practices or not fair and reasonable.

How do we go about targeting that discovery in the most efficient way? What we did, Your Honor, is we tried to be very constructive and utilize all the tools of discovery that are at the parties' disposal. In particular, we utilized requests for admissions, interrogatories, and the 30(b)(6)

topics in an interlocking way, Your Honor, to try to narrow the scope of issues as we much as we could.

What we did is we asked insurers -- and I note, Your Honor, we were targeted as well on who we served. In footnote 1 of our letter, Your Honor, you'll see who it was that we targeted and we targeted ten, and we posed to them questions asking them to admit certain things about the TDPs, and we were very specific and precise in those questions.

For example, we asked the insurers to admit that the claims matrix values are consistent with the BSA's historical settlement practices. Now, if an insurer, Your Honor, admitted that, then we understood that the insurer -- who, unlike the Coalition, did not exist at the time -- the insurer, based on its experience and evidence available to it, had no evidence that those values were inconsistent with historical practices. That effectively ended the inquiry for us on that issue if an insurer admitted that position. If it didn't, that's fine.

What we then said is, here's an interrogatory, if you didn't admit that the claims values, for example, were consistent with the debtors' historical practices, what is the factual basis for you not being able to admit that, and did you have claims handling experience with them that said in the -- and just by way of example, Your Honor, you know, the claim and the TDP is dealt with at a certain value, let's just say

100, and your practice is that, no, no, that was always at five, fine, we want to discover that now. We don't want to discovery that at the confirmation hearing, so lay that out for us, if you could, in response to this interrogatory.

And, no surprise, the insurers did not meaningfully respond to the interrogatories, and so what we did is we propounded 30(b)(6) notices that said, to the extent that they denied that a particular -- you know, like I -- Your Honor, if you look at the RFAs, which are appended as Exhibit 2 to the insurers' motion, so they are before the Court -- if you look at those RFAs, we ask very specific, targeted questions. And, as we said, if you denied that, then we'd like that to be the subject of a 30(b)(6) deposition, the basis for your denial.

These aren't legal conclusions or contentions, Your Honor, these are facts. There's no question in our mind that these are factual questions, how it handled claims, what criteria the insurers relied on, what caused the BSA to address such claims in the tort system at higher or lower values, what informed that. These are all factual issues that we were seeking to understand from the insurers. And, like I said, if along the way there were particular ones that they admitted, then we wouldn't have to ask any questions about those topics.

The insurers' own authority, Your Honor, as we put in our letter, supports that the way in which we framed these

questions is a proper way of doing it. I just direct Your Honor to the State Farm case that we cited in our letter and that the insurers relied on.

We should note too, Your Honor, that the Coalition -- I just want to correct the record here on this -- the Coalition did meet and confer with insurers, we met with them and conferred with them on November 5th. Their contention at that meet-and-confer was essentially that our topics called for a legal conclusion. Just as I did just now in presenting to Your Honor, I discussed with the -- I personally discussed with the insurers in that meet-and-confer how we were actually seeking to understand facts and the approach we were taking and why we were taking it the way we were, to be as efficient as we could.

And I specifically asked if any insurer, you know, during that meet-and-confer on November 5th, if any insurer intended to refuse to make a designee available at all or could we continue our discussions, and no insurer advised me on that date that they intended to not make a designee available. It was not until nine days later when this motion was filed.

Your Honor, but what we've heard today -- so that's the -- I just wanted the Court to understand the approach we've taken. We've tried to be as targeted as we could and to narrow issues along the way. What we've heard today, I think,

from Mr. Plevin and the insurers, Your Honor, is that they are not planning to call any fact witnesses at the confirmation hearing. Your Honor asked the question that I and a number of others, I think, had immediately, which was how does that play into the expert reports that will be provided. I'm not sure we heard the same thing from Mr. Plevin and from Mr. Christian.

I think what we heard -- and I am loathe to put words in lawyers' mouths, but they'll come back and tell me if I got it wrong -- I think what we heard from Mr. Plevin was that their expert would be basing things on, you know, the debtors' information alone. I think what we heard from Mr. Christian, essentially, was that their experts may speak to the facts as their insurance company understood them.

So we'll see how that plays out, you know, Your Honor. What I would suggest, though, is that there may be a path forward, as you heard from, I think, all parties on different sides of this issue, depending on what the insurers are willing to stipulate to with respect to what they will or will not put into evidence either via fact witness or an expert witness.

And so I would -- I hope it's constructive, Your Honor, that I make the suggestion that we don't think it's appropriate for the motion to quash to be granted given that these (indiscernible) are continuing. So we would urge the

Court not to rule and grant the motion for that reason. We think that, for all the reasons we've stated today and as we stated in our letter, the motion should be denied.

But of course, if Your Honor denies the motion, that won't stop us from continuing discussions. If Your Honor grants the motion, it will have an adverse effect on the willingness of parties to talk, obviously.

So I hope that was helpful, Your Honor. I'm happy to answer any questions you may have.

THE COURT: Well, are you suggesting that if we get clarity around the issue of whether the -- of whether the insurers -- and that's too broad a brush, okay -- an insurance company is going to be introducing their own factual evidence at confirmation with respect to the TDPs, the values, the matrices, et cetera, and whether -- and if they're not -- and if they're not going to be providing their internal factual information to an expert, but simply relying on the debtors' information, then are you saying you don't need these depositions, is that where we're going?

MR. MOXLEY: I think what I would say, Your Honor, is that if a particular insurer was willing to stipulate that the TDPs are based on the debtors' historical settlement practices, then our issue is resolved from the Coalition's perspective.

THE COURT: Yeah, but that's a different issue. I

mean, you know, admitting to something versus not knowing the facts are very different, it's very different. It's not, you know -- not admitting doesn't mean you're denying and it doesn't mean you know the facts. So I think it's different and --

MR. MOXLEY: Yes, and I think --

THE COURT: -- I don't see them agreeing to that. It was a thought. I just wanted to make sure I understood.

MR. MOXLEY: Yes. And, Your Honor, what I would say is -- maybe I wasn't as clear as I should have been on this -- let me just say, from the Coalition's perspective -- I don't want to speak for other parties -- from the Coalition's perspective, we are open to having continued discussions with the insurers to understand precisely what it is they do and do not plan to put into evidence, whether via a fact witness or an expert witness through the expert report or through expert testimony. Today was the -- I mean, you know, you heard from Mr. Plevin that the insurers had a call yesterday and he reported that on this -- that's the first that we, the Coalition, have heard that information.

And so what I'm suggesting to Your Honor is that I think that discussions can continue and are potentially productive to either obviate the need for some of the insurer depositions, depending on what insurance companies are doing. And I agree with you, Your Honor, that the insurance companies

take different positions, so there may be some insurers that are willing to stipulate to certain things and other insurance companies are not. And so there may be a way to reduce the number of depositions that go forward if these talks are allowed.

Thank you, Your Honor.

THE COURT: Let me ask you this -- and I don't think I've asked this question yet of anyone -- when you -- when the Coalition issued their deposition notices, did you issue them to all insurers, primary insurers, excess insurers? Who did you issue them to?

MR. MOXLEY: No, we didn't issue them to all insurers, Your Honor. We issued them to ten insurance companies. They're identified in footnote 1 of our letter, which is Docket Item 7312.

And the approach we took, Your Honor, was to ask insurance companies who had been heavily involved in the case -- so I'm not suggesting that they necessarily were all primary or that that was the driving factor in who we chose, it was more to understand sort of the insurance companies that have really inserted themselves into the issues in the case, what is their position, what is their evidence, if any, that suggests the TDPs are inconsistent with historical practices.

And, Your Honor, just to put a finer point on this, you know, the way our RFAs were structured and the way that

they've been built into the 30(b)(6) topics, the idea was to understand if a particular insurance company had any evidence that was contrary to or that suggested that the values in their experience were different from the TDPs.

So Your Honor is quite right to correct me and to say that maybe I went too far in what we would need in a stipulation, but if there was something that, for instance, an insurance -- and I recognize, Your Honor, that I may be sort of negotiating a stipulation in the middle of court and I don't want to be inappropriate about that, but since you asked what will be constructive -- you know, if there are ways in which a particular insurance company could stipulate to what information it has. For instance, we don't have any information -- we, Insurance Company X, do not have any information that suggests that the values are different; we still have issues and objections to the TDPs, but we don't have any evidence, that may obviate the need for a deposition because we don't have to be concerned then that there's going to be evidence in the expert report that we never got a chance to ask questions about or discover.

THE COURT: Okay. I'm still struggling with the idea that one insurance company -- and, particularly, perhaps an excess insurance company -- who had minimal experience with the debtor, would know what the debtors' historical experience was and/or would know whether they had any evidence that was

contrary to it, or would -- and I had a third or, I lost it, but --

MR. MOXLEY: Well, Your Honor -- I'm sorry, Your Honor. Well, on the first of your two ors, you know, they may not know. And that's part of our point is we just want them to say, we don't have anything contrary. On the second, you know, what they --

THE COURT: Those are two different things. Those are two different things that require a whole lot of different diligence, let's put it that way.

MR. MOXLEY: Right. But, Your Honor, that goes to the point, though, of whether or not we should have an opportunity to depose the person or the company.

THE COURT: And I guess I'm trying to figure out the -- quite frankly, the value of that information, even if somebody -- even if some insurance company 20 years ago has, you know, helped -- paid on five claims, what's the worth of that versus they're having to go figure all of that out, and the time and expense for both the insurance company and, quite frankly, the estate, and given the time period that we have and what has to be done?

MR. MOXLEY: I think the Coalition agrees with Your Honor wholeheartedly, but that is the balance. That's what we're saying, I think, is that if an insurance company is not willing to tell us, they're not going to bring to bear the

experience they had in those five cases in 1990, they should tell us they're not going to bring that to bear at the confirmation hearing, if that's what it is. If they're not willing to say that, we should have an opportunity to question the company about that experience and how they plan to use it.

So it's a balance, I think, Your Honor, and if -- so I think we shouldn't be hamstrung by not being able to question the witness if they're not also willing to say I'm not going to bring that today.

THE COURT: Okay. And I take it the Coalition has been able to see the information that the debtor has with respect to its historic claims handling procedures?

MR. MOXLEY: No, Your Honor, we have not. And we are, just as the other parties, a part of the discovery process now. We -- I don't want to inappropriately get into mediation issues, but we don't have any special access.

THE COURT: Okay.

MR. AZER: Your Honor, can I provide some insight into one issue that was raised?

THE COURT: Mr. Azer.

MR. MOXLEY: Thank you, Your Honor.

THE COURT: Thank you, Mr. Moxley.

MR. AZER: Yes. Thank you, Your Honor.

I know one thing that you focused on is, you know, claims from 15 years ago, and I think that was based on Mr.

Christian's comments, and I just want to clarify a couple of points.

The insurers were paying out claims basically up until the time of filing. And so I actually looked at an exhaustive spreadsheet we have for Great American and the last -- the most recent one I can find that they paid is 2016. Zurich, for example, paid claims in 2018/2019. So we're not talking about claims that are truly historical from 20 -- 15, 20 years ago, we're talking about more current claims. That's point one.

And then, point two, Your Honor, we completely hear you about the proportionality point, and that's why the debtors are willing to limit the depositions to those insurers who actually paid to defend claims or paid indemnity amounts, which would significantly narrow the scope of the depositions.

THE COURT: Okay. So doesn't the fact that you can look at a spreadsheet tell me that you have all of the information that the debtors need to put on their case?

MR. AZER: So, Your Honor, the spreadsheet tells me they paid a number, but it doesn't tell me -- like, if we look at the TDP -- sorry -- when we look at the TDPs together, right, there are criteria for determining that it's a valid claim. So what the spreadsheet tells me is on -- I think it was March 21 of 2016, Great American made a contribution to an abuse claim, but what it doesn't tell me is, when Great

American made that contribution to that abuse claim, did it consider the same factors we consider in the TDPs, which is identity of abuser, connection to Scouting, date of abuse, location, it doesn't say that.

So that's the piece that we're really talking about is not the quantifiable numbers -- yeah, we have the quantifiable numbers, but what we don't have is saying, hey, claim adjuster, you thought about the same things we did. Does that --

THE COURT: And what if they didn't --

MR. AZER: -- help answer the question, Your Honor?

THE COURT: -- and what if they didn't, then should I find the TDPs' criteria are not good, is that -- that seems to be the flipside --

MR. AZER: No, I think --

THE COURT: -- of this.

MR. AZER: Your Honor, I actually don't think that's the case. You know, we obviously have our criteria and we're saying it's consistent with that, but if the debtor -- if the -- I'm sorry, not the debtor, apologies, Your Honor -- if the insurers basically are verifying that they looked at the same thing, we don't understand how they can basically take the opposition position now when on a prepetition basis they were agreeing with what we did.

THE COURT: There could be any number of reasons

for that. Okay. Thank you.

MR. AZER: We understand, Your Honor.

THE COURT: Thank you.

Mr. Rizzo, you're a new face here.

MR. RIZZO: Good afternoon, Your Honor, Louis Rizzo for Travelers Insurance Company and related entities. Thank you for allowing me to address some of the points raised most recently and provide some context.

Travelers is one of those excess carriers that participated in payment of two claims, one was 26 years ago, the other 28 years ago. And not only is that the history of claim payment known to the debtors, that was disclosed in our discovery answers, and yet, with that information in hand, we received these same -- not just 30(b)(6) notice, but also an individual claims handler notice for the claims handler involved in those two claims decades ago.

And I can't help but recall as I sit and listen today to Your Honor's admonition when this compressed schedule was put in place where all of us, all parties were admonished to think -- be thoughtful about discovery requests, be mindful of the schedule, and think about what's needed -- needed -- for each party's burden.

We've seen shifting sands of argument here from the parties, including filings, Your Honor, that have taken place during this hearing relating to these matters in dispute, it's

hard to understand how these issues can arise in the face of the knowledge of not just the body of information that is available to all and in the possession of the debtor, but we played out clearly in our discovery responses. It seems to me there has been no effort to discriminate between what's needed and what's not. And so the notion that how an adjuster may have thought about whether he should agree to the requested funding for a settlement proposed by the Boy Scouts 26 or 28 years ago is necessary for the debtor to meet its burden is impossible to fathom.

There's a suggestion that they want to speak to the carriers that defended and paid these claims. Excess carriers without -- almost without exception, do not defend the claims; they have the right, but not the obligation to defend them. The Boy Scouts and perhaps their primary carrier defend those claims. That's the information that's potentially relevant to the analysis as the debtor and the plan proponents have framed it.

And with that context, Your Honor, we would urge the Court to grant our -- the insurers' motions to quash and deny the cross-motion to compel.

Thank you.

THE COURT: Thank you.

Ms. Marrkand, I have not heard from you yet on this matter.

MS. MARRKAND: Thank you, Your Honor. As I mentioned earlier, I represent Liberty Mutual. And you've heard Mr. Plevin and I think others talk about fronting policies. So I hate to get into the weeds on coverage like this, but under the fronting policies, Your Honor, as we've disclosed to the Coalition, the FCR, and the TCC -- of course, the Boy Scouts already knew this -- the Boy Scouts handled all of the claims, Your Honor, prepetition claims under the fronting policies. They selected defense counsel, they litigated the cases, they settled the cases, they took the cases to trial.

So I think I'm hearing then, Your Honor, that because Liberty Mutual didn't -- and we do have some excess policies, Your Honor, upper, upper, upper excess, we never even got notice of any prepetition claims under those policies -- so Liberty Mutual never paid a single dollar for the defense or indemnity of a prepetition abuse claim.

Number two, Your Honor, I'm a little -- I think it's very important here about when anyone makes a representation to you about what they have or haven't done, and the FCR said it served discovery. And it did serve discovery, Your Honor, interrogatories, all of which are identified in this letter, there are about eight of them, all of which go to prepetition claims handling. Those are interrogatories. There is a single document request, Your

Honor, about manuals or claims handling procedures from the FCR.

And when Ms. Grimm said a minute ago, Judge, this is just kind of empty procedural, we don't want to get caught in this kind of quagmire, because we could have just jumped on what the Coalition did. Well, actually, Your Honor, the debtors had moved for protection of claims manuals and that motion was ripe, and the Coalition and the T -- I think everybody joined them, the debtors withdrew their motion, Your Honor, as did the Coalition withdraw its joinder.

So, first, there was no discovery served by the FCR for claims handling procedures; secondly, the debtors, who initially moved for that, withdrew their motion, and Mr. Azer reported that to you. So we are now so attenuated from what really matters, which is the debtors prepetition claims handling practices.

And you might recall, Your Honor, Mr. Goodman told you on October 5th -- these are his words, Your Honor -- that you were asking kind of for a roadmap of what was going to happen on confirmation discovery and Mr. Goodman, a plan proponent, said that, "In terms of discovery, debtors' historical settlements and experience in the tort system is what is driving the discovery process. Debtors will prove the TDP values and factors are consistent with debtors' historical experience."

For us, Your Honor, Liberty Mutual, and as Mr. Plevin said a little while ago, we have no independent facts. What are we going to rely upon when we come before you? We're going to look at what the debtors have produced, we're going to look at what their experts say and what our experts say. Under no circumstances could we be hypocritical and put on a witness whom we haven't let be deposed, whether as a 30(b)(6) or a fact witness, and think you would ever allow us to do that, nor are we going to provide an expert with any information or documents on prepetition claims handling unless that too has been provided.

So it is difficult to understand right now, Your Honor, how any of this bears on what you are going to be dealing with and what the debtors have asked you to deal with.

And I would just make one final remark. When you asked Mr. Moxley does he have access to the prepetition claims handling, he's a plan proponent, Your Honor, the debtors do. It's the debtors' plan and it will be the debtors who are going forward.

So I think, Your Honor, you have asked a series of very surgical questions and I'm, in all candor, not sure that one of your questions that you put to the debtors' counsel or the FCR's counsel or the Coalition's counsel was actually answered, I think it was artfully -- they were artfully deflected, but if we need to say it again and confirm it in

writing, certainly, I can do that for Liberty Mutual. I know Mr. Plevin was authorized to speak on behalf of all of us. We have no independent facts. We're not putting on any fact witnesses, nor are we relying on any data.

And as I did note, when debtors initially sought a claims manual from Liberty Mutual -- and it's exactly what Your Honor has said -- does it mean that if a witness testifies that the TDPs are unreasonable, are not consistent with the tort system, therefore, your work is over? They would never admit to that.

This is about legitimate fact discovery in the context of this case, Your Honor, and I would respectfully urge that you certainly deny the FCR's cross-motion, at a minimum, and grant our motions, but if you need to, to ask your questions again to get straight answers.

I really appreciate the time to address you.

THE COURT: Thank you. Let me ask you a question, which then I'll ask -- I've got the three -- I've got Mr. Winsberg's hand up, Mr. Plevin, and Mr. Christian -- and when you address me, you can answer the same question then for me.

The gist of -- quite frankly, the whole gist of the argument, I think, that the -- I'll call them all the objectors to the motion for a protective order or to quash, their whole position is, seems to be boiled down to, well, what if an insurance adjuster has information or adjusted

claims in the exact same way the Boy Scouts did, then aren't we entitled to know that to -- I think what someone said was -- impeach the insurer's position -- they didn't say impeach a witness, but they said impeach the insurer's position.

What's the response to that?

MS. MARRKAND: I think, Your Honor, that is why it is the debtors' historical claims handling practices. We didn't pay any, so -- nor defend any. I'm somewhat in the bucket of the excess carriers.

THE COURT: Uh-huh.

MS. MARRKAND: So why could it possibly be that an insurer who paid -- it doesn't seem to matter, Your Honor, if it's ten claims or what the year was that those payments were made, how does that bear now on 2021 and the way cases are litigated in the tort system today?

Because what you will know, Your Honor, is -- and the Boy Scouts are going to admit this in front of you -- when they handled their claims, they considered the jurisdiction, they considered the judge, they considered the defense -- I'm sorry, the plaintiff's counsel, they considered the nature of the abuse, the severity of the abuse. And when Mr. Ogletree -- I believe he is the Boy Scouts' 30(b)(6) witness -- he's also going to talk, just as the Third Circuit did in Combustion Engineering, about liability. There has to be liability and injury that the Boy Scouts can prove.

I suspect -- I don't know, Mr. Ogletree hasn't been deposed -- but what an insurer did or a series of insurers did in the context of a handful of claims, or maybe Hartford more, I don't honestly know, how does that then, as basically what the debtors are saying is, we should be estopped, Your Honor, actually estopped from defending the TDPs -- or challenging the TDPs because in a certain context this is what insurance company did. So you will then be asked, Your Honor, to evaluate the claims handling for each particular claim, that's what that will devolve into.

So it is not -- and that's what -- I'm afraid I'm seeing some, you know, hide-and-seek here because we've heard a couple of -- we've heard a couple of statements. If you defended -- wait a minute, let me get it exactly right -- I think Mr. Moxley said, "If an insurer were heavily involved, inserted themselves into this case" -- I'm not quite sure what that means -- I have inserted Liberty Mutual into this case because I was invited to this proceeding as an insurer, so of course I've inserted Liberty Mutual into the case because we issued those fronting policies and excess policies, but it doesn't mean that I am precluded, Your Honor, from offering evidence relying on the debtors' documents, the debtors' testimony and their experts, from bringing that to the Court's attention and saying this is what they've just said, Your Honor.

Under what they're asking you to do is basically say I just want to play this out for trial. A witness testifies -- yeah, I didn't consider, for example, how many times this poor young person was abused. Therefore, Your Honor, does that mean in that particular case that you would -- since this is not in front of a jury -- you would estop that insurer and say, see, you didn't consider that in the Jones case? Whether it was 40 years ago, like Mr. Rizzo said for Travelers -- and I take Mr. Rizzo at his word that there must have been something recent, I believe he said with Great American -- that cannot be that the debtors, who have put this all before you, are basically giving -- this is the Faustian bargain they want, withdraw your complaints about the TDPs and we won't depose you.

And what you have rightly spotted, Your Honor, is that's not right. We don't have the burden here, they do, and we are trying to get the discovery that we're entitled to to see how we put forth our case. But you've heard Mr. Plevin say we're not putting up any fact witnesses, we don't have any independent evidence; we're not giving secret information to experts.

This all comes down to one issue, the argument of impeachment, and I think that is extreme and I think particularly, Your Honor, given the clock that we're under, it is, as Mr. Plevin said, completely disproportionate to what

this case requires.

THE COURT: Thank you.

Mr. Winsberg?

MR. WINSBERG: Yes, Your Honor. Can you hear me okay?

THE COURT: I can.

MR. WINSBERG: Just real briefly. I think Your Honor hit on the head, Mr. Azer was able to on the tip of his fingers in the middle of this hearing, pretty impressively, pull up information, you know, on what carriers had paid in settlements. They have this information, they're not contesting it, it's at his fingerprints; they produced it. There is a document production and in there is a spreadsheet, a pretty voluminous spreadsheet, I'm told it's over a hundred columns, that has all this information in it. So they have the information.

As our clients, the Allianz insurers, are excess, we produced a redacted loss run, among other things, so they have our information already on those settlements. And what they're really trying to get at and trying to argue in relevancy for Your Honor is the sausage-making -- the idea that somebody's sausage-making and how they made a decision back like, you know, five, ten, thirty years ago, you can take the pick, is somehow relevant or proportional to determine whether these TDPs, which the debtors have put at issue with

their proposed findings and order, are appropriate or relevant or proportional, and we don't think they are.

And so we would respectfully submit that the Court should, you know, grant the motion for protective order, that the claims information, you know, is not relevant or proportional in light of your decision in Imerys and we think you got it right there.

And we'd also note, you know, one last point on the FCR's motion. You know, look, everybody needs a little bit of grace in this case and we get it, it's such a busy case, but they did file their supplemental paper in the middle of a hearing and, you know, we don't really think that's appropriate either. But, in any event, we do think you got it right in Imerys. They have the information and what they're really asking for is information that they could have tried to get from us if they had just granted -- consented to our motion for stay relief, but that's not what they chose to do and how they want to do it on this compressed time frame.

So we respectfully request Your Honor grant the motions and thank you for your time today.

THE COURT: Thank you.

Mr. Christian?

MR. CHRISTIAN: Thank you, Your Honor. David Christian, again, for Great American.

I'm first going to address the question you posed

to all of us, and then I just want to hit on a couple of more technical points for the sake of record and to make sure there's no confusion for Your Honor or later.

In response to the question you posed first to Ms. Marrkand, I think Your Honor had already sort of gotten your hands around what is the appropriate response and that is, let's say a claim that was first presented to us in the early 2000s for abuse that allegedly took place in the 1990s, you know, it involves a particular judge in a particular jurisdiction and there's a settlement demand that the debtor wants to accept, and we're being asked to contribute, you know, a share to it. In other words, it's not our settlement, we're not paying the total value of it, we weren't involved in the defense of it, but we're just being asked to resolve a particular case. And our insured says, you know, it's the one case we've got right now that's really got us worried and we'd like you to contribute. And this is all, of course, hypothetical; I'm not disclosing any particular details about a specific case.

Our decision to either go along with or not contest or not file a declaratory judgment action against our insured with respect to that case is a decision that has no bearing whatsoever on the findings this Court has to make under Section 1129 of the bankruptcy code. It also has nothing to do with how one would reasonably and appropriately and fairly

address 80-some-thousand claims that are being presented.

We have gone from a world where I think it was something like 250 cases, maybe a thousand or slightly more than a thousand of potential claims, to over 80,000 non-duplicative claims, and how you handle that fairly and reasonably is totally unrelated to a question of will you contribute to this particular settlement in this case that we've worked up that maybe is trial-ready, that is going to have defense costs associated with it, maybe in the millions of dollars, right? So they're not just apples and oranges, they're fruits and vegetables; they're not even in the same category.

And so, you know, I think that's the response to Your Honor's question and I think Your Honor had sort of gleaned that earlier in the hearing.

Now, on two more technical points, I guess I wanted to return briefly to the -- FCR's cross-motion with respect to the procedural arguments that were addressed by Ms. Grimm. Just so the record is clear and so Your Honor understands what we're dealing with, I want to lay out exactly what happened.

FCR filed a cross-motion on Monday in which they admit that they did not meet and confer prior to filing the motion, they said they could meet and confer after they filed the motion. Then, late last night, they withdrew the motion with respect to some carriers, including Mr. Plevin's client,

who authored the response to their cross-motion, so that presumably he couldn't argue it today? I really don't understand the decision-making on that, but that happened late last night.

And then, today, during the hearing, after the Court had already been convened for more than two hours, they filed a proposal of what they would serve on us by way of document requests if they were allowed to do so. Because, as you've already heard, they didn't actually request these documents, the FCR didn't.

And why is all that technicality significant here? Well, because there are some carriers who never got any document requests from the FCR. My client did, so I can't make that point. But if my client had been asked to meet and confer about this cross-motion before it was filed, it's possible we would have resolved it. Indeed, we resolved that issue with other parties who have served document requests on us. So the order and the timing makes a difference.

And so here we are in a position where the FCR has cross-moved about something it never sought, that it tried to piggyback on parties with whom we've resolved issues through the meet-and-confer process that is supposed to happen before a motion gets filed just so we don't get caught in the situation with the FCR seeking documents that it never sought in the first place during a hearing.

So I do think the procedural issues are an independent basis to deny the FCR's cross-motion. I think, however, the argument you've heard today, Your Honor, means you can deny the cross-motion on the merits. I mean, I think we've spent a lot of time and Your Honor has gotten a good feel for the substance of it. And so, on either basis, I'd be happy for you to deny the cross-motion, but I think we know what the right answer is on the merits as well.

And then just one last technicality, at the risk of over-lawyering this for just a half a minute -- I feel like, given the stakes in this case and the number of parties involved, it's important to be clear about this. I heard Mr. Moxley say that it would help the Coalition to know that we would use the debtors' information alone, that's the phrase I wrote down in my notes. Well, it's not necessarily the debtors' information alone that would be used, and let me give just two examples to be clear about that.

Let's say an expert -- and I include in this the debtors' experts, Bates White for example, they surely are aware of other facts related to sex abuse claims. I mean when, for example, Bates White does its analysis, it's surely bringing to bear its experience in other mass tort bankruptcies and other bankruptcies involving sex abuse claims. And so, you know, I don't want the sort of characterization that's gone on at this hearing about the fact

that we're not presenting our witnesses and our claims handling as factual evidence that's relevant to the Section 1129 issues to mean that we're limited strictly to the debtors' information alone. And I'll give just another example about that.

I might argue to you later that in most mass tort cases the convenience class payment is $200. That's a fact, right, from another case, that's not the debtors' information. And that, when you compare that to the $3500 being offered under the plan supported by the Coalition, that that's not reasonable, right? I may make that argument to you and I'm relying on a fact that's not debtors' information, it's -- you know, it's the Kaiser Gypsum TDP that pays $200 rather than $3500 for a convenience class.

So I know Mr. Moxley was speaking off the cuff and even trying to negotiate, as I think he put it, in open court, and so I don't mean to suggest that Mr. Moxley was purposely trying to box us in or play "gotcha" with us, but I did -- because of the number of parties and because of the stakes, I wanted to be clear. When we get through the expert case, when we get through the presentation of the evidence at the confirmation hearing, there may be things that aren't in the debtors' files that are brought to the Court's attention. But just to reiterate, to the extent it needs to be -- Mr. Plevin said it, Ms. Marrkand said it, let me say it on behalf of

Great American, we're not going to come touting to you, you know, this is how Great American resolved a sex abuse claim or this is what a Great American claims handler thinks or, you know, see right here, we have this guidance where we say don't do it like they do it in the TDPs. We don't think they should do it the way they're proposing to do it in the TDPs, but our evidence isn't going to be because Great American on its own has determined what the right answer here is.

So, with that, I think I've covered all the points I wanted to make sure were clear for the record and I'm happy to answer any questions.

THE COURT: Thank you.

MR. CHRISTIAN: Thank you, Your Honor.

THE COURT: Okay. Mr. Plevin, I'm going to let you play last.

MR. PLEVIN: Thank you, Your Honor.

The first point I would make is that neither Mr. Azer nor Mr. Moxley nor Ms. Grimm addressed the proportionality point at all. And I would ask you to consider what this is going to look like in the confirmation hearing, if this discovery goes forward. The debtors apparently want to go claim-by-claim in the depositions to see what the insurers thought about each claim they handled.

So I think my client was involved in five claims where they were asked to contribute to a settlement, they're

going to depose one or two of my witnesses, presumably for seven hours each, about what they did in those five claims. And then if we make an argument at the confirmation hearing based on the debtors' evidence that we think the TDP values are too high or that the matrix -- that the matrix uses an aggravating factor that it shouldn't, they're going to then want to present to you the evidence of the depositions about these five claims.

The result, Your Honor, the inevitable result is that you're going to be mired in the details of what an individual claim handler at Zurich or Great American or some other carrier thought about the debtors' request that they contribute to a particular settlement, whether that's in 2016 or 1998. It's going to take the confirmation hearing way off track and add days and days to it. And, when you think about proportionality, I would ask that you think about that.

Debtors made an offer of a stipulation, but that stipulation is illusory. Sorry, Your Honor, the mail just was delivered. What the debtors' response to the motion, in their motion what they say they're looking to stipulate is, quote, "Specifically, if an insurer can stipulate that it has no information relevant to the debtors' historical claims handling practices and agrees not to contest the plan, then the debtors won't depose that insurer."

So, in other words, we have to -- in order to avoid

these depositions under their proposed stipulation, we have to agree not to file any plan objections on any issue, and that seems to me to be an illusory stipulation and not a meaningful offer.

Mr. Azer attempted to argue that the debtors needed information about allocation to other insurers in order to defend the Hartford settlement. And I think Mr. Winsberg was exactly correct in calling this a renewal of the request for a binding estimation.

Hartford's policies, as I understand it, were in the 1960s and 1970s. My client's policies and the policies of the other excess insurers are all in 1986 or later. There's no reason to think that we would have had any involvement or any potential responsibility, or that any analysis of our policies or claims handling is needed with respect to an abuse that might trigger a Hartford policy 20 or 25 years earlier.

What is more, debtors entered into not one, but two settlements with Hartford without the need for depositions of or information from any other insurers. The debtors had all the information they felt they needed to conclude that they thought the Hartford settlement was a good settlement and they don't need depositions of other insurers on that issue.

Mr. Azer indicated that he thought -- and this is not a quote, this is a characterization -- that the insurers were throwing up a roadblock of sorts in asserting that

defense counsel-privileged submissions should be -- should be held privileged, because the reality is, as Mr. Christian just explained, is when our clients were asked to contribute to a settlement, they typically got defense counsel evaluations of the case as part of the information that the insurers looked at to decide whether to agree to what the Boy Scouts were asking. This case, Your Honor, is not delivering full releases to chartered organizations, and I'm sure they would be thrilled to know that debtors are proposing to hand over defense counsel-privileged claim evaluations to the plaintiffs' bar so that those can be used against the chartered organizations in future tort actions.

What is more, the TDPs themselves have an opt-out that allows claimants to seek recovery in the tort system. Again, what claimant wouldn't love to have BSA's defense counsel's privileged case evaluation as they pursue tort system claims? And all of this is for information that is, at best, marginally relevant, including topics on underwriting and negotiation of the policies that have no relevance at all and which for some of the carriers go back decades.

Ms. Grimm made a point where she said that the -- they need discovery from the insurers because the insurers say that the TDPs are or may be collusive. Well, the information about that is not in our files, the information about that is in the documents exchanged between the debtors and the other

plan supporters like the Coalition, and we'll evaluate that evidence when we see it and decide if we are going to make an argument that things were collusive. What we did in responding to Boy Scouts requests has nothing to do with that issue.

Ms. Grimm said the findings are required for the plan to be confirmed. And I suppose that's right in a sense because they have put them in as conditions precedent, but the bankruptcy code doesn't require those findings.

Mr. Moxley said that the RFAs were targeted and are proper subjects for the insurers' 30(b)(6) witnesses. Our response to the RFAs -- and I think most of the other insurers gave similar responses -- is that we don't at this time have sufficient information to admit or deny the RFAs, and my responses pointed out that's because we haven't had discovery yet from the debtors. So my witnesses don't have any information yet to support any of the things that they've asked us to admit.

When and if they do get that information, it's all going to be something that they either received through counsel and they would be called upon at a deposition to marshal that evidence, marshal the evidence of what the Boy Scouts' historical practices are, and then compare that to what they did or what their company did, and then explain the basis for an admission or a denial -- I guess it would be a

denial of the RFA. That is a classic contention interrogatory and the cases are quite clear that a human being is not required to serve as an answer to a contention interrogatory. So I disagree completely with Mr. Moxley's characterization of the Coalition's RFA-related topics as targeted or seeking facts, it is seeking evaluative legal conclusions and contentions, and requiring someone to marshal all of that information on the spot.

And then, Your Honor, I think to respond to your question -- I don't want to beat a horse that Ms. Marrkand and Mr. Christian have already addressed -- I don't think that what -- if one our claim handlers in evaluating a claim looked at the same factors that the TDPs proposed to include, that doesn't mean that the TDPs necessarily should be confirmed. It means perhaps that our claim handler acceded to a request by the BSA, that's all it means. And, again, we're going to get into the point of being mired in claim-by-claim evaluations and we're going to be delving into privilege issues because a lot of what our claim handlers did, if they were looking at this, was based on what privileged information they were receiving from the Boy Scouts.

Thank you, Your Honor.

THE COURT: Thank you.

Okay. Well, I see hands are up, but I'm prepared to rule on this. And I appreciate very much the arguments, I

had read the papers and found them helpful in defining the issues, I haven't read anything that was filed today.

And I was interested in the question that I asked almost everyone, which is what if there is some difference between -- or what if the insurance company takes a position but its claims adjuster -- I'm not being articulate here. Let me back up.

The question I asked was, okay, what if the claims adjuster on its one or five claims agreed with the Boy Scouts, would that be relevant information, or how do I use that information? And I think the responses I got from the separate insurance companies is correct, we would be down rabbit holes. We would be off in tangents in the confirmation hearing. How would that information be used?

And that leads me back to the main point, which is that the debtor has the burden of proof on the appropriateness of the TDPs since it has put them at issue very specifically in the case and asked for very specific findings, the insurance companies did not initially put this at issue and it is the debtors' burden. They have the information that they need. They know why they crafted the TDPs, which the insurance companies had no part of, and they'll put on their proof.

The deposition notices, which are what are in front of me, also do not appear to have been targeted to insurance

companies that may have significant information about their own claims handling in the sense that they handled a significant number of claims.

What I'm hearing is I've got excess insurance companies that are being asked questions who maybe were involved in two or five or ten claims, I've got fronting policies, which I'm learning about, but my understanding is that the insurers company really is just administering the claim, it's more of an administrative function. I hope I'm right on that. I don't think I have a primary insurance company in front of me who would have handled, I'm guessing -- and it is just a guess because I don't have this in front of me -- a significant number of cases. The criteria for being served with the notice of deposition appears to be that you were involved in the case, the insurance company is involved in the case and has spoken up, that does not mean they have information.

So I do not find that these depositions were -- such as they were are even targeted at insurance companies that might have what's arguably relevant information, although minimally relevant and I think would lead us down tangents. So that's another reason that I'm denying the motions and the cross-motion, and I'll get to that.

The other -- well, that leads to proportionality. Given that, I don't think that the deposition notices were

targeted toward insurance companies most likely to have information that the debtors and the Coalition and the FCR say they need. I think that the 44 deposition requests are simply out of proportion to the possibility that there might be some relevant information that might be able to be used. And I'm saying that because of, again, what I've already stated, but also because we are in essence 60 days before confirmation.

The debtors asked for and I gave them a very expedited confirmation schedule. I know Mr. Kurts has said on a number of occasions, well, this is twice as much as you normally get. Well, this case is more than twice as much as the normal bankruptcy case heading towards confirmation in terms of the issues that are outstanding. And I'm told the debtors have 26 areas, topics that they might present expert testimony on.

In all of this context, I just think that these requests are not proportional to the time it would take away from the critical confirmation issues, the expense of that to the estate, the expense of that to the insurance companies whose employees I think, again, have minimal, minimal relevant evidence, if any. So I think that that's important as well.

When I went through the topics, I found this Exhibit 2, "Topics at issue," very helpful. This was Mr. Plevin's filing. As I walked through many of the contentions of the debtors, I do believe they're asking for legal

conclusions. I wasn't sure that the Coalition actually had responses to Coalition topics 1 through 4, so I wouldn't grant that. I'm not sure the FCR had a response to its topic 3. I think the TCC's matters have been continued.

The prepetition claims handling, that's really what I've been addressing. The RFAs, which were the Coalition's, while the Coalition says it wants the factual basis in the filings, I couldn't often on some of these topics tell the difference between these and the legal conclusions that were in previous -- that were in the previous section on legal conclusions.

And then the big question I did have with respect to the lack of information category, which encompassed a lot of this, is were the insurance companies going to be putting on a factual witness to talk about their own experience and their own claims adjustment and experience, and the answer has been resoundingly no. And Ms. Marrkand has actually -- has obviously picked up on my comments that, no, no expert is going to be able to use any internal documentation of the insurers that hasn't been shared, and which I'm not making be shared, to support an opinion, and I know that no lawyer would think I would permit that to happen. So that's not going to happen.

So, when I put all this together and I see what we have coming in front of us in January -- and, again, the at

best, minimal, used for impeachment purpose on positions and not even witnesses, I don't know how that would even play out -- I'm denying the motion and the cross-motion.

Again, when I looked at the statements that the FCR is relying on in the cross-motion to say that there's some relevance here to what they're requesting, I don't see it, I just don't see it. So even if I -- I think someone said -- provide some grace in this, which I think is wholly appropriate, that the documents were never asked for and the meet-and-confer didn't happen. I've heard enough argument that I'm not going to grant the cross-motion.

MR. PLEVIN: Your Honor, may I just ask a clarification?

THE COURT: Yes.

MR. PLEVIN: I think you said inadvertently twice that you were denying the motions and the cross-motions.

THE COURT: Oh, I'm sorry. Yeah, I'm sorry.

I'm granting them. Thank you.

MR. PLEVIN: So, you're granting the two motions to quash and --

THE COURT: I'm granting --

MR. PLEVIN: -- denying the cross-motion?

THE COURT: Yes. I'm granting the motion to quash. I am denying the cross-motion. Thank you.

MR. PLEVIN: Thank you.

UNIDENTIFIED: Thank you, Your Honor.

THE COURT: Thank you.

Okay. That's Numbers 6 and 7.

MR. ABBOTT: Yes, Your Honor. That puts us up to Number 8 on the docket, which is D.I. 7239. That's a letter from Ms. Currie [sic], regarding the insurers' motion to compel. I'll just assume Ms. Currie is on the line; although, I'm not sure she, or whoever from her group, is going to argue that, Your Honor.

MR. CURRIE: Good afternoon, Your Honor. This is Kelly Currie from Crowell & Moring, on behalf of the Zurich Insurers. And our client is joined by a number of other insurers in bringing the motion to compel.

And, Your Honor, if I may, I may just start for a few minutes to try to just go over, briefly, some of the ground that the Court has heard before about why we are seeking this motion to compel discovery against these law firms who represent thousands and thousands of claimants in this matter. And it's because, you know, as the Court has heard before in the context of the Rule 2004 applications brought by Century and joined by others, that, you know, these firms have had a much more than passive role in this litigation.

The Court learned about relationships that these law firms have with claims aggregators and a whole range of

red flags in the claims aggregation and processing, and, frankly, lights were flashing red just on the number of the claims and the volumes of claims explosions leading up to the bar date.

And what we have here, Your Honor, is the situation where, as the Court has referred to a couple times today in going into this discovery period, per the confirmation process, the Court urged all the participants to be as cooperative as possible, to try to tee up the issues that are relevant before this Court, and to, you know, bring to light the discovery that is going to inform a lot of arguments that are going to be relevant in terms of the confirmation process.

And what's happened, you know, since the discovery period has started, we served discovery on these firms -- and I should have said at the beginning, Your Honor, one of the law firms that we served discovery against, AVA Law Group, they're not being heard today because Mr. Gray had a scheduling issue and we've all agreed that as to AVA Law, this will be heard on the 29th.

But as to the other five firms, Your Honor, what happened was, essentially, in a number of meet-and-confer conferences with counsel, we offered, Your Honor, in the interests of really getting to the real discovery issues, to withdraw these motions and agree that we would proceed as if we were in a Rule 45 context, a subpoena context, if the firms

would agree that the substantive discovery disputes would be heard before Your Honor, rather than in disparate, foreign jurisdictions where we may have to, you know, bring motions to transfer; whereas, this Court, I think everyone agrees is certainly best-suited to hear the substantive issues, you know, that might be raised, for example, that come up in the other motions that we're going to talk about later, for example, privilege issues, in the way.

And so, our effort in this motion to compel, Your Honor, is to say that given the level and the kind of engagement that the law firms have consistently had in this proceeding, that even if they are not nominal parties, Your Honor, they have comported themselves as parties. And if not --

THE COURT: Excuse me for a moment.

MR. CURRIE: Yes, Your Honor.

THE COURT: Excuse me just for a moment, Mr. Currie.

Please check your audio, everyone else. I'm hearing a keyboard. Thank you.

MR. CURRIE: Thank you, Your Honor.

And so, you know, the effort really was to try to be as pragmatic as possible, given what the Court has expressed many times, without the express discovery schedule.

And the issues that I think are most important that

are on deck for the other firms that we're going to talk about later, you know, for example, we've been saying we're not seeking privileged information; we're seeking facts that go to the integrity of the claims process, the facts that go to, you know, whether Section 1129, you know, good faith requirements have been met.

And so, that's what brings us here today. And I want to talk a bit about the activity of each law firm that's before us here today in this motion and why the Court ought to consider them, if not, nominal parties, you know, parties for the purpose of discovery. But with the Court's permission, one of the law firms is the Kosnoff Law Firm and, as the Court is aware, Century is scheduled to take Mr. Kosnoff's deposition next week.

And Mr. Schiavoni, I think, would like to be heard as to the intersection between this motion here and what is scheduling to be teed up next week so that there's not any -- so there's clearer understanding of what the expectations are for what's to happen next week and how that might intersect with the Court's views on this broader motion.

So, with the Court's permission, I would like to pass the baton to Mr. Schiavoni to be heard regarding Kosnoff Law Firm and then I will briefly discuss the other firms that are the subject of this motion.

THE COURT: Okay. Well, I do think it would be

helpful to, and I think we need to talk about each firm individually, and I want to make sure I know what you think the deposition is, or the document requests and interrogatories are specifically relevant to, for confirmation purposes. And I know some of the law firms have raised the relevancy issue, so I want to understand what you think it's relevant to and then we'll -- I do think the law firms, some of them may be in different positions, and they may not be, but I think each one is entitled to be heard separately.

So, if you want to start with Kosnoff, that's fine.

MR. SCHIAVONI: Okay. Your Honor, I will.

This is Tanc Schiavoni and maybe I could just lay some of the groundwork for Mr. Kelly [sic] on the rest of it.

So, with Mr. Kosnoff, we noticed his deposition and we subpoenaed him also; we did both. The subpoenas were issued on the West Coast. The notice was issued out of this court.

He's agreed to appear on Monday. Frankly, I thought that was the end of it. I actually didn't even realize he was on the calendar here and now I realize I sort of maybe was bamboozled a little bit, that there's some sort of embedded dispute in the Monday deposition. I think Mr. Kosnoff is under the view that he's only going to appear with respect to the dispute on solicitation and no other issues.

So, you know, we do, as a practical matter, need to resolve this, okay. So, we have Mr. Kosnoff signed large numbers of proofs of claim. He's filed a 2019 statement saying that his signature was attached to other proofs of claim by other unidentified individuals. He's interjected himself directly in solicitation, I would say both, by, in a sense, signing the proofs of claim, which, you know, lead to, then, the selection of who gets to vote, but also by his -- the role he's played in balloting.

Others of these folks, you'll hear from Mr. Kelly, have interjected themselves by the use of either master ballots or by the use of self-described balloting centers at their firms, where they collected individual ballots. I think it's sort of just another form of a master ballot.

In Mr. Kosnoff's case, in addition, when his counsel did appear in the case, he's identified the appearance as being on behalf of Mr. Kosnoff as a party. So, there's that, also.

And, you know, in addition to that, we did think that Mr. Kosnoff was conceding the jurisdiction or acknowledging it, in agreeing to be deposed under the notice on Monday. And, in fact, we moved it from today to Monday, really thinking that he was conceding the jurisdiction in that regard. If I'm mistaken, you know, I will -- I'm not going to hold Mr. Wilks to agree to the deposition in that regard, but

I was certainly under that impression in deciding to go forward.

We can, of course, do Mr. Kosnoff's deposition just on the solicitation issue on Monday. We file a motion to transfer and do his deposition and get documents, the documents from him later. You know, that's not ideal. I have a motion here. We're ready to file it this evening if that's what the Court, you know, would like us to do. But I think he's within the jurisdiction of the Court by the function of how he's interjected himself holding solicitation and in signing the proofs of claim.

And to be clear, you wanted to know what documents we wanted. You know, in Mr. Kosnoff's case, we were able to identify a significant number of proofs of claim that he signed on a given day; a number that we thought was impossible, objectively, to vet in submitting them.

We also picked up through, like, forensic document review, some that were, you know, appear to be basically issued in two -- on the West Coast and East Coast at the same time, so it looks like other people were submitting them, using his name. And, you know, I think that's a legitimate area of inquiry.

You know, in some of these situations, we have folks saying, Well, like, whatever happened, we've since cured it by running out and getting signature for them, okay. But,

Your Honor, it's like the way we did this to identify them, it's like we were only able to identify certain groups. Like, this was not intended to be all of them.

So, the fact that someone was sort of caught and then focused on trying to cure ones that we came across in the 82,000, it doesn't mean that it's not -- like there's others like this out there, that they're the tip of the iceberg. There's no question, but that this method of how these signatures were done were wrong and there's also no question under the case law that by signing, under oath, these folks were submitting themselves to being questioned about what they did about, you know, this process. We cited case law to Your Honor on the 2019 submissions and then later about it.

It doesn't seek, you know, privileged information, if that's what those cases hold, you know, that when you signed, you can explain what you did and how it was done. I think you're going to see as we get closer to confirmation, you know, we have some thoughts about how some of this is tied together, but we need to take the discovery.

It's like we, you know -- you the original plan was that we do the aggregators first. They put up massive resistance. You know, we're trying to get them down, right, Rule 45 to this Court.

But, you know, the most appropriate way is to go right to the source. Mr. Kosnoff says he has evidence

directly about this, and if Your Honor would prefer we issue a Rule 45, you know, the transfer motion, we will get that on file and we will get that on file tonight, but we're going to lose a week on it -- that's the only thing -- and we'll get it on file with a motion to shorten notice.

But, you know, I think we have the basis to go forward with what we have and what we're asking for is highly relevant because the entire voting here turns on these proofs of claim. And, yes, some of them have been technically cured by having their signatures put on them, but, you know, the thing that's lost in this case is that -- and I've heard it. It's like, well, you know, there's no objections being filed to the proofs of claim.

And no one has wanted to go out and blunderbuss, issue objections, but, you know, it ties back to the complaints we had, which was, one was that the questions that actually go to the core issue of liability, you know, are minimal, okay. It's like there is enough notice here to know that the person is alleging a claim against the Boy Scouts, but there's not strict liability in most of these jurisdictions. So, it's like the actual establishment of liability, it comes down to a question or two on these, you know, on the proofs of claim for which we're not able to go out and take information in the proof of claim to actually directly investigate it.

So, like, we can't take a proof of claim if it says on it that Joe Smith was the guy who did this to me or whatnot. It's like, I can't be using the proof of claim to cross-examine witnesses. It's like the confidentiality order is pretty straightforward in that regard and, you know, I can't go speak to relatives. I can't do things like this to investigate the claim. So, you know, we're going at it in a different way about how they were -- how the claims, themselves, were put together in such a rapid, you know, manner.

And this is not -- you know, Mr. Kosnoff, you know, his entire firm is responsible, he claims, for 17,000 claims. It's like, having him sit for a deposition for a few hours is proportionate. It directly goes to confirmation objections, solicitation objections, and we say it's relevant.

And if Your Honor would like us to, you know, bring the Rule 45 motion, we will do that.

THE COURT: I want to make sure I understand. Let's say everything you say is correct. Let's say the signatures -- I don't want to speak generally; we're speaking about Mr. Kosnoff -- and Mr. Kosnoff actually says in a verified statement that he filed with the Court that his signature was misused, used without his permission on multiple claims. I'm sure I have that right, but that's -- I've got three verified statements by Mr. Kosnoff.

So, let's say that's correct and then let's say Mr. Kosnoff also signed a bunch of proofs of claim and let's say he didn't review them properly before they were signed -- and we're making assumptions here; don't worry, Mr. Wilks -- let's say that he didn't properly vet them and let's say the case law is that if they're not properly vetted, maybe sanctions are available because there's a violation of Rule 11. And we have case law on that; Judge Fagone's (phonetic) decision. There's actually a Third Circuit decision I read recently to that effect. So, let's say that's true.

What's the link to confirmation that you want to explore, because it's not sanctions. That's not a link to confirmation.

MR. SCHIAVONI: I understand that, Judge, and, you know, we have not, as you know, pursued that, you know, at this point.

You know, you've made the point that your independent research has brought you to the conclusion, I think, or the failure to abide by that rule is not a basis all by itself to reject a claim. And I have not done that research. That may or may not be the ultimate conclusion that flows from that, but it wasn't the conclusion that we were looking for, okay.

We thought this was relevant, Your Honor, because if you remember, we brought this motion along with a motion to

relax the rule on limitations on omnibus objections.

THE COURT: Uh-huh.

MR. SCHIAVONI: And we were looking for ways to identify in the claims pool where the most problematic claims were to focus investigation on those claims and there were two ways to do -- in some ways, there were two ways to do that. One was to look at the claims that came out of the process on the back end and information about them, and we put some evidence before you about what the results were of the claims; how many were coming in states with "statute of limitation" issues about them and whatnot.

The other way to look at it was the process by which they were put together. If you had one group of claims that were prepared by a firm that sat down in the old-fashioned way, met with the claimants as they walked in the door, you know, did a traditional interview, asked them a few questions, and then the lawyer, after meeting them, made the decision about whether to take the gentleman on, or the lady, as a client, you really get one quality set of claims, right.

And then if you look at another set that might have just been simply created by -- or not -- it's like, you know, generated by a for-profit aggregator and then sold to a firm, you know, for which signatures were rapidly attached as they were bought as they were coming in on the bar date and they might have realized that they were short on the number of

claims needed to hit a fixed target, it's like, you might reach a different conclusion about where -- about, you know, the general strength of those claims. It would not, necessarily, support by itself in the individual rejection of a claim, but it would allow us all to focus resources on those particular claims as ones for heightened scrutiny and the very group that the Court had suggested to us that we should come back with to identify claims where we might want to take depositions.

We've been extremely careful, reluctant to, in any way, you know, disturb the survivors here, but we have not asked for depositions -- we have not come back and tried to pick individual depositions. This was our thought of a responsible way to proceed. And, you know, this level of inquiry going after just, you know, Mr. Kosnoff, in particular -- and Mr. Kelly can speak to the others -- was intended to be very targeted and to go, you know, right after the proofs of claim, themselves.

I will add, you know, on the confirmation front, there's an additional sort of, you know, 1129 good faith overlay with Mr. Kosnoff, his 2019 assertions, and the proofs of claim because he does, in his email that the TCC felt they had to turn over to the United States Trustee, lay out an overall plan about how they were going to go forward to create a voting bloc, how it was an intentional part of that effort

to try to generate a voting bloc, a supermajority voting bloc. In his 2019, he goes a step further and he gives what I think of as like a Combustion Engineering element. He says that they were specifically targeting jurisdictions where they thought there was -- where he recognized there were "statute of limitations" problems in aggregating those claims.

So, I think his imminence and his connection with how the proofs of claim were put together, you know, it ties together with a bigger story about how the whole "proof of claim" process, you know, we think may have just come off the rails in the first place, and -- which is a good faith objection, Your Honor. And it was very intentional; it wasn't unintentional. It was the very kind of effort the Third Circuit looked at with Mr. Rice in Combustion Engineering, where there was an effort pre-petition to lock up a supermajority of claimants who had, I think the Circuit referred to them as "stub claims" or claims of weaker merit, in order to override the Code protections for having an unimpaired class.

THE COURT: Yeah, that was an 1129(a)(10) issue, right?

MR. SCHIAVONI: As framed on the reversal, yes.

But I think that would also go to the -- in the same decision, I think he also remanded on good faith.

THE COURT: So, it may go to an 1129, good faith

issue, I guess the trust distribution procedures, in terms of claims, okay.

MR. SCHIAVONI: It morphs into that because it -- you know, for various reasons.

Mr. Kosnoff is -- Your Honor, if you wanted to stage these, that's one thing you could think about if we had all sorts of time, but, you know, clearly, Mr. Kosnoff is the one to start with and we're poised to do that and that's where we put our resources.

And I'll let Mr. Kelly, you know, deal with the others, but I think I got -- I think I have enough jurisdictional basis with Mr. Kosnoff for the Court to enforce the subpoenas. But, again, if there's an issue about that, you know, just be sympathetic if we lose a week on it, but we will get those on file tonight, if necessary, and we will plead with the Court in California to, you know, move that east as fast as possible.

THE COURT: Okay. Why don't we -- Mr. Wilks, why don't you respond, since this is targeted -- before we go back to Mr. Currie on the other ones. And, Mr. Wilks, I would like to understand, first, why don't I have jurisdiction over Mr. Kosnoff and Kosnoff Law?

MR. WILKS: Well, Your Honor, it's like -- let me start it this way. One thing that kind of keeps happening is we keep arguing motions that aren't on the agenda or they're

not even motions. Because Mr. Currie's motion has nothing whatever to do with the deposition and that's kind of what Mr. Schiavoni just devoted all his remarks to.

So, I want to speak to that first if I may, Your Honor, because we think Your Honor already told us last week, you think Mr. Kosnoff has injected himself into the case on the solicitation matter in ways that he had not before, because Your Honor and I have talked about, I think, three times before, whether or not he is before the Court as a party. Your Honor has consistently held that he is not.

I'm sorry if Your Honor is having a hard time hearing me.

THE COURT: I've got you now.

MR. WILKS: Okay. Your Honor has already ruled on that a number of times. So, I'm happy to run back through that, but I want to talk about last Friday, because last Friday Your Honor addressed the subpoena motion and Your Honor properly said in every case, you don't enforce subpoenas issued by other courts unless it has been transferred to you. That's the way the rules work. That's the way Your Honor ruled and that was that. Now, we're kind of re-arguing that.

But one thing Mr. Schiavoni did at the very tail end of that hearing was, he said, Hey, wait a second. Your Honor has said that he's injected himself on this solicitation issue. On that, can I just issue a notice of deposition of

depose him?

Your Honor said, Yeah, I think that's probably fine, or something like that. I think a notice is fine is what Your Honor said.

Okay. We heard that, and so Mr. Schiavoni and I got on the phone and we spent some time. There is also another party, Mr. Patterson has noticed Mr. Kosnoff's deposition, and it was scheduled, actually, to take place today. On Mr. Schiavoni's request we made Mr. Kosnoff available today.

Just the other day, I think it was Wednesday -- and I had called Mr. Schiavoni this week several times, Hey, let's talk about, you know, the scope and what your expectations are and logistics and all those things.

And he finally called me back on Wednesday and said, Hey, listen, can we go forward on Monday, instead?

So, and Mr. Patterson already noticed a deposition, so, yeah, sure, we'll go forward on Monday.

And Mr. Schiavoni said, Look, I'll call you and we'll talk about scope and we'll have a meet-and-confer and the whole thing.

Great. I never heard from him until just now, when Your Honor heard from him.

So all of this is happening. Your Honor, I'm not even clear what the issue is because, you know, we're talking

about, you know, proofs of claim and things that Your Honor has already thrown out and so forth.

But look, here's the thing, we have agreed to put him up for a deposition. He's going to testify on Monday by Zoom and folks are going to have a link to it or so forth, or however Mr. Patterson wants it, because Mr. Patterson is the one -- he and I have actually talked.

I haven't -- Mr. Schiavoni hasn't engaged with him, and so Mr. Patterson is going to go first, the way I look at it -- it's his deposition -- and he's going to ask a whole bunch of questions like that. And if Mr. Schiavoni is dissatisfied with the scope of that deposition, he can ask his own questions, and if he's dissatisfied with it, my gosh, Your Honor, he notion how to bring that up to you.

So, number one, there's not a motion before Your Honor pertaining to any deposition, and so there's nothing for Your Honor to rule on. And number two, even if there were, I would just like to ask Your Honor, hold off and let's wait and see. Because, candidly, I don't think we're going to have an issue and I think Mr. Schiavoni would know that if he had just called, but that didn't happen, and that's fine.

So, I'm happy to go further down the road on this. We can address Mr. Currie's motion. I think Mr. Robbins and others have sort of broader arguments that I join in and I intend to let them present those arguments. I've already

presented to Your Honor, I think this is the fourth time I've been before Your Honor on discovery requests of Kosnoff Law.

There's a whole lot of reasons that Mr. Kosnoff is not a party to this case. He's an advocate. He's a lawyer. There's no precedent that anybody has cited, and none that I have found or my folks have found, could say that a lawyer who represents claimants or who represents creditors is a party.

The filings that Mr. Kosnoff has made in this case have always been solely -- actually, there's one exception -- have only been in resistance to discovery requests. Resisting discovery does not make you subject to discovery. I mean, it sounds kind of silly to say that, but that's kind of what they're proposing.

THE COURT: So, I would agree with you --

MR. WILKS: The only exception, Your Honor, is the 2019 --

THE COURT: Yes, go ahead with the exception.

MR. WILKS: Well, we resisted that, Your Honor, and I know Your Honor was frustrated with -- I think Your Honor was frustrated with me, and I hate that, when a judge is frustrated with me, but I think Your Honor asked me why am I fighting this so much.

It's not that we were so resistant to telling Mr. Kosnoff's story, Mr. Kosnoff, my gosh, this is a man who loves to tell his story and he's happy to do that. But there

are laws and there are rules that -- and procedures that need to be followed, and we felt it was inappropriate to subject Mr. Kosnoff and Kosnoff Law, actually, it's his law firm, to the 2019 process.

But Your Honor ruled and we accepted Your Honor's ruling and so, we served the 2019. But I'm not aware of any case law -- and, certainly, Mr. Currie hasn't brought it to Your Honor's attention that the act of filing a 2019 confers party status on a lawyer representing creditors in a case. I think that's a dangerous rule to adopt and I think this would be -- there's no reason for Your Honor to adopt that sort of brand new rule in this case.

Mr. Kosnoff is going to give a deposition on Monday and I'll bet my bottom dollar that Your Honor is going to get a transcript of that attached to some kind of application by someone very soon.

MR. SCHIAVONI: Well, Your Honor, it's going to be --

THE COURT: Okay. Let me -- no, wait a second -- let me ask a question.

So, Mr. Kosnoff actually filed two 2019 declarations. He filed one at --

MR. WILKS: Well, there's one for AIS.

THE COURT: No -- okay. There may be one for AIS.

MR. WILKS: The one for AIS was signed by all three

firms that, you know, worked together under that AIS name.

THE COURT: Okay. And then he filed another one separately --

MR. WILKS: That's correct.

THE COURT: -- at Docket 5924. And that filing goes well beyond a 2019 filing. It is nine pages where it's clear that Mr. Kosnoff wanted to get his story out there. This is not required by 2019.

And in it he makes a lot of statements, including with respect to proofs of claim, how they -- how the firms, the three firms worked together, how certain proofs of claim were signed, and why doesn't this extra filing, which is really personal to him and doesn't have anything to do with his clients, why doesn't that subject him to the jurisdiction of this Court to be questioned about what he chose to put in a verified statement?

MR. WILKS: Well, Your Honor, I just don't think there's any authority for doing that. I don't know that that's been done where a non-party, let's use that term, has been deemed a party. If I can kind of use that kind of, you know, terminology, it's always someone who controls a creditor or has a very close relationship with a creditor.

There's one -- it's two different agencies of a foreign government. You know, the non-party agency is going to actually reap the benefits of the litigation, as well;

they're deemed a party. Those are the circumstances in which a non-party is -- party status is foisted upon them by their own, either their status or their activities.

Another case that the other side cites, Your Honor, is where there's a spouse, I think a wife in a Chapter 7 circumstance. In that jurisdiction, you have the wife who's presumptively a party. So, those are the kinds of circumstances in which there's authority. There's no authority -- I mean, the case law is out there, is a 2019 inadequate?

Well, now, it sounds like Mr. Kosnoff is being criticized, or Kosnoff Law, I think is the actual, I think was the signatory, but it doesn't matter. He's actually being, you know, penalized because he was over a case, you know, providing too much information on how this group works together and what it is.

Because there's a lot of misinformation put before the Court on what -- how AIS operated.

THE COURT: But that, then, has to do with him.

MR. WILKS: Well, the idea behind --

THE COURT: That has to do with him; that's more personal.

MR. WILKS: Well, it was all about this group, though. So, 2019 is about a group. If you are representing a group or if you are acting for a group or something like that,

tell us how the group works, what is it, who runs it. That's how we interpreted 2019.

And, honestly, I anticipated if I didn't do it that way -- if we didn't do it that way, if Kosnoff Law didn't do it that way, we were going to be right back in front of Your Honor being told, this is inadequate, so -- inadequate. I mean, this is something -- he didn't volunteer to file a 2019; he was ordered to do so and he did.

THE COURT: Well, but there was --

MR. WILKS: You know, it was comprehensive.

THE COURT: But there was 2019 with the information required by 2019, actually, a separate one filed by Mr. Kosnoff, so there's three.

MR. WILKS: Yes, Your Honor.

THE COURT: Okay. Well, I'm just saying that, I don't know, do you get to put a verified statement like this on the record and then say, I'm sorry, nobody gets to question me about it in this court?

MR. WILKS: Gosh no, Your Honor. He's giving a deposition on Monday.

THE COURT: Okay.

MR. WILKS: I haven't made any arguments today about the scope of that deposition.

THE COURT: Okay.

MR. WILKS: I haven't made any arguments about

that.

I'm talking about -- when we're talking about the interrogatories and the requests for production that Mr. Currie is seeking, I ask -- that's a little bit different, because those requests are not, Hey, tell us about your 2019. It's not.

It's, tell us about your client contacts and your client work that you did on these cases; classic work product, classic stuff that lawyers are doing every day in the representation of their clients. That, I have a lot to say about, Your Honor.

THE COURT: Okay.

MR. WILKS: The question Your Honor asked: Hey, can they ask you about the 2019?

Well, he's giving a deposition on Monday. I don't want to sit here and say, This is what people should ask him. I'm not going to do -- I'm not going to write people's deposition outlines for them. Maybe the 2019 is their roadmap.

But if Mr. Kosnoff is not forthcoming in that Monday deposition in a way that offends Your Honor's sensibilities or it breaks the rules or is caging, was not comprehensive, we're going to be back here before Your Honor and I'm going to have to explain that. But I would really urge Your Honor let Monday come and go and let's see what

happens on Monday.

THE COURT: Okay.

MR. SCHIAVONI: Your Honor, we haven't got a response to the documents subpoena, so they haven't turned over any of the documents.

MR. WILKS: (Indiscernible.)

MR. SCHIAVONI: Well, we certainly haven't gotten a turnover of any documents at all. Not one.

I can give Your Honor some very pointed omissions. There were emails that the TCC has produced that show Mr. Kosnoff's communications with the TCC and its members, but Mr. Kosnoff hasn't produced a single one here, and that's just the tip of the iceberg. He hasn't produced to me anything, period. Nothing, okay. So, we know he's withholding documents. There's been no compliance on that front.

And what I thought I heard from Mr. Wilks was that the preparation of the proofs of claim had already been dealt with and was off the table. So, I take it I'm going to hear on Monday that questioning on the proofs of claim are not proper and it won't be permitted.

The other thing I guess I'm hearing is he's arranged -- they're going to have someone do a deposition before me. Okay. And, like, who knows whether I'll get any time at all, you know, as part of it.

So, yes, I think I'm sort of a little bamboozled

here. It's like, I think the topics in just the 2019 include the proofs of claim and how they were prepared and we ought to get the documents that were the subject of our subpoena.

THE COURT: Well, the question is, do you want to go forward on Monday or not, without the documents, or what are you asking me for? What do you want?

MR. SCHIAVONI: Your Honor, I'm prepared to -- like, if Mr. Kosnoff's view is he's producing himself on Monday to be heard on solicitation and I will get a separate deposition on plan confirmation issues, then we'll go forward with the Rule 45. We'll be back to you hopefully next week and we'll depose him a second time on those issues and have the documents compelled at that point.

MR. WILKS: Your Honor, can I just ask Your Honor not to rule on the basis of what Mr. Schiavoni thinks might happen. That's all he's coming to you with is I think these things might happen and, gosh, that might be really bad, so please give me relief now; that's what he's saying to Your Honor.

MR. SCHIAVONI: Well, we already know you're not producing documents --

MR. WILKS: Hold on. Hold on. Just --

MR. SCHIAVONI: -- unless you're going to tell us now you're going to produce them.

MR. WILKS: Just let me finish.

THE COURT: Okay.

MR. WILKS: If I may finish, Your Honor?

THE COURT: Okay.

MR. WILKS: Look, we filed a response to the subpoena and there were objections, for a lot of the same reasons we objected to Mr. Currie's requests. It's objectionable; you're asking for, basically, a lawyer's file, okay.

So, I supplemented it by identifying for Mr. Schiavoni what doesn't exist, what communications aren't there. So, it's narrow.

I told him: Meet and confer with me. Meet and confer with me. And he doesn't even confer; he just goes to Your Honor and he talks to me through you, and that's fine.

But what he's doing now is just re-arguing his Rule 45 motion that Your Honor denied last week. If there is an issue after Monday, Mr. Schiavoni knows his way to Your Honor's office.

THE COURT: Okay. Well, I'm not sure --

MR. WILKS: There's nothing before Your Honor to rule on.

THE COURT: I'm not sure that -- it's been a long week, so I'm not sure that I actually ruled on a Rule 45 issue last week.

MR. WILKS: Well, you did, Your Honor.

THE COURT: I think I said that I don't generally do that, okay. If you have to subpoena somebody, then you have to subpoena somebody. I don't remember the actual context, but regardless ...

MR. WILKS: Well, Your Honor, yeah, there was a subpoena. One subpoena issued and there's a question of the second one.

But Your Honor said, no, that's -- the motion, the Court said, is denied. Your Honor ruled on that --

THE COURT: Okay.

MR. WILKS: -- but it's a California subpoena.

THE COURT: Okay. So, you have a deposition. It's set to go forward on Monday. If you want to go forward with it, go forward with it. Mr. Patterson, apparently is going forward. You guys need to coordinate. If there's an issue, come back to me afterwards.

If Mr. Kosnoff has to be deposed again, he'll be deposed again. We'll figure it out.

I will say that I haven't ruled on anything with respect to Mr. Kosnoff being a party or not since Mr. Kosnoff filed his declaration. And that's one of the reasons I raised it, Mr. Wilks, so you will go back and take a look at it. You understand that it is something that I am considering and whether that changes his situation.

MR. WILKS: Very good. And, Your Honor, obviously,

there's other substantive arguments that we have about the scope and privilege issues and work product issues and all of that. But I understand, Your Honor. I will go back and look at that, on that threshold issue of his --

THE COURT: Jurisdiction --

MR. WILKS: -- party status.

THE COURT: -- and party status.

MR. WILKS: Yes. Yes. Understood. Thanks, Your Honor.

THE COURT: Okay. Thank you.

Mr. Currie?

MR. CURRIE: Thank you, Your Honor.

Just going in order of our motion, as we've discussed earlier, we're not considering the AVA Law Group today. So, the next one in our papers is the Napoli Shkolnik firm. And addressing, first, the relevance question, Your Honor, and, you know, not to repeat everything that's already been said regarding the proofs of claim, but this is a situation where there's evidence that, for example, Paul Napoli signed 672 proofs of claim, including about half of those within a couple of weeks of the bar date.

And other attorneys, as well, filed proofs of claim from -- including Mr. Bustamante signed proofs of claim on behalf of claimants. And, you know, as the Court, and as you recognized, Your Honor, there's certainly concerns that ought

to be examined when attorneys are signing proofs of claim.

And, you know, there's case law that says when an attorney does so, they make themselves a potential fact witness, subject to deposition, subject to examination on why or what diligence did they undertake so that they would meet the requirements of having personal knowledge about the claims that they were attesting to in signing the claims. And so, these issues really go to the core integrity of many of the claims that are part of this process.

And, also, I think there's evidence that hasn't been refuted before, you know, for example there was a filing at Docket Number 2211-3 and it's part of the Rule 2004. It's a declaration that was submitted that -- a document examiner who looked at many of the proofs of claim that were, even those that were purportedly cured by the Napoli firm. Well, first of all, there were -- the document expert observed that the signature pages appear to be different from other pages in the proofs of claim; in other words, even the ones that were purportedly cured because the original proofs of claim had many missing document fields, but even the cured claims had signature pages different from other pages in the proofs of claim, to have suggested that they were signed on different days or different locations. And we are looking for the opportunity to explore these issues.

As I think Mr. Shkolnik described it is, you know,

we may be just seeing the tip of the iceberg. You know, we have these bits of evidence that we, ultimately, will want to explore at deposition. But in the first instance, we're asking for documents -- not privileged documents; we're not looking for communications between the law firms and the claimants. We're not looking for -- what we're looking for is documents that go to how these claims were solicited, how these claims were aggregated, how -- what was the relationship or the financial relationships between law firms and the aggregators that led to, you know, these signings of proofs of claim by attorneys, in many instances.

And the same document I just referenced, 2211-3, the document examiner said that one of the aggregators, Consumer Attorney Marketing Group, he found evidence that that firm submitted over 500 proofs of claim, including proofs of claim submitted by an attorney from Napoli.

So, what we're seeking, you know, in the first instance is relevant documents that go to this issue. And, ultimately, as the Court is well aware, having documents to be able to use in a deposition certainly makes things go more efficiently and get to the heart of the matters much quicker. And, you know, there may be explanations for many of these red flags, but we don't have any declarations in response to any of these motions where anyone was attesting to what the facts may be. We have some representations from some of the law

firms, but we believe that it's important for there to be an examination of these issues in a careful way that really go to issues that are relevant to the confirmation, Judge.

THE COURT: Okay. Let me hear from -- is it Mr. Bustamante who's for Napoli Shkolnik?

MR. BUSTAMANTE: Yes, Your Honor.

Brett Bustamante on behalf of Napoli Shkolnik. Can you hear me, Your Honor?

THE COURT: I can.

MR. BUSTAMANTE: Of course, I would just like to point out first that Napoli, our opposition that we filed last night adopts the arguments set forth in Ask LLP's and Andrew Thorton's [sic] brief. They will be arguing the substantive issues, as I understand it, so I don't want to step on their feet, but since we are up first, I maybe would just like an opportunity to respond to some of that.

And just to preface this with everything, we have sort of been lumped into this group. We have no relationship with Mr. Kosnoff. We have never worked with him or anything like that. We haven't filed the 2019 and we also haven't been served a subpoena.

That said, just as a way of quick background, and that, I think, explains our position in this. We believe the Napoli firm has been attacked by the insurers since the advertising motions last year merely because of our support

for the Coalition.

With regard to Napoli, there's been very little evidence offered; it's mostly *ad hominem* attacks. And we have discussed them in the court previously. It includes attacks against family members of our attorneys. They repeatedly cite to negative statements made by someone in a court filing several years ago against one of our attorneys. So, from our perspective, it's mostly *ad hominem* attacks that they submit as evidence to Your Honor, and they do so in the letter motion that's before Your Honor right now in a footnote.

Really, these *ad hominem* attacks have been the basis for the discovery that's been served on our vendors, on our financial institutions, and now us. And, really, from our perspective, it is just an excuse to attack law firms representing claimants to gain a litigation advantage.

The insurers' justification, as I understand it, has changed over several motions. Originally, in the advertising motion, their concerns were of fraudulent claims potentially being brought. Then, in the 2004 motions, they accuse Napoli, without any evidence of outright fraud -- that was a quote from their motion. Since then, in the hearings on those motions, they backed away from that and said there was no outright fraud.

Even today, in their questioning with Mr. Schiavoni, you know, I think Your Honor asked the right

question. Let's say all of these were improperly vetted, you know, or anything or such and let's say they did everything wrong: How does it relate to plan confirmation?

And they gave a one-minute answer, which I noted down, but at the end of it, the conclusion seemed to be it just ties the story of how the "proof of claims" process came together. That's not relevant for plan confirmation for discovery purposes, as least.

The reality is, and I'm just addressing the substantive issues; the procedural issues, which I think are more pressing before Your Honor are, again, being addressed by other law firms, so I'll let them handle that. But the reality is, there was no fraud. Napoli used attorney signatures to preserve claims before the bar date; that's as simple as that, and we stated so in our 2004 motion.

Since then, the vast majority of claims that we originally filed bearing an attorney's signature, have been amended. Now, they have claimants' signatures.

So, you know, Mr. Schiavoni says that this is -- this doesn't matter, but it really does matter because that's their whole basis for bringing this discovery and bringing those motions that they've been harassing us with over the past year. Clearly, there was no fraud, because now we have claimants that are on the proofs of claim.

There was some accusation that I don't believe has

ever been made before by Mr. Currie, that some of the signature pages are different from other signature pages or different from the rest of the document and that, somehow, is the tip of the iceberg of some, you know, unarticulated theory. I mean, there's -- I mean, that's true.

I was part of the claims process, Your Honor, and, you know, at the risk of representing too much to the Court, you know, we have to send clients the forms and they have to send us back their signature pages. Sometimes they review the form and send us back a signature page. There's no reason to suspect that's indicative of any fraud and it certainly doesn't make the proof of claim any less acceptable for confirmation purposes.

But with the issues that are before Your Honor right now, we have not been served a subpoena. They know -- the insurers know that you can't serve interrogatories on non-parties; that's why they have come up with this rather marvelous theory that somehow we're a party. But the reality is, we're not a party and, therefore, we should not be responding to interrogatories.

They know that they have to comply with Rule 45; that's why they complied with some law firms and not others. They've determined that, I guess, we're not in the hundred-mile radius and they don't want to go to another court and that's why they're trying to claim we're now a party, instead

of complying with Rule 45.

And, frankly, in the meet-and-confers I had with them, which took place over the course of the week, it became clear they don't have a basis for this discovery. They don't know why it's relevant for confirmation purposes. And I think Mr. Schiavoni's statement expresses that, as well. They simply did not give you a reason why it would be related to Napoli. They gave you some, maybe, that are related to Kosnoff that don't pertain to us, but certainly not with regard to Napoli.

Napoli isn't using a master ballot. All of the clients are voting for themselves. So, again, it's simply how the process, or to use Mr. Schiavoni's words, the story about how the "proof of claims" process came together is completely irrelevant to confirmation discovery with regard to Napoli, because we are not a master ballot; the clients are voting for themselves.

And I am sure, despite this, insurers' counsel is going to be able to put together some seemingly plausible explanation. You know, they'll say something like, Your Honor, this is the most important discovery in the case, you know, this is the dog that wags the kettle [sic] or whatever phrase that they use.

But the reality is that this discovery targets the law firms and not claimants. It's apparent from the discovery

because it doesn't matter whether Napoli represents John Doe or John Smith. The discovery is irrespective of whatever client we represent.

And they could have served discovery targeted to clients, but for whatever reason, they didn't. The intent is to harass us and, frankly, Your Honor that's sort of the sentiment that I want to leave you with is that parties, you know, shouldn't be allowed to use the discovery process to attack the adversaries' attorneys to gain a litigation advantage and they shouldn't certainly not be permit to forego the Federal Rules of Procedure in doing so. It's a clear abuse of the discovery process and it needs to stop.

Likewise, I believe it was the insurers' counsel who, last week, reminded the Court about the duty of candor in this jurisdiction. We ask the Court to remind the insurers of their duty of candor and cease the *ad hominem* attacks concerning Napoli.

That said, in the meet-and-confer and multiple letters, we have reached out to the insurers and we have repeatedly informed them that we would accept service of a properly served subpoena and they have not taken us up on that offer. They are, from our perspective, they are wasting our time. Time that I could be devoted to speaking with clients and explaining the solicitation procedures right now; it's being consumed with this, and that's their goal.

Does Your Honor have any questions for me?

THE COURT: The only question I have, and I don't know if, perhaps, someone else is going to address this, which is fine, is very specifically on the party issue, is why isn't signing a proof of claim, why doesn't that make you a party with respect -- and filing it -- make you a party with respect to that claim --

MR. BUSTAMANTE: I --

THE COURT: -- and/or is it just that you're not a party, but you're still subject to questioning, but just not as a party; is that the answer?

MR. BUSTAMANTE: I, of course, will let Mr. Robbins handle the official answer. I know my thoughts, personally on the issue is that, you know, as attorneys, we certainly sign all sorts of documents on behalf of our clients all the time. It does not make us a party to a litigation just because we are executing a complaint, executing even a sworn affidavit.

In New York, we have to verify complaints, which are very commonly signed by attorneys. That does not make us a party in interest. Certainly, under the Federal Rules, it does not make us a party in interest for the purposes of discovery. So, that would be my answer, but if Mr. Robbins tells me I'm wrong, then you'll have to go with that.

THE COURT: Okay.

MR. CURRIE: Your Honor, do you wish me to address that question or shall I wait my turn?

THE COURT: Well, Mr. Currie, why don't we go to Mr. Robbins' clients next.

MR. CURRIE: Thank you, your Honor.

If I may, I just want to say one thing in response to Mr. Bustamante, regarding service of a Rule 45 subpoena. You know, the insurers offered, in our discussions with, in the meet-and-confers with the Napoli firm, to convert or serve discovery to a Rule 45 subpoena -- you know, they have an office in Wilmington -- and the response was that they believe that we would have to serve the firm in New York and litigate the Rule 45 subpoena in New York, which is one of the reasons why, you know, in order to try to strive for efficiency, is one of the reasons we brought this motion.

So, I think that was important to clarify that, Your Honor, that we did offer to convert our discovery to Rule 45 and get to the more substantive issues, but they declined to do so.

THE COURT: Well, Rule 45 is not necessarily known for its efficiency, okay.

MR. BUSTAMANTE: Fair enough.

MR. CURRIE: Yeah, that's absolutely right, Your Honor.

THE COURT: Okay. Let's turn to Mr. Robbins'

clients.

MR. CURRIE: Yes, Your Honor. Thank you. I'm just going to the next part of my outline, Judge.

So, Your Honor, regarding Mr. Robbins' clients, so his clients, Ask LLP and Andrews & Thornton, so what we put in our papers is, you know, exactly -- you know, regarding the proofs of claim -- the concerns that the Court forewarned everyone about are present here with -- for example, one of the ASK attorneys, David Stern, signed nearly 1500 proofs of claim including, you know, 686 within two weeks of the bar date. An Andrews & Thornton attorney, Sean Higgins, signed nearly a thousand -- 955 -- and including 951 of those within two weeks of the bar date.

And so, you know, the same kinds of concerns that we've been talking about with others where you have attorneys signing hundreds and hundreds of proofs of claim really goes to the core of, like, could they -- did they generally do the diligence? Does the diligence and the process support counsel's signing on behalf of the claimants in the claims process?

You know, we don't know the answer because we don't have the information. We don't have the documents. We don't have the ability to unpack the issues that are raised with exactly the concerns that Your Honor raised in essentially saying, I really don't want to see one lawyer signing a

thousand proofs of claim, but here we are with both of these law firms.

And so, again, you know -- and, again, like, you know, as we stated in our papers, you know, we're not suggesting that these firms are named plaintiffs or named parties in this firm [sic], but they're engagement in the level of, their engagement in this process suggests that they ought to be, you know, at minimum, treated as if they're parties, especially when all of us are confronted with the very tight discovery schedule.

And having the additional time, you know, essentially frittered away by trying to litigate these in foreign jurisdictions, essentially suggests that, you know, the suggestion is that the preference is for these firms may be to just run out the discovery clock with a hope that we're not going to get anything.

And, you know, what we were trying to accomplish both, through our meet-and-confers, where we were suggesting to counsel, why don't we agree that we convert or we'll give you a Rule 45 subpoena if we can agree that the substantive issues can be considered before you, Judge, but the parties declined to do that. And what we want to do is actually get to the substance, but we find ourselves here at this preliminary stage.

THE COURT: Okay. Let me ask you this -- I

understand that argument. Mr. Robbins is going to respond to it. He's going to start by saying that is not a thing, but then he'll get beyond that.

So, the documents you want, let's talk about those. Is there distinction between process and documents that reflect communications between counsel and the client?

I know these issues came up in two that are not in front of me today: Verus and Mark J. Bern. That was a big part of the response to, or the filings in connection with those two motions.

Here, I want to understand exactly what you want. And I've got the first -- the sets of interrogatories in front of me, and it strikes me that some of this -- well, I guess I want to understand that notwithstanding the interrogatories, which I'm looking at, that you're not looking for attorney-client privileged information; what you're really looking for is proprietary, confidential information about how the firms generate clients and how they prepare the proofs of claim?

MR. CURRIE: That's right, Your Honor. We're not looking for the communications with the claimants and their lawyers; that's not what we're going about.

But I think what would shed light on whether there were any issues in the integrity of the solicitation and the aggregation of claims is if we knew about documents and communications; for example, if a law firm was using an

aggregator or a vendor, what were the, you know, what do the documents reflect about the nature of the financial arrangements, in terms of the incentives that the aggregator may have had to collect as many claims as possible within a short time period, would suggest that care was not taken and that they were then -- and the fact, for example, of when communications transpire between the aggregators and the law firms might suggest what was the potential level of diligence that the lawyers were able to do if they were using claims aggregators or actually talking to the claimants.

But what -- we're at an information deficit, because we don't know what the nature of those communications might be or those financial arrangements and incentives and that's what we're seeking. We're not looking for the information or the discussions between the lawyers and the claimants; that's not what we're about.

THE COURT: Okay. Thank you.

Mr. Robbins?

MR. ROBBINS: Thank you, Your Honor.

Can you hear me all right?

THE COURT: I can.

MR. ROBBINS: Thank you.

So, I'm going to address two points: whether our clients which are -- again, for the record, A&T and ASK -- were also making certain broad arguments that I -- as Mr.

Bustamante pointed out, applied to several of the firms who are similarly situated here on this motion. We're going to talk about the party versus non-party question. We're going to talk about whether the Court is free, as the insurers ask, to sort of (indiscernible) the whole Rule 45 process, which is what they're asking you to do.

But what I want to be clear about what I'm not going to cover today. I am not going to make an argument about the relevance or lack thereof of what the documents are that they're asking for. If and when we get to the merits of these requests, when a subpoena is duly issued and if and when it comes before this Court, I will have plenty to say about whether the effort by these insurance companies to discover the propriety processes of the firms that I represent have anything, whatsoever, to do with the confirmation process, and for a whole host of reasons, I will explain at that time, they manifestly do not.

But for today, all that matters is whether these document requests, as interrogatories, are proper. Are they properly served on two law firms by virtue of their status as lawyers for claimants?

The answer is no, they are not. And this notion that the insurers peddle that the definition of "party" can sort of be some kind of sliding scale, according to which, at some point, you morph from mere lawyer for a client into a

party in your own right is, I think, a fool's errand to begin with. Party versus non-party is an on-off switch; you either are a party or you are not.

My clients are not. And if there were going to be a sliding scale, which, of course, there is none, and the one and only case they cite, the Compagnie Francaise (phonetic) case, just has no bearing on the question at all. There, the issue was whether one French governmental agency could be subpoenaed for documents served on another French agency when the parent agency was the principal and the other agency was its agent.

That's obviously got nothing to do here with the lawyer-client relationships. They are not principals and agents.

But if there ever were going to be a sliding scale, Your Honor, nothing could be more perverse than the sliding scale these insurance companies are feeding you, because according to their argument, the more diligent the client -- the lawyer is, the more work the client does, the more papers the client files and signs; in other words, the more the law firm does its job as zealous advocates for clients, the likelier it is to become a party and, therefore, to have its own efforts leveraged against the clients. What a perverse set of incentives that would be if the law permitted party status to depend on that, you know, how much, how involved you

are.

So, to get back to the answer that you asked Mr. Bustamante and which he was kind enough to defer to me, you asked whether merely signing the proofs of claim can possibly make you a party. The answer, full stop, is no; it cannot possibly be. If the law were otherwise, there are countless pleadings in countless jurisdictions that require the signature of a lawyer, or at least permit the signature of a lawyer.

And if those rules converted you into a party simply because you obeyed them, we would be seeing lawyer depositions all the time. In fact, we see lawyer depositions almost never. And the notion that this is an appropriate time to do so, strikes me as quite odd. Quite odd.

Not in the least, because some of the very arguments you heard the insurers make a few hours ago when the shoe was on the other foot. When the shoe was on the other foot, here are some of the things that the insurance companies told you. They said: Gosh, this is disproportionate to the case; the case is coming to confirmation soon; we have got to ask ourselves, what is the value added; you know, this is a melting ice cube and we don't want to see it melt by having a set of rabbit trails for discovery.

Well, now the shoe is back on the other foot and we don't hear them telling that tale anymore, but it is just as

true when they won their motion to quash as when they seek to enforce subpoenas that are just as much, if not more, in the nature of a rabbit trail.

Now, let's go through the more particular arguments that these fellows make on party status. In their papers, but tellingly not in Mr. Currie's oral argument today, they opened with this one. They said that our firms are parties because they are Coalition members, as reflected in their 2019 statements. I didn't hear that argument repeated today.

That was because since we filed our opposition last evening, the insurers, perhaps, finally read the 2019s and when they did, they probably saw that in the paragraph numbered one, in every single one of the filings, from the very first 2019 until the very most recent one at Docket 6458, paragraph number one in each case says that the only members of the Coalition are persons who are sexual abuse survivors. Those are the members of the Coalition. Those are the actual parties to this case; their law firms are not. So, we can dispense with, I think, the highly misleading claim about the 2019s, which, as I say, I didn't hear repeated today.

They say, then, that the Coalition moved to be a mediation party and by taking that step, they became a party for all purposes. I'm not sure about the logic of that, but again, that doesn't make the point because the Coalition is

not the law firms; the Coalition are the claimants, full stop.

They say things like, Well, these firms appeared in other bankruptcy cases. Well, you know, I assume there is a set of law firms that are repeat players in these cases. I'm in Bankruptcy Court at least long enough to know that it's something of a repeat-actor club, but I don't see how any of that makes a dime's worth of difference for purposes of making people parties; otherwise, there would be all kinds of parties on this screen today because some of these names show up in lots and lots and lots of cases.

They say, well, your clients got litigation funding so, therefore, they're parties. And that also is nonsense.

Yes, some client law firms got funding. Some of the big insurance company law firms probably get bank financing, too. They don't have to go to hedge funds because, I don't know, they've been on Wall Street for 200 years or since the Mayflower landed. Good for them. But financing is financing and it doesn't turn you into a party.

And then they say, Well, you know, you participated in the 2004 process and you didn't speak up. You didn't make this party argument back then so you've somehow waived it.

Also nonsense. 2004 discovery is available against non-parties. It covers "entities"; whereas, Rules 34 and 33 cover parties. So, we plainly aren't parties.

And as for this middle position where they say,

Well, you know, you're not parties, but you've been so active and, you know, so noisy and -- I don't know -- some other adjective, that you've somehow morphed into a party.

And as Your Honor stole my thunder on that, that is not a thing. There is no middle category. Parties are either parties or non-parties; it's an on-off switch. It isn't something that you can be a little bit pregnant about.

All right. So, there's just nothing to the argument that our clients are parties. There's nothing to the argument that any of these law firms are parties. I don't have the burden of arguing Mr. Kosnoff's case, but if I did, I would tell you he's not a party either. But, certainly, our clients are not.

So, then they say, Well, okay, maybe we're not parties, so, probably, we should have issued subpoenas. We didn't, but we would like you to pretend that we did and then after you pretend that we did, we'd like you to enforce it right now in front of you and get to the merits.

I have no doubt that's what they would like, but that's not the law. The law says you've got to obey Rule 45. You've got to actually issue a subpoena.

We're happy to take service of the subpoena, but we're not happy to waive a whole bunch of rights that the law clearly prescribes, which Your Honor adverted to earlier.

So, to me, where we end up, Your Honor, is

essentially where you ended up when the shoe was on the other foot this morning. The time for confirmation is fast upon us. The value added of these subpoenas, if and when they ever get issued, is minimal. But even if it was more than trivial, which it isn't, but even if it were, it's not a "get out of jail free" card. You've got to follow the rules.

The rules are Rule 33 and 34 apply to parties. We're not parties. They need to issue a subpoena and they need to obey Rule 45.

They make, by the way, one final point, which is they tell you that you can enforce the subpoena, notwithstanding Rule 45(c), either because our law firms transact business within the hundred miles or because it wouldn't really be that burdensome, so let's dispense with Rule 45.

Both of those are just dead wrong. Rule 45, the applicable provision of Rule 45(c)(3)(a), I think is the subprovisions, you will see, Your Honor, that the business must be conducted "in person." In person; that's what the rule subsection says, and there is no contention, and there couldn't be any contention that the appearance on these Zoom sessions by lawyers, otherwise in California and Minnesota, as my clients are, have somehow transacted business in person. They haven't. So, you can't dispense with Rule 45 on that ground.

And then they invoke some open-ended exception that they ground in a case that they cite, I believe, at Footnote 85 to their submission, their motion to compel. And this sort of omnibus exception, which would swallow the whole, if it were true, says, according to them, Well, so long as it wouldn't be terribly burdensome to produce documents, for example, if they were electronically filed. You don't really have to obey Rule 45's hundred-mail rule.

You will search that case high and low for any real support to that, and you won't find it, and not surprisingly, because it would totally gut the hundred-mile rule contained in Rule 45 for most document discovery in the age of electronics. And, yet, the rule has been amended since the Email Age, without any material change, except for, you know, some formal changes about where provisions appear.

So, just to sum up, we're not parties. There's no such thing as quasi-parties. And there's no excuse for not following the law that Rule 45 prescribes.

And with that, Your Honor, I think I'm done, unless the Court has questions.

THE COURT: I do have a couple of questions. First of all, let me ask you this for one of your clients since you brought it up. So ASK has appeared in person in front of this court for years, and years and years, had has been approved as counsel by this court for years, and years, and years

particularly witih respect to avoidance actions. So why don't they regularly transact business in this jurisdiction even if they've been circumscribed as we all have been to virtual hearings for the last couple years.

MR. ROBBINS: Well the question, I guess, is whether the fact that you litigate frequently in a proceeding which you're retained constitutes conducting business. I suspect the answer is no or else, you know, there are some large Delaware large firms that would find their files ransacked on a regular basis who appear in this court every single day.

I think the proposition simply proves too much. The notion that you can appear as an advocate for clients on a regular basis and thus turn yourself into a party in your own right seems to me wildly counter intuitive. I think it creates a set of perverse incentives. It means that you should, for example, not be a regular member of the Delaware bar because the more you participate in bar activities as a lawyer the likelier you are to have your files rummaged to the disadvantage of the very clients you represent. That cannot be what Rule 45 is getting at.

In any event, I don't think that is a question Your Honor needs to ask today because there is no subpoena in front of you. They haven't served us with a subpoena. They have asked us to act as if they have, but they haven't and they've

asked you to act as if the improper discovery requests were actually a subpoena, but they aren't.

So although I think the answer to your question is no, appearing as a representative of parties as a lawyer does not trigger the in-person business provision of Rule 45. As I say, Your Honor, it's a question for another day because there is no subpoena in front of you for my clients.

THE COURT: Let me ask you this question, so let's say I would agree that in a circumstance where a lawyer represents one client and signs a proof of claim form as agent for that client, and files it with the court, does not make the attorney a party. What about a situation where here I have, and I'm not sure if this is the facts for your clients, but where here I have an attorney signing proofs of claim, say 300 proofs of claim on behalf of a client without permission. Does that make the attorney a party?

MR. ROBBINS: The answer is no, but let me unpack it just a little. First off, if a lawyer signs a bunch of proofs of claim without permission a fact, by the way, as they used to say on Perry Mason when I was a kid, assumes a fact not in evidence. There is no evidence, none, and it is false to suggest that my clients did that.

Let's take on the hypothetical, let's suppose somebody did that. I suppose, Your Honor, they would be appropriately sanctioned under Rule 11 or its bankruptcy

cognate, but if you look at the advisory committee notes to Rule 11 you will see that Rule 11 motions are supposed to be litigated on the basis of an existing record and that discovery in aid of sanctions is generally forbidden.

So even if it were true, Judge, even if it were true that some lawyer had engaged in the mischief you have described it would not warrant discovery, though it might warrant sanctions. But what it would not do is convert them into a party. Imagine, for example, plaintiff's class action lawyers. So let's take it out of the mass tort context, put it in the context of a securities class action. Now I am usually on the defense side of those cases, but imagine the other side.

They're putting together a class action and they're trying to satisfy the numerosity requirement of Rule 23 of the Federal Rules of Civil Procedure. They're getting a bunch of people into the class sufficient to satisfy numerosity, but then they have this meeting in the conference room where they say, uh-oh, aren't you worried that if you tip the balance and satisfy the numerosity requirement suddenly we're going to become parties because we've now signed a complaint for too many clients. There's just no difference. It cannot be that you become a party in your own right simply because of the number of parties you represent has increased.

Your hypothetical, Judge, added an important

wrinkle. You said not only is it numerous, but it's unlawful. It's signing up people who didn't authorize you. That's sanctionable and if you can prove it that lawyer should be severely sanctioned, but there is no authority for discovery even in aid of sanctions. Here we don't even have that.

THE COURT: So you're saying that somebody who files a proof of claim in my court cannot be pulled into my court by way of discovery issued under a notice. They could only be pulled into my court by discovery issued under a subpoena and if they're outside the 100 mile radius too bad.

MR. ROBBINS: Well the answer is yes with one qualifier. If the lawyer files a claim in his or her own right, you know, then they become a claimant. But the strict answer to your question is no. If all the lawyer has done is sign a proof of claim and file it he or she is like any other lawyer filing any other pleading in any other courtroom in any other jurisdiction. They are a lawyer, they are not a party. If they've done it unlawfully, if they've done it without vetting, if they've done it in a way that violates Rule 11 the court has all kinds of authority to issue sanctions, but what you don't have is the authority to treat them as if they are their client; they aren't

THE COURT: So how would I effect my all kind of authority? How would I do that? How would I force them to be at that podium that nobody is at right now? How would I force

them to do that?

MR. ROBBINS: Well, of course, there are lawyers who are going to come before you because they're representing their clients and you can ask them all kinds of questions which may or may not be germane, and they'll either answer them or they won't.

If the question is how can you make them turn over their files or their proprietary information to either the court or to opposing counsel the answer is that merely because they have signed a proof of claim does not give this court that authority any more than it would give any other federal judge the authority to go through, allow opposing counsel to rummage through a lawyers file simply because, for example, he or she was required to sign -- to verify an interrogatory set of answers.

THE COURT: Well I will make a distinction between attorney/client privileged information and proprietary confidential information that a firm would prefer not to turn over, but is privileged at all. So I agree with that, but I am still wondering how I get that attorney in front of me. I will tell you the cases that you read about improperly signed proofs of claim are all about the process. They are all about the process that the attorney used or didn't use --

MR. ROBBINS: Yes.

THE COURT: -- and the diligence the attorney did

or didn't do went before that proof of claim was signed,

MR. ROBBINS: Yes. Your Honor, adverting to a line that is consequential. So let me tell you what -- the answer is you would have the authority to do what you just said because if there is evidence on the record, on the existing record, that suggests that a lawyer has misbehaved either by making up claims or filling in information on a claims form that didn't come from the client, so on and so forth, you absolutely have the inherent authority to pursue discipline proceedings if, you know, the process of Rule 11 is strictly followed.

But there is no authority short of a *prima facie* showing of misconduct for a court, whether this court or any other federal judge, to seek the kind of internal law firm discovery that the insurance companies are seeking. This is without regard to the question of relevance because I said I was going to save that for another day. I got a lot to say about why this stuff is irrelevant, but for today all that matters is that we are the parties and that the hypos that the court is concerned about are ones that flow from your inherent authority to police the proceedings in front of you under principals like Deegan v. United States, and various other court cases dealing with the inherent authority of courts.

In the absence of any evidence of the kind of misconduct that triggers a court's authority to police

activities in front of her I'm sorry, and I always hate to be a lawyer telling a judge she can't do something, but you can't do something and you can't do this.

THE COURT: So I can't do something if I know from a review, not a personal review, but from a declaration from someone who has done a review of the proofs of claim that lawyer X signed 300 proofs of claim on one day.

MR. ROBBINS: No, you can't. I --

THE COURT: Why not?

MR. ROBBINS: Well, again, we talked about this back in January of February in the context of 2004. I -- that -- at that time we didn't discuss the question of party status because under 2004 that is not pertinent. There is nothing the least bit suggestive, much less nefarious, about lawyers signing a bunch of documents during a pandemic when you can't go out and visit people, and people can't come to your office readily, and everybody is wearing a mask, and the deadline is -- you know, the bar date is coming up, and it's fast upon us, and people are vetting and scrambling to get information, and doing their job which means it takes more time not less time to get the requisite information so that the bar date is fast upon us.

Finally, there is a certain number of people who simply can't get -- you know, clients who can't sign it themselves so the lawyer signs it after doing his or her

appropriate due diligence. There is nothing the least bit unseemly about that. It is exactly what you would expect. So the notion that that kind of a showing could ever be enough to trigger the court's inherent authority based on sanctions, I think, is really a bridge too far.

THE COURT: I don't think it would be based on sanctions. I think it would be what you said, my inherent authority over the proceedings before me and whether, yes -- well I guess there could be a valid reason that somebody filed -- signed 300 proofs of claim on one day or there might not be. There might be a reason that isn't valid that they signed 300 on one day because that is a lot to sign on one day.

It does not suggest that you, at least, contemporaneously revised 300 proofs of claim in one day, felt comfortable with them and signed them. Maybe you reviewed them over the last five months, I don't know. But that is concerning to me.

MR. ROBBINS: I understand that, Your Honor, though I think it, frankly, strikes me as totally anodyne. But even if it -- you know, if it is concerning that still is not the standard. The inherent authority -- let's be clear, the inherent authority of courts is not boundless. You know, it is closely tied to the sanctioning authority. I don't believe that the court has the authority under 105 or under inherent authority or anything else to order either an in-camera review

of lawyers' files or, worse yet, turning it over to insurance companies and opposing counsel.

It would be a different matter if there was something facially sanctionable or even probably sanctionable about some kind of behavior. The circumstances you are identifying, Judge, that somebody signed a bunch of proofs of claim right before the bar date, you know, I guess I find so innocuous that the notion that the court has the inherent authority prescribed by no rule, limited by no precept to allow opposing counsel to rummage through our files based on a hunch that maybe somebody didn't vet these claims sufficiently which, by the way, won't be proved by any document I don't think, but it doesn't matter.

First of all, all that matters today is that they are using an improper way of getting this material. If and when they use the right approach we can have a fully elaborated version of this argument because, as I say, I've got a lot to say about its relevance and its providence. It's just not today's question.

THE COURT: So your position is even if I had, which you would dispute, inherent authority in this scenario that I posited --

MR. ROBBINS: Right.

THE COURT: -- that still doesn't make any of the law firms a party for purposes of the discovery that is being

sought, the documents and interrogatories that are being sought -- documents sought and interrogatories asked.

MR. ROBBINS: Exactly right. We are not parties. There is no such thing as quasi parties and there is no warrant for avoiding Rule 45 by its terms. That is all you need to decide to get rid of all these motions today.

THE COURT: Thank you.

MR. ROBBINS: Thank you, Your Honor.

MR. CURRIE: Your Honor, may I be heard very briefly --

THE COURT: Of course.

MR. CURRIE: -- on one of the points that you raised which I think is a very important one. You know, the lawyers that we're talking about at the firms at issue are not -- we're not talking about the same scenario where lawyers ordinarily appear in front of a court or in a litigation. Here the lawyers sought and obtained your permission to sign proofs of claim and at the time that you agreed to permit that you granted them that permission, but raised the very concern that we are confronting here; the concern that situations where lawyers who would be signing hundreds or even a thousand proofs of claim, and the consequence of that is that they put themselves squarely in the cross hairs, if you will, of becoming fact witnesses.

How did that all come about? How did all these

claims in the scramble, as Mr. Robbins talked about, heading up to the bar date, how did all that sort out and how do we know that proper vetting and due diligence was done? We don't, we don't know; therefore -- you know, what counsel seems to be arguing here is that the court shouldn't even be permitted to permit discovery on it, but yet the claimants want to get paid on these proofs of claim under the plan.

So I think a broader point that Your Honor honed in on is it's completely appropriate for discovery on these issues because of what's at stake. It may well be right that Mr. Robbins, you know, may be right that in many circumstances there is an explanation or an explanation for some of the claims, but we don't know that.

THE COURT: Thank you. Let's move onto the others.

MR. CURRIE: Yes, Your Honor. The next firm that is in our motion is Krause & Kinsman. Again, not to repeat the main point, but here, you know, one of the partners, Mr. Krause, Adam Krause, signed over 2,500 proofs of claim; more than any other attorney that we are aware of. Over 2,000 of those claims were within two weeks of the bar date.

The court is familiar, because of other motions in this case, with various claims serves as the aggregator. Krause & Kinsman work with that claims aggregator to submit proofs of claim and our understanding, based on what we have seen so far is that Verus submitted over 1,900 or

approximately 1,900 proofs of claim that were signed by Mr. Krause.

So as Mr. Schiavoni mentioned earlier the effort to get at relevant information that goes to this process through the aggregators is proving very difficult. And our effort here is to try to get at a picture of what is going on in this scenario, in the scramble leading up to the bar date with this firm. So that is why, you know, it goes to the relevance in particular regarding this scenario here.

THE COURT: Thank you.

Mr. Conaway.

(No verbal response)

THE COURT: You're still muted.

MR. CONAWAY: Good evening, Your Honor.

THE COURT: Good evening.

MR. CONAWAY: Mark Conaway on behalf of Krause & Kinsman.

Before I get into the direct response I want to address something that you raised with Mr. Sullivan -- excuse me, Mr. Robbins. The court absolutely has inherent authority to inquire upon those that appear in front of it to answer questions. Whatever the breadth and scope of that apparent authority is, however, does not inure to the insurers benefits here. The fact of the matter is your ability to do something and their ability to do something are entirely two different

matters.

There is nothing that stops Your Honor from asking a lawyer that appears in front of you did you do this or did you do that. That is fundamentally different from issuing the subpoena to a non-party to open up their files based on what is, I think, suspicion without merit. The fact that anybody signed a proof of claim form and that we don't know or, I think the words were, we just can't be sure that there was integrity in the process I think the answer to that, Your Honor, is just turn that around.

We have no reason to believe that, at least, with respect to my client that there was anything but integrity undertaken. These folks have ethical, and professional and criminal responsibility associated with their acts to sign these forms. What we are doing is now running down a rabbit hole for discovery that will get us nowhere.

The questions they have asked, the answers they will get, even if they get them all, only open another door. They don't answer the question -- and, really, to tell me that somebody signs so many odd forms, that they did so many in a certain day, that they used the claims aggregator not one of those things is prohibited by the rules, is inherently illogical, inherently fraudulent, inherently wrong, but if you want to come to the conclusion that those things are that's great.

We are all big boys and girls though and litigation forces all of us to make decisions. And in this case chasing this rabbit down this hole is their choice, but its litigation. We're going to a confirmation hearing in two months, if you want to waste your time chasing nothing, getting nothing, opening the door to additional discovery, kicking over the apple cart of the debtors' reorganization that is where this ends up.

I am not going to repeat myself over and over. I wish I had had Mr. Robbins time, he did a great job. His argument over proportionality and the balance here as compared to the proportionality complaints that were raised in the earlier motion is remarkable given that.

The insurers here, if they had gotten all they wanted, would have been looking at 5,500 claims for which they would have sought discovery for. Now a lot of those claims, as you have heard, Your Honor, were resigned by the claimants themselves. So I don't know what the real number is, but we're talking about 5,500 claims for which there was an effort to dig through files, to ascertain whether something we think or they think might have happened, but we don't have any evidence of it. All we know and all we have put on the record, Your Honor, is that there were signatures, there were lots of them, they happened near the deadline and the claims aggregator involved.

If you are going to accuse a lawyer of not living up to their professional obligations you ought to have more than that in your hand; you really ought to. This is not the way to do things. I don't accuse anybody of anything unless is know what I'm talking about. This, in my mind, Your Honor, is one of the lowest forms of accusation you can make.

Thank you, Your Honor. If you have any questions I'm available to answer them.

THE COURT: No. Thank you very much.

I believe that is all of the law firms involved in number eight, is that correct; agenda item number eight?

MR. CURRIE: Yes, Your Honor.

THE COURT: Okay. Nine and ten are similar, correct?

MR. CURRIE: Yes, Your Honor, they are.

THE COURT: Okay. I would like to see if we can get through them tonight. Lawyers have been here all day and they raised similar issues. So I would like to go ahead, this is agenda item number 9 is a motion to compel compliance with a subpoena served on Slater Slater Schulman.

MR. CURRIE: Yes, Your Honor. As you pointed out our motion to compel as to Slater Slater Schulman and to the Eisenberg Law Firm as well arose under similar circumstances where in that we served them with a Rule 45 subpoena and they responded here. You know, some of the arguments that counsel

makes in response, essentially tried to conflate what we're asking for into what we are not asking for, convert what we're asking for into what we're not asking for.

We are not asking for privileged communications between the claimants and the lawyers. As we went over it in discussing the last motion what we're seeking for is documents that go to the process; you know, how were -- particularly in circumstances where proofs of claim were signed by attorneys, what was the authorization, what were the documents to -- you know, we're seeking documents that might identify lawyers who interacted with claimants not what they talked about, documents to identify third parties, whether its aggregators or other third parties that had a role in the claims accumulation and vetting process or in the signing of the proofs of claim and submission of them.

We -- so I can go through the list of our requests, but, essentially, we're not looking for what counsel asserts that we are. We're not looking for the privileged communications. We are trying to get at this claims process particularly where lawyers were signing proofs of claim close to the discovery date. One of the things that I think we will probably hear, because counsel raised it in their response, is some of those proofs of claims were cured, if you will, or ultimately signed by claimants, but it wasn't until some of these issues were raised that those cures happened.

So I think it's with -- even though if some of them have been ultimately signed by the claimants themselves that it remains relevant to the -- if for all the reasons we've been talking about for the last hour or so about why unpacking that process is still important and, essentially, where we are with these two law firms, Your Honor, is where we ultimately would like to be with all the firms that we had been talking about today and be able to obtain documents.

I can say that we did make some progress in some of the meet and confer discussions narrowing the issues and trying to make our views clear. And hearing from counsel for Slater Schulman. And I think we did manage to narrow some of the issues, but we arent able to come to an agreement. You know, their view is that -- and I may be mistaken, but I don't think that the Slater Schulman -- counsel for Slater Schulman produced any kind of a privilege log yet. It's a little hard to address claims of work product, for example, when we don't have the documents in front of us because as the court is aware a work product document may have genuine work product or facts that are not privileged and are not work product as part of one document. We don't have anything to discuss because we don't know what there is.

So what we are seeking here is that the court order actual compliance and compliance with our subpoena. If we're going to engage in a debate or discussion of particular

privilege issues let's try to get to that.

THE COURT: Thank you.

Mr. Alberto.

MR. ALBERTO: Good afternoon, Your Honor, or I should say good evening now. I see its dark outside. Justin Alberto from Cole Schotz on behalf of Slater Slater Schulman.

I am going to start where Mr. Currie left off and I believe that we have, on several meet and confers now, indicated that we would be willing to, at some point, undertake the burden of going through a privileged log to the extent anyone can explain to me why this or to Slater why this discovery is at all relevant.

I apologized before, Your Honor, I did pop onto video twice because I think there are some overlapping issues that were discussed at length during colloquies between you and Mr. Robbins earlier today. I ultimately decided to sit down both times because it wasn't my matter and I think everybody is getting tired towards the end of the day here and I didn't want to belabor the record, but the discovery that the insurers seek it's not only irrelevant, its untimely, it's completely over broad and it's not proportionate at all to the needs of the case at this time.

I find a lot of irony in Mr. Currie arguing this side of the aisle this afternoon while Mr. Plevin argued the other side of the aisle this morning. I agree with Mr.

Robbins in that respect -- excuse me, Mr. Russell in that respect. It's not even close to the full picture of why we're here today.

Unfortunately, Your Honor has heard a lot about turning the temperate down in these cases. This discovery does the exact opposite, in my opinion, and would leave confirmation down tangents that really have no bearing on 11/29 or, at least, no bearings that I can figure out. The discovery is a continued effort by insurance companies, all of whom have to defend against mass tort cases like the ones presently before Your Honor day in and day out to investigate business practices of the personal injury bar that represents the claims -- excuse me, the claimants whose claims the insurers may ultimately have to pay. So they have an economic incentive to be here muddying the water. This is the second time that they have sought discovery from Slater and other firms based on the, still, unsubstantiated allegation that there was wrongdoing in the claims process.

I want to make one point before I move onto the discovery that is before Your Honor today. The last time that we were before Your Honor the insurers sought substantially the same discovery back in February pursuant to Rule 2004 based on their theory that there was egregious claims mining in this case before the bar date. Rule 2004 has been noted by Your Honor and Your Honor's colleagues on the bench as far

broader then the Rules 26 through 45 normal strictures of discovery that were here today.

Let me say one other thing on that, Your Honor. If there was a shred of evidence that substantiated any claims that the insurers believe of wrongdoing or nefarious conduct we would be having a much different conversation today. We wouldn't be here on a one-off Rule 26 or 45 discovery matter. We would be here fighting over an omnibus claim objection or worse a sanctions motion.

In my view, Your Honor, again, the discovery at issue today, at its core, at most is relevant to a question of authority. Did Slater attorneys have the authority to execute proofs of claim on their clients' behalf. And while I still believe the issue of authority is completely irrelevant at this juncture the rest of the discovery about Slater's business practices, how it came to represent a client are wholly unnecessary and completely irrelevant to the 1129 confirmation standards and could never yield any probative evidentiary value to plan confirmation.

What question Slater asked our client, what documents they reviewed, what questions they have its just -- it goes to the heart of the attorney/client privilege and work product doctrines. The insurers know that they are not entitled to that and when you read these requests for production of documents, particularly, I think request 7

through 11 they are, essentially, asking that we turn over our entire client files for 14,200 clients.

The claimants, Your Honor, they will have their proverbial day in court when it comes time for a trustee or whomever to reconcile and analyze the voracity of these claims that were submitted in these cases. The claims will rise and fall on their own without regard to what Slater's intake process was or was not and how they came to have -- how they came to represent their clients.

The claims are the clients. They are not Slaters. If the trustee, after reviewing those claims, thinks certain client claims are invalid for whatever reason he or she can object and seek to have them disallowed or use whatever the equivalent took the trustee has at its disposal pursuant to the trust distribution protocol that ultimately, you know, I expect to follow from confirmation in these cases.

So really what they're looking for, which I still believe is irrelevant, but I'm happy to address about the question of authority, it's been raised a lot, it's been hinted at, let's get right to it. We submitted a letter response yesterday, Your Honor, and that included Slater's form of engagement letter which all 14,200 Slater clients signed before their claims were submitted. That proves that Slater absolutely had the authority to sign claims on behalf of all of its clients, period, full stop.

Slater didn't stop there though. It went to great efforts to have approximately 95 percent of the claims submitted prior to the bar date, signed by the actual client and then after the bar date obtained even more signatures to bring the total percent, I believe, to 97.5.

So, again, Your Honor, the claimants in these cases they're not corporate clients with in-house legal departments who allege -- who get paid to be responsive and respond to legal inquiries on a lightning fast basis. They're individuals and they're individuals who allege to have suffered some of the most unthinkable and reprehensible acts conceivable.

It's not unreasonable to think that a small percentage of them might not respond to a signature request in a timely fashion and this is exactly why Slater sought and obtained an ethics opinion that we also attached to our response yesterday that Slater not only had authority to sign on behalf of its clients who for whatever reason were unreachable couldn't sign for themselves, but, in fact, likely had an ethical obligation to do so. That should not open Slater to discovery now. I agree with Mr. Robbins before that it would be a perverse outcome for a lawyer to take that act on behalf of its client just to be opened up later on to discovery.

Your Honor, I am happy to cede the podium. Again,

I stand on my belief that at this juncture it's just wholly irrelevant. The claims are valid under 502 until they're objected to. Slater is not submitting a master ballot. And the last thing I will say, Your Honor, the voting procedures order also includes carefully negotiated provisions concerning the use of electronic ballots. The meta data in audit trail of which, I believe, are automatically deemed to be part of the record in this case.

So, you know, put together we have a second attempt that discovery by a group of insurers economically motivated to keep a pot of dollars available to claimants as low as possible with no new evidence supporting how this discovery is relevant to or needed to satisfy or test the 1129 plan confirmation standards against the backdrop of a voting process by which the party and Your Honor is ensured that there could be no legitimate pampering that goes unnoticed.

So, again, I just don't see how this is relevant now. To the extent that I'm told by Your Honor that it is relevant we will, of course, produce a privilege log, but we have said and I did want to correct the record that, you know, to the extent we're told that this is relevant we will, of course, comply with our obligations to produce a privilege log, but I just don't think that they could pass the relevancy issue. Of course Your Honor may disagree, but that is my view and I'm happy to answer any questions you may have.

THE COURT: I don't think I have any questions of you. I did note the ethics opinion that the Slater firm received and followed.

Mr. Currie, the question I have about the Slater firm for you was a couple. One, I noted, and it must have come out of your filings, that they filed approximately 14,200 claims and 95 percent of them were signed by the claimant prior to the bar date. So you are only talking about 5 percent of their clients whose claims the firm signed and now there's 97 and a half percent who have signed proofs of claim themselves, the claimant.

So if I am going to consider the information I got from Mr. Hinton about -- and look at the fact that a certain lawyer filed a number of claims and that that should be suspicious because they did, when I am looking at the Slater firm shouldn't I take into consideration that 95 percent of their claims were signed by a client? Doesn't that weigh in favor of the fact that there doesn't need to be an investigation of the Slater firm in terms of concern about fabricated proofs of claim?

MR. CURRIE: Your Honor, I think that the court can appropriately look at figures like that across the different law firms that we're talking about and the different circumstances under which these claims were submitted. So I am not suggesting that it's not appropriate to consider those

factors.

Here, you know, with the Slater firm one of the things that becomes -- that sort of has emerged from this discovery process is we've learned a little bit more that we didn't know before. We didn't know, for example about the ethics opinion that the firm sought. I think the Slater firm could be appropriately praised for that. It seems like an appropriate thing to do.

One of the things that struck us about the opinion letter that they received is the dangers of failing to carefully examine claims and the ethical dangers that can arise when attorneys sign proofs of claim. So I think that is, in many ways, re-enforces some of the issues that we're seeing broadly among many of the cases of the law firms here.

So I think one of the things I think is still appropriate, Your Honor, for the Slater firm is even though the -- it appears or at least the representation has been made that now where we are is that the outstanding claims have been -- that were originally signed by lawyers has shrunk.

What we don't have -- and we have a representation to that effect, but we don't really have an understanding of the process by which that happened. You know, in other words, and I'm not suggesting that it happened here, but one of the things that we -- that the court has seen from some of the work that was done earlier in the process in the Rule 2004 is,

you know, evidence one you look under the hood reveals, for example, there might be a difference between the date when a claim form is signed where, for example, the lawyers signature proceeded that.

Then even if, hypothetically, that were the case and even if at some point later a claim form was signed by the claimant themselves one doesn't know just from that fact is, well, if the original claim form had a lot of missing important elements but at some -- and it was signed by a lawyer, but then was somehow cured what you don't know is what went into that cure process. Are we saying that is it the case that were previously the evidence suggested that forms were signed and information was filled in later which raises questions about the authenticity or the accuracy of the information, you know, has that been fixed. We don't really know unless we are permitted to seek discovery and ultimately just seek depositions to find out from those who are involved in what we're talking about here which is the post-submission correction of claims what exactly happened.

So I think -- so just to reiterate, Your Honor, I think it is -- I think it can be relevant to examine or take into account what percentage of the claims submitted by a particular law firm were signed by the claimants initially versus counsel. I think it's not the only factor to be considered.

THE COURT: Okay. But you are kind of shifting in that the original sin, as I understood it, was that a claimant didn't sign their proof of claim form and now we have the survivor signing their proof of claim form, but now you want to know information about that. So you are kind of shifting the goal post here, aren't you?

MR. CURRIE: Well I guess what I would say, trying to add to your analogy, if the original sin or the original evidence of the potential problem in the process is an attorney signing the proof of claim form that wasn't the only type of problems that became evident with the initial investigation that came up during Rule 2004 process, in the application of Rule 2004.

Some of the other examples that were described in some of the declarations the court read was, you know, for example, the example I said, where proofs of claim were apparently created after the lawyers' signature was affixed. And other proofs of claim where proofs of claims appear to have like an identical preprinted signature page that are, at some point in time, attached to that.

Instances where it wasn't just a lawyer submitting a proof of claim but where some of the proofs of claims were largely blank with very important fields not built in at all. And so in some ways this lawyer signing the proof of claim is the canary in the coal mine. It's an indication of potential

serious problems in the review process, but it doesn't necessarily reveal that it's the only problem or the only concern.

MR. SCHIAVONI: Your Honor, you drew the conclusion that all these other ones were signed by the claimants. Factually that is not the situation here. It's like huge numbers of the signatures were electronic. If you remember, the coalition fought tooth and nail during the bar date process against verification of signatures having to be provided.

So what percentage of these signatures are handwritten versus whether the aggregator chose to attach electronic signatures it's like you're drawing a conclusion from this that isn't before you right now. It's like this huge number of electronic signatures that are unverified.

THE COURT: We permit people to file proofs of claim with an electronic signature. I mean they just do. Omni does that. Prime Clerk does that. That is how you do it. If you submit it through their portal or whatever it is that is how you do it.

MR. CURRIE: These were court approved protocols.

THE COURT: How can we say people can't do that?

MR. SCHIAVONI: Your Honor, in the totality of the circumstances that we put before you, and let's be clear about this, on the 2004 hearing, you know, lawyers like Mr. Alberto

they were there. They didn't submit any evidence to contest, any evidence to contest any of the affidavits that went in. They didn't contest any of the evidence.

There were hearsay assertions as there are now about what took place, but the actual evidence that showed large numbers of forged signatures, and we put that before the court, went into evidence uncontested. These were signatures, the same handwriting used for hundreds of different claimant names. I don't remember which firm it was at the moment, so I'm not --

THE COURT: I'm not sure it's Mr. Slater. I'm looking, I've got those. I pulled out those declarations so I will be looking at those, but I am focused on the attorneys in the firms that are in front of me, and I view them as individually, so I will be looking at that.

I do think, I mean it does strike me because this is all sort of mathematical, you know, here is the percent of this and the percent of that, if my numbers are right and these attorneys -- the Slater firm clients signed 95 percent of the claims that were submitted by the bar date that is pretty indicative of not falling within the original sin, let's say that.

MR. SCHIAVONI: Your Honor, you may not understand what we were looking at and that was fundamentally the proofs of claim being prepared by third parties, by a third-party

source. This firm in Montana, you know, for which we submitted a declaration from an employee there. You know, huge numbers of these being generated, you know, by law firms -- by these businesses and not the law firms.

So if this particular firm had a situation where they had some stub group of them where the aggregator couldn't sign them and they had to sign -- they submitted a signature and they all got done that way that may just be indicative of that particular problem, but we haven't been able to get at any of this, get behind any of it.

I think what we put before you is fairly significant evidence that -- you know, it's like we haven't come on a lark, this isn't a fishing expedition. You know, we put forward some serious evidence that ties together to a group of firms who all tie together to an email about creating a particular bulk of votes and it's like you will see it also ties together to fund it that's coming from a common source.

So, you know, it was not done *ad hominem*, it was not -- it may be that, you know, if things are here, but it's like this was a legitimate effort to look into what we perceived to be a legitimate problem. It's like it's not a lark, it's not a fishing expedition. It was based on a solid foundation. It's not responded to by just these hearsay, you know, assertions of outrage. It's like when they had the opportunity to put on evidence they wouldn't. It's like the

level of resistance we have gotten to getting depositions from anybody, the aggregators in particular has been absolutely intense.

You know, I did hear, you know, when this schedule was set, this expedited schedule, I heard the plan proponents come before the court and we talked about how the plan proponents for asking for something extraordinary and it was, I forget the saying, like for those who ask for extraordinary relief some extraordinary cooperation is going to be perhaps, you know, expected.

So we will serve subpoenas in all the different jurisdictions if that's necessary, but, you know, to show-up with Mr. Robbins who is a tremendous lawyer, tremendous lawyer, okay, but, you know, the level of resistance doesn't correspond to the level of cooperation we were promised when the schedule was set.

THE COURT: Thank you.

Mr. Alberto.

(No verbal response)

THE COURT: You're muted.

MR. ALBERTO: Am I unmuted now?

THE COURT: Yes.

MR. ALBERTO: Okay, sorry about that. I was trying to interrupt Mr. Schiavoni and I guess lucky for him I was on mute. This is so far beyond anything that is in the record.

It is Mr. Schiavoni's clients' fishing expedition. It is not our burden to put on evidence. They have to prove relevancy and they have not done that.

I agree with you, Your Honor, that the evidence that we have by pure numbers shows that Slater was a sterling example of exactly how to present claims. And the fact that some claims were signed on the same day, even if it was several hundred of them, is not probative to any fact many other than the fact that Slater was still trying to get its clients to sign those remaining claims and only when they could not and were told that they had an ethical obligation to submit those claims nonetheless that is when they submitted them.

There is no evidence to show. It's not our burden to carry. Discovery has to be relevant and proportionate to the needs of the case. Mr. Plevin said that earlier today and I thought he outlined the standard for discovery perfectly. It can be applied equally here. This is completely irrelevant and not at all proportionate to anything other than the insurers fishing expedition. Your Honor should not allow this.

THE COURT: Thank you.

I think our last matter is Rothweiler.

MR. CURRIE: Yes, Your Honor. I guess what I would say is the issues are, essentially, teed up in the same way

for the Eisenberg Rothweiler firm. Again, you know, they -- it was a firm that signed, that submitted bout 18,000 proofs of claim and what we have, for example, is Mr. Eisenberg signed nearly a thousand, 963 proofs of claim. The vast majority of those within a couple weeks of the bar date. And he executed 190 proofs of claim in a single day. And another ER attorney, Joshua Schwartz, signed 1,448 proofs of claim and over 300 on a single day.

So, you know, those numbers if that is the original sin, in the court's words, you know, those kinds of numbers cast real doubt about whether proper vetting of these claims complied with, you know, the oath affirmed in signing the proofs of claim or the obligations under Rule 9011. So it seems perfectly appropriate under these circumstances that we are able to get -- obtain the documents that we're requesting and then, you know, ultimately our plan is to seek depositions with those documents in hand to be able to explore and unpack just want was going on here and to be able to shed light on the issues.

As we talked about in our discussion of the previous motion, again, we're not seeking communications between an individual claimant and an attorney. You know, that is not what we are looking for. We are looking for information, documents that go to the claims aggregation, compilation, submission, you know, signing and potentially any

cure. And, frankly, the contracts and other documents that go to understandings and relationships with third parties.

So, essentially, you know, what counsel has submitted in response is, to us, a very generalized categorical privilege log which is not of much use to anyone because, essentially, it doesn't provide an opportunity to actually understand what kind of documents there might be that they are claiming privilege over so that we could raise arguments, you know, for example, whether there may be plenty of documents there that either we meet the burden of demonstrating the need for them under the work product doctrine or documents that may have some privileged content, for example, because it contained a communication with a client that could be redacted and other parts that are relevant to the information that we're seeking to get at the underlying issues.

So, you know, I welcome the fact that they were willing to produce a privilege log, but it's not one that is helpful to us.

THE COURT: Thank you.

Mr. Hogan.

MR. HOGAN: Thank you, Your Honor. Good afternoon, good evening, good Friday afternoon I will call it. Thank you, Your Honor. Daniel Hogan of Hogan McDaniel on behalf of Eisenberg, Rothweiler, Winker, Eisenberg & Jeck.

Your Honor, I will try to be brief. It's been a long day. I have sat through all the other hearings, obviously, today. I have heard all the various relevant arguments. I will try not to pair anything that has been said by Mr. Robbins or Mr. Alberto, but I just want the court to have the understanding about how Eisenberg, Rothweiler is a little bit different then these other parties.

Your Honor, we were initially served with party discovery by these insurers. We pushed back immediately as you would expect us to do and they conceded ultimately that we weren't parties. And I'm sure some of that has to do with the fact that Eisenberg Rothweiler is a Philadelphia firm and its well within 100 miles of where you sit now.

So nevertheless, we objected, we agreed to accept the subpoena. We, in fact, accepted the subpoena and we filed initial responses and objections that really gave them nothing. I mean from our perspective relevance wins the day for us here. And even if it doesn't win the day for us attorney/client privilege and work product do.

That being said, Your Honor, and in light of your comments over the past week about the need for the parties to be mindful, to be thoughtful and to try to focus the issues as to not burden the court with these issues we revisited our responses and we prepared a privilege log. We gave the insurers some of what they were looking for in the hopes that

they would go away, but that is, as I know from doing this long enough, not how this works.

Nevertheless, it gives us some credence with the court as we come to you and explain that, you know, we had disclosed to them the fact that Eisenberg Rothweiler didn't use any call centers, didn't use any claims aggregators. I mean these are the bad acts that they're arguing are the basis for the relevancy of these documents.

We also told them that we didn't do any -- there was no third-party financing involved with these claims. We told them that -- one of the crux of questions that they had related to whether page 12 of the proof of claim, which is the signature page, whether that was separately signed and attached to the proof of claims. We told them that under no circumstances did we do that with the claims, that when the proof of claim was signed by an attorney at Eisenberg Rothweiler it was done after reviewing the entirety of the proof of claim.

Your Honor, there were a number of proof of claims that were signed by Eisenberg Rothweiler attorneys in the lead up to the bar date and that is not to be unexpected given the time crunch and given the very nature of a deadline. The pandemic didn't help in any way, shape or form. So, Your Honor, that is where we find ourselves, but Eisenberg Rothweiler did make the effort to disclose the relevant

information that we could provide them to the answers that we could provide them that, in fact, we hadn't partaken of those actions which would give rise to a potential argument that we were somehow bad actors and that we did something wrong which, in fact, we didn't.

Your Honor, if I could I just want to address the relevancy argument because some of the other parties didn't really have to because they did the whole dance, hey, we're not a party, we will save relevance for another day. We don't have that luxury, Your Honor. What we have is a database. Eisenberg Rothweiler has claims and they have people that talk to clients, take notes, and receive emails, and get documents and everything goes into a database. The database, by its nature, is amalgamation of attorney/client communications, of work product, of documents received from clients.

The notion that based on these allegations which don't have any basis -- will point you to the very first page of the very motion that the insurers are pursuing. They state in there that ER disclosed requested materials to a third-party, for example, you're a case manager. We have had no contact communication or relation with your case manager. That is just patently not true, but this is what they are utilizing as a basis to boot strap themselves to make this relevance argument which, again, is outside the pale.

1129(a)(3), obviously, the plan has got to be

proposed in good faith and not by any means forbidden by law. That is the debtors' burden. That is not our burden. That is not the insurance company's burden, but it is definitely not our burden. So from our perspective the relevancy and the proportionality of what they are looking to take away from our clients and from Eisenberg Rothweiler it is just huge. There is no basis for it, Your Honor. In terms of the value added I don't see how there is any value added to these cases in terms of trying to get this confirmation across the finish line by the end of January.

Your Honor, I just wanted to make sure that I address some of the comments that you made. We definitely see this as a red flag. You know, in terms of our privilege log we believe it is satisfactory and together with the attorney/client privilege and the word product give rise to the defense we need necessarily not have to produce any of this documentation.

Your Honor, unless you have any questions for me I will rest on my papers.

THE COURT: I don't think so. Thank you.

MR. CURRIE: Your Honor, I see a couple others have their hands up. I don't know if that is still from previous or if they want to be heard.

MR. SCHIAVONI: I just had something very quickly. Your Honor, the Rothweiler claims were shared with the Kosnoff

claims. Mr. Van Arsdale is the one who owns an interest in the Montana shop reciprocity. Mr. Hogan is a gentleman, he's a professional, I think he has made a misstatement about the source of the claims. I think he would find that they would come from reciprocity, these claims, and from that boiler room in Montana if he looked into it.

You know, that is why a little discovery here would be useful because, you know, these sort of, again, hearsay assertions about the facts aren't the facts.

MR. HOGAN: Your Honor, could I just respond to that?

THE COURT: Yeah, go ahead.

MR. HOGAN: Thank you. So nowhere in the motion is there any mention of reciprocity, Your Honor. This is the first I'm hearing about reciprocity. Number two, it wasn't my construct that the AVA motion be set forth either next week or the following week. I am not sure when it is scheduled for, but I don't represent AVA law. I can't speak to what AVA law did, so I don't think that is appropriate for Mr. Schiavoni to ask me to address something that, number one, isn't in the motion and, number two, isn't relative to my client.

THE COURT: Let me ask you -- whoever, Mr. Schiavoni, or Mr. Currie, or whoever can answer this question -- I permitted discovery of the aggregators, albeit later then you wanted me to, but I did, where does that stand? What

courts are those in?

MR. SCHIAVONI: In Montana right now we have an emergency -- like we were -- we have an emergency motion to transfer the Montana proceedings to your court, Your Honor, to be heard.

THE COURT: That is with respect to who?

MR. SCHIAVONI: Reciprocity.

THE COURT: And is that in the bankruptcy court there or the district court there?

MR. SCHIAVONI: I believe it's in the bankruptcy court.

THE COURT: What about the other? I'm recalling three aggregators.

MR. CURRIE: Well, Your Honor, you will recall that the ones that are going to be heard later are Verus and KLS are also with the Marc Bern motion.

THE COURT: Okay. So those have been put off a few times. Are you guys talking?

MR. SCHIAVONI: Yes, Your Honor. I think you had admonished the parties to talk and -- maybe that is not the right word to use, okay. So enough.

THE COURT: Okay. Well its 6 o'clock and my staff deserves to go home. We have completed the docket. Item 11 was the only thing left and I think that was the motion to -- that I think we actually talked about last time. Am I right

on that?

Mr. Schulman, I think I saw your hand up.

MR. SCHULMAN: Good evening, Your Honor. May I please the court, Jeffrey Schulman from Pasich LLP, insurance counsel to the TCC.

I believe if Your Honor would allow for 60 or so seconds just to close the loop I think that may be helpful because I also think that the last item on the agenda is probably the least controversial of the day. The court certainly got a flavor today for some of the insurance coverage disputes by and between the parties. The TCC is continuing to work with the 22 joining insurers. I think there actually may be more on that list now in order to be part of the solution and not part of the problem.

I studied the scheduling order before today with the hopes that I could come up with a brilliant idea for how to get all these stipulations negotiated, and drafted, and signed and then if any issues remain to take limited deposition testimony by December 1st or at least to get that testimony secured at some point thereafter in a manner that does not impact the confirmation hearing date.

In all candor, Your Honor, I don't have that brilliant idea, but my guess is that this court would tell us that at almost 6 o'clock in the evening on the East Coast that it remains incumbent on the parties to, in effect, find a

solution and I remain optimistic that we can and we will do so. And I also believe, Your Honor, that in addition to today's rulings this court's statements regarding the debtors' burdens and others based upon representations by the insurers as to the extent to which they will be calling fact witnesses, what they will not be providing to their experts and how all of that impacts that which is discoverable from the insurers. I think all of that will be informative as we continue to work together.

I don't have anything else to add unless Your Honor has any questions or wishes to hear anything further.

THE COURT: I don't.

Ms. McNally.

(No verbal response)

THE COURT: Ms. McNally, you're muted.

MS. MCNALLY: Does this work?

THE COURT: Yes.

MS. MCNALLY: Apologies. Your Honor, I co-signed the letter that originally pulled those motions from your court's docket and I just wanted to echo what Mr. Schulman said that we are continuing to work together. I think your rulings today will be very instructive in narrowing the areas of some dispute. We hope that this will be the last you hear from us. But if you do hear from us I expect it will be on a much more limited basis.

THE COURT: Thank you.

When is our next date together?

MR. ABBOTT: Your Honor, Derek Abbott. I believe we are Tuesday morning at 10, I believe.

THE COURT: Okay. Can people please check you're audio.

Okay. Tell me again, Mr. Abbott.

(No verbal response)

THE COURT: You're muted.

MR. BUCHBINDER: It's the 23rd, Your Honor, Tuesday.

THE COURT: Okay.

MR. ABBOTT: At 10 a.m., Your Honor, yes.

THE COURT: I thought I might have that day. What do we know is on that date?

MR. ABBOTT: Give me a moment, Your Honor. We did file an agenda earlier. I will just have to go grab it.

THE COURT: Okay.

MR. ABBOTT: Your Honor, my apologies. I'm not finding it as quickly I had hoped.

THE COURT: Okay. Do you know is it something other than discovery?

MR. BUCHBINDER: Your Honor, this is Dave Buchbinder. I have my copy up. If I said more of the same would that be a description? There are three --

THE COURT: Go ahead, Mr. Buchbinder.

MR. BUCHBINDER: There are three items and they are to be summed up as more of the same; all discovery. And similar to this afternoon's matters.

THE COURT: Okay. Then I will be some or all of you on Tuesday. I am taking the 8, 9 and 10 -- I am taking the last few matters that we argued collectively and I will be prepared to rule on those Monday or Tuesday. I will give you the answers. I do want to take a look at the firms individually as I said I would. And you are somewhat in different stages because some of the firms are at the substantive stage and some of the firms are still at the am I a party and what is the right process stage.

So I want to look at each of those, but I will do that promptly and we will get a ruling on each of those various matters.

MR. ABBOTT: Thank you, Your Honor.

THE COURT: Thank you. We are adjourned. Everyone have a good weekend.

(Proceedings concluded at 6:04 p.m.)

CERTIFICATE

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Mary Zajaczkowski November 20, 2021
Mary Zajaczkowski, CET**D-531

/s/William J. Garling November 20, 2021
William J. Garling, CE/T 543

/s/ Tracey J. Williams November 20, 2021
Tracey J. Williams, CET-914

Exhibit B

to Declaration of Todd C. Jacobs
in Support of
Westport's Motion for Protective Order

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
	.	Case No. 19-10289 (LSS)
IMERYS TALC AMERICA, INC., *et al.*,	.	
	.	
	.	Courtroom No. 2
	.	824 North Market Street
	.	Wilmington, Delaware 19801
	.	
	.	June 22, 2021
Debtors.	.	10:30 A.M.

. . . . . .

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

TELEPHONIC APPEARANCES:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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For Aylstock, Witkin, Kreis & Overholtz:	Robert Pfister, Esquire KTBS LAW LLP 1801 Century Park East, 26th Floor Los Angeles, California 90067

MATTERS GOING FORWARD:

1. Motion of Certain Insurers for Protective Order [Docket No. 3364 – filed April 9, 2021

2. Motion of Holders of Talc Personal Injury Claims Represented By Arnold & Itkin LLP to Extend Discovery Deadlines and Permit Discovery of the Plan Proponents, Prime Clerk and Certain Third Parties Relating to the Solicitation and Voting With Respect to Ninth Amended Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code [Docket No. 3425 – filed April 17, 2021]

3. Debtors' Motion to Quash or for a Protective Order in Connection with (I) J&J's Subpoena to Prime Clerk LLC for Production of Documents, Dated March 26, 2021, (II) J&J's Subpoena to Prime Clerk LLC for Production of Documents, Dated April 13, 2021, and (III) the Cyprus Historical Excess Insurers' Subpoena to Prime Clerk LLC for Production of Documents, Dated April 16, 2021 [Docket No. 3459 – filed April 21, 2021]

5. Motion of Holders of Talc Personal Injury Claims Represented by Arnold & Itkin LLP to Disregard Certain Vote Changes Made Without Complying with Bankruptcy Rule 3018, and the Required Showing of Cause in Connection with the Voting on the Ninth Amended Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code [Docket No. 3624 – filed June 8, 2021]

Ruling: Matters Taken Under Advisement

DEBTORS' WITNESS(s):

ERIC DANNER

EXHIBITS	I.D.	REC'D
Declaration of Eric Danner		33

(Proceedings commence at 10:40 a.m.)

THE COURT: Good morning. This is Judge Silverstein. We're here in the Imerys Talc America bankruptcy case, Case Number 19-10289.

Brandon, if you can go over the protocol and remind everyone, please.

THE ECRO: Good morning. It is very important that you put your phones on mute when you're not speaking. When speaking, please do not have your phone on speaker as it creates feedback and background noise, which makes it difficult to hear you clearly. Also, it is important that you state your name each time you speak for an accurate record. Your cooperation in this matter is appreciated. Thank you.

THE COURT: Thank you.

I'll turn it over to debtors' counsel.

MS. STEELE: Good morning, Your Honor. For the record, Amanda Steele, Richards, Layton & Finger, on behalf of the debtors.

Thank you for the additional time this morning. We believe it was helpful to narrow some of the issues for today's hearing.

Your Honor, we have a number of items on the agenda this morning and they can be grouped into the following categories:

Number one, motions or letters that relate to

solicitation-related discovery requests, which are Agenda Items Number 2, 3, and 6.

A motion to seek to disregard certain votes cast in favor of the plan, Agenda Item Number 5.

A motion seeking approval of notice procedures with respect to the debtors' potential acquisition of one or more businesses, Agenda Item Number 4.

A motion to quash that relates to non-solicitation-related discovery disputes, Agenda Item Number 1.

And finally, interim and final fee applications that we filed a certification of counsel for yesterday, but we understand they are not going forward today as Your Honor needs additional time to review the fee apps.

If it's acceptable to Your Honor, the debtors would propose to take the matters in that matter. We would also propose to hear all the solicitation matters together because there is substantial overlap between the matters and to better streamline the hearing. For efficiency purposes, the debtors would propose that the debtors and other parties opposing the requested discovery provide their arguments first, followed by the parties that have requested the additional discovery.

If the foregoing is acceptable to Your Honor, we would believe we should begin with the evidence in the discovery matters. A declaration was filed by the person of talc personal injury claims, represented by Arnold & Itkin, in

connection with their discovery motion. And we understand that counsel may wish to seek to move Mr. Itkin's declaration into evidence subject to cross, or call him as a witness.

The debtors do not intend to call any witnesses to the discovery matters or the 3018 motion at this time.

THE COURT: Well, let me ask. Has this order of presentation been discussed with others?

MS. POSIN: Your Honor, this is Kim Posin of Latham for the debtors.

It has been discussed with the other plan proponents. We have not discussed it with the other objecting or requesting parties. We have reached a resolution with Johnson & Johnson this morning with respect to their solicitation-related discovery, but we have not discussed the order. We thought it made sense to take them together.

There are -- there's a substantial overlap among those requested discovery requests, and a lot of the parties joined in other parties' requests, so there -- they seem to sort of be morphing a little bit together. But that's the proposal.

THE COURT: Well, I do --

MS. DAVIS JONES: Your Honor, if I may be heard?

THE COURT: I do agree that the solicitation-related matters should be heard together. But my question is whether the order of presentation and the suggestion was

discussed with others, and I hear it was not, outside of the plan proponents.

And I'm sorry. Who wished to be heard?

MS. DAVIS JONES: Your Honor, it's Laura Davis Jones. Good morning.

Your Honor, for the record, on behalf of Arnold & Itkin, Your Honor, no, there has been no discussion with us about the hearing or the order of the hearing or, indeed, any last-minute discovery resolutions that may have been reached with J&J. I saw some emails fly by here in the last five to ten minutes.

But Your Honor, that issue aside, it is -- Number 2 on the agenda is actually our motion, so I was a little confused by the suggested order that we would hear objections to the motion before we would hear those in favor of discovery. I think this all comes off as our motion, we thought right after we'd be able to present that.

With respect to testimony, Your Honor, we are not expecting to call Mr. Itkin and we are not seeking to put his affidavit into evidence. I spoke with Mr. Ramos the other day and told him it is possible that we would call Mr. Itkin. But because the plan proponents were going to have such an objection to his declaration, I said I would not be using that declaration.

But Your Honor, I think, frankly, the facts that

are in the record now and that are in the responses to our discovery are more than sufficient to provide a basis for the relief requested, and we're not going to need to call our witness. Mr. Itkin is here, if Your Honor should want to hear from him, or others. But Your Honor, I do not think that's going to be necessary.

And we'd ask that, at the appropriate time, Your Honor, we be able to present our motion.

THE COURT: Thank you.

Is there anyone else who wishes to be heard with respect to how we go forward?

(No verbal response)

THE COURT: Okay. I hear no one.

So we will go forward then with the solicitation discovery first. And I do agree, as I already said, that that will include -- I thought it was 2, 3, and 5 is somewhat related. I probably -- I didn't actually group 6.

MS. POSIN: 6, Your Honor, is the Johnson & Johnson discovery letter, which relates to solicitation discovery, which we have resolved. And I would like to read out the resolution into the record. But that would be included in --

THE COURT: Okay.

MS. POSIN: -- in what we're proposing to be heard together.

THE COURT: Okay. I did review that and I did

group that with 2 and 3. So let's hear that. I'd like to hear the resolution with Johnson & Johnson first.

MS. POSIN: Absolutely. I'm happy to do that, Your Honor. Again, Kim Posin again for the record. And bear with me, Your Honor, because I have it in a number of different places, but -- and we did reach this resolution. And I want to also thank the Court for allowing us additional time. I think it was reached about a half an hour ago, and we did promptly provide it to the other parties. I understand that was only 10 minutes ago or 15 minutes ago, so they may have not had a full opportunity to digest it. But here goes for what we've agreed upon with Johnson & Johnson:

First, just to be very clear, we have agreed that -- we have agreed to a number of things. But we have all recognized that results may -- you know, we will agree to work cooperatively, in the event that the results that we ultimately come up with, with these various searches, cause issues or raise concerns. So just to caveat that with this is not a final determination as to what's going to be produced; it's merely what we're willing to (indiscernible) so that we can, you know, work through any potential issues that result from the searches.

So, with respect to the discovery that was directed to Prime Clerk, we have agreed to the following:

Date restrictions between January 27th, 2021 --

which is the date that the solicitation procedures order was entered -- to May 7th, 2021, which was the date that Prime Clerk submitted its final vote declaration.

The search terms will be "Imerys" or "talc," and the domains that we will be searching or that Prime Clerk will be searching include 27 domains. And these relate to parties or representatives and it includes parties or representatives of parties that submitted, among other things, late votes and changed votes. It also includes the Baron law firm.

So that's our resolution with respect to discovery between Prime Clerk and non-plan proponents.

With respect to discovery between -- communications between Prime Clerk and the plan proponents, we've agreed to the following:

Dates are February 25th, '21 to May 7th, 2021.

The search terms are the same, "Imerys" or "talc."

The domains will include the following law firms: Richards Layton, Latham & Watkins, Robinson Cole, Willkie, Gilbert, Young Conaway, and Hughes Hubbard, as representatives of each of the plan proponents.

The scope of the response or the documents will be produced with respect to everybody other than Latham and Richards Layton, are non-privileged communications relating to voting and balloting, with respect, of course, to the Imerys plan.

And the scope with respect to communications with Latham and Richards Layton will be non-privileged communications related to late votes, changed votes, voting updates, and the status of votes or ballots.

And the search terms will be discussed -- additional search terms will be discussed as appropriate or necessary, again, after the receipt of the results.

With respect to the plan proponent discovery that was served by J&J, the parties that will be conducting searches will be the debtors, through Latham and Richards Layton; the committee, through Willkie, Gilbert, and Robinson Cole -- oh, and Steve Baron -- and the Imerys plan proponents through Hughes Hubbard; and the future claimants representative through Young Conaway.

And the date restriction for those searches will be January 27th, 2021 to May 7th, 2021.

The domains that will be searched with respect to this one are -- there's 21 law firms. It's less than the prior search and it includes all of the parties or representatives of the parties who submitted votes after March 25th and/or changed their votes from a reject to an accept, and it excludes committee members -- or sorry -- representatives of committee members.

The search terms for these will be "discussed," again, depending upon the receipt of the results.

And the scope of these requests will be non-privileged communications relating to solicitation and voting on the debtors' plan.

Finally, with respect to third-party discovery, first, with respect to depositions, Johnson & Johnson has agreed to cap the depositions at four hours each for Bevan and Williams Hart and three hours for Trammell. Those are the three firms that committed votes after March 25th and changed their votes, again, from a reject to an accept, with a scope limited to solicitation and voting and related issues, including the validity of votes.

Subject to those limitations, the committee and the debtors won't oppose J&J's request for leave to depose each of those three entities, Bevan -- law firms, Bevan, Williams Hart, and Trammell.

In lieu of a separate deposition of Steve Baron of Baron & Budd, Steve Baron will be a committee 30(b)(6) witness. His deposition, the 30(b)(6) deposition, has already been scheduled. J&J will be able to question him about solicitation and voting during that deposition, and 1 hour will be added to that deposition for that purpose, for a total of 13 hours.

With respect to documents, the committee and the debtors will not oppose J&J's attempts to seek nonparty document productions from Bevan, Williams Hart, and Trammell

regarding solicitation and voting with respect to the Imerys plan.

The committee will include Steve Baron as a custodian for its review and production on solicitation and voting, subject to the agreement, as noticed previously, on reasonable search terms and search parameters. The plan proponents and J&J have been emailing proposed parameters back and forth. They're detailed, but we think we're going to be able to reach a final resolution with respect to those matters.

Importantly, certainly with respect to the debtors, since discovery is to occur within the current schedule -- which we can certainly walk through as that has changed a bit over the course of the last couple of months and weeks -- subject to the third parties responding to discovery promptly -- obviously, none of us have control over what the third parties may do and those folks also sitting for deposition within the current schedule. Otherwise, it's certainly possible that we can go -- we can go past the July 23rd deposition deadline under the current schedule for some of these nonparty depositions, we recognize that. But the expectation is that the overall confirmation schedule will not otherwise change on account of this third-party discovery and those depositions.

And then, finally, Johnson & Johnson will agree to

withdraw its subpoenas directed to Onder and Levy, both of which represent members of the committee. This agreement covers the scope of J&J's solicitation and voting discovery, requests for leave to take additional depositions, and its request issued after the cutoff for written discovery.

And I'm sure Mr. Tsekerides or Mr. Friedman or Mr. Lombardi will let me know if I missed anything, but I believe that is the full agreement.

MR. TSEKERIDES: Yeah. Your Honor, it's Ted Tsekerides from Weil Gotshal for Johnson & Johnson.

Ms. Posin accurately reflected what we agreed to, subject to the search terms. And you know, I think we'll get there. I'm sure, as everyone on the Zoom knows, you know, you'll get hit reports back and then we'll go from there.

The one thing I would add, to the extent that -- since we're all here, we would ask that the Court grant leave to take these depositions, so we don't hear from somebody else that we needed court permission to take these three other depositions of Mr. Bevin, Williams Hart, and Trammell, so there's no issue there. We already served the document subpoenas on that, but we wanted to wait at least until today to serve the deposition subpoenas. We would do so immediately and have it, as Ms. Posin said, within the July 23rd date, which is a date we had proposed and, frankly, picked it based on the hearing today, believing that, after today, we all have

a better understanding of what's going to be permitted, and that a month for this fairly limited area of discovery would be more than enough.

So we do thank the debtor and the plan proponents. We wish they had gotten back to us sooner. But you know, I guess nothing like last-minute resolutions in bankruptcy cases, so that's where we are.

THE COURT: Thank you.

Okay. Well, that was a lot to take in. And I would think that the others who are -- who have also sought discovery may need a few minutes to decide whether this is acceptable to them or whether they have additional needs that weren't covered, or whether they have disagreement because we're going to have one plan going forward on how to take the discovery with respect to the voting and solicitation issues.

So let me ask Ms. Jones.

MS. DAVIS JONES: You're right, Your Honor, that is a lot to take in right before we start here. But I appreciate all the effort of Mr. Tsekerides and (indiscernible) and others, who I'm sure pushed to get this done.

Your Honor, I think it would be helpful for us to be -- have -- be able to take a break to absorb this and see if we can get in this train or not. I have not heard Ms. Posin say whether this is something that she's offering up to others. But Your Honor, we are -- if we're not in the loop or

if this doesn't satisfy our loop, we are prepared to go forward with our motion. But I think, Your Honor, I would make sense to take some time to see where this leads us and for Mr. Morris and I to compare notes and see if leaves open issues for Your Honor or where we are.

MS. RICHENDERFER: Your Honor, this is Linda Richenderfer from the Office of the United States Trustee.

We did not file anything, but I was going to make remarks today about the importance of discovery on the voting and solicitation issues (indiscernible) develops. And I guess I just would have two quick observations:

One, I don't think I heard that there would be a deposition of someone from Prime Clerk, and I don't know whether I could have missed that in the reiteration by Ms. Posin, I'm not sure. But I do think that's an important issue due to the declarations (indiscernible) complete transparency in the voting and tabulation process here.

And Your Honor, I'm just not quite sure that four hours is going to do it for the deposition, considering the number of people that I know submitted joinders and because of the issues that I've seen (indiscernible) in the documentation and (indiscernible) things in mister (indiscernible) deposition, so I'm just a little cautious. Four hours may be more than sufficient for J&J. I just don't know if other parties are (indiscernible) U.S. Trustee or (indiscernible) on

behalf of Arnold & Itkin have questions.

So I guess those would be my two immediate observations regarding the proposal.

MS. POSIN: And Your Honor, I can address that. Again, this is Kim Posin, for the record, for the debtors.

With respect to Ms. Jones' request or comment, absolutely, we're happy to extend this proposal to all parties that have provided or requested solicitation-related discovery. And if, in fact, everyone were to agree to it, we could make this hearing certainly much shorter today.

With respect to Ms. Richenderfer's questions, yes, we will be intending to put Prime Clerk up as a deposition. We haven't yet scheduled their deposition, but it will be included. And we do intend to provide them as a witness or they will sit for a deposition.

With respect to the final comment on the four hours, I think -- I actually think the issues are really -- are relatively narrow. The main issue, as we see it, is why the vote changed, which I think can be elicited in probably two minutes of testimony. I understand parties may have more that they want to talk to about, but I think that's really the main issue. And so we thought that four hours -- we, frankly, thought less than four hours, but J&J twisted our arm and got us to four hours. But that was the rationale behind the timing.

THE COURT: I think it just depends --

MR. PFISTER: And Your Honor, this is --

THE COURT: -- on how many questioners we have.

MR. PFISTER: This is Robert Pfister from Klee Tuchin on behalf of Aylstock, Witkin, Kreis & Overholtz, additional objecting parties, talc claimant holders.

First of all, we do appreciate the offer to speak with the debtors in connection with the J&J proposal. My two comments would be:

Number one, I echo the concern about four hours, but I also echo the concern -- or the notion of one hour that's been afforded to J&J to question. I know that was part of it. And we, as objecting parties, would also want to be in on that. We've coordinated and done very well, I think, in depositions to date, in making sure that it's non-duplicative and that, you know, one objecting party after the other doesn't ask the same question. But if we're going to have others, that one hour may not be sufficient.

The other thing I'll just flag, and I'm happy to discuss it, is all of the search terms in discussions were that non-privileged communications. And I think, before we'd agree to any resolution of the discovery motion, we would have to know whether we're on the same page, in terms of non-privilege. If the production excludes everything between the plan proponents on the theory of common interests, then it

would be almost no production, it would seem, unless it had a direct, you know, outside party involved.

So those would be my two comments, Your Honor. But we, like Ms. Jones, are happy to participate in discussions on this.

THE COURT: Anyone else? Okay. Oh --

MR. SCHIAVONI: (Not identified) Judge, we did, on behalf of the Cyprus insurers, serve a subpoena on Prime Clerk, we separately moved, separately joined. It sounds like the subpoena is going to be accepted against Prime Clerk.

It's not clear to me whether they -- like our document requests were slightly different. Like our view was anything that was in the solicitation package that was put in there by the claimants is not privileged. And to the extent it was in the solicitation package and sent by the balloting agent to the claimants, that that ought to be produced. I don't know, it doesn't sound like there's an objection to our subpoena and the requests. And if that's the case, then I -- there's not an issue.

I'd -- we definitely would coordinate with J&J and not ask duplicative questions. We tried not to ask any questions at all, but like I -- you know, I don't know about the -- you know, we share some flexibility and the limitations on time, we would try to work with them on the confines of what J&J negotiated. We'd just ask that our subpoena and its

document requests be accepted, the main part of it.

THE COURT: Thank you.

MS. FRAZIER: Your Honor, Heather Frazier on behalf of the TCC and FCR, special insurance counsel.

One note with regard to Mr. Schiavoni's subpoena. It does ask for the solicitation materials; however, included in those materials, in some cases, were letters between a claimant's attorney and the claimant themselves. Those letters are attorney/client privileged. In this case, although, you know, Prime Clerk put together the solicitation materials, they essentially functioned like sort of a Kinko's, more of a postal delivery service, and there's no waiver of attorney/client privilege there. So we would ask to exclude those letters and, in fact, don't have any sort of waiver from the parties who own that privilege of the claimants themselves and their attorneys.

MR. SCHIAVONI: Your Honor, this is an issue that we have litigated previously in mass tort cases. When a claimant lawyer -- if a claimant lawyer sends out a letter to his client, it's privileged. If a claimant letter enlists the balloting agent to put in the solicitation package a communication from the lawyer, he definitely waives privilege. He's basically free-riding on the indicia of neutrality and independence of the solicitation agent, who, you know, by giving him something in the first place, you know, constitutes

a waiver of the privilege. He's not -- he's by no means -- the balloting agent -- an agent of the claimant lawyer's for any reason at all.

This is something, by the way, the very claimant lawyers in this case know from prior litigation on this topic. So, no, I -- that's -- I'm glad we finally smoked this out after months of pushing them on this. It goes directly to the integrity of the solicitation procedures to know what was in them, what was presented to claimants, how it was presented, and it's not privileged.

THE COURT: I have not -- I have not dealt with that issue before. I'm finding some of these issues around solicitation very interesting and they're giving me a different view on how I view solicitation, whether it's neutral, whether it is biased or partisan in any way. So I'm finding these solicitation issues -- well, for me, they're novel. So I don't know the answer to that question about whether -- well, I approved a solicitation package. It included a letter, I assume -- I don't remember -- perhaps from the official committees. I doubt that I approved anything other than that going into a solicitation package. So I don't know what the law is surrounding whether a plaintiff's counsel can engage the solicitation agent to put in a specific letter only to their clients. So I'd like that briefed.

I -- if there's other law out there, if this has been litigated before, I'd like to see that law. I do not recall it in the reading that I did. So I'd like some briefing on that specific issue. I'm not going to decide that today, but I will decide it. We can set up a --

MR. SCHIAVONI: Your Honor, can I --

THE COURT: -- schedule for that.

MS. POSIN: Your Honor --

MR. SCHIAVONI: If I might just ask: In connection with the briefing of that, the previous time we've dealt with this, it was very helpful to have just a short privilege log identifying the firms that, you know, loaded the solicitation packages with their own spin on what was being voted on. So if we can just have the identity of those, you know, in a privilege log form that we could include in the briefing.

And if -- to the extent the assertion of that privilege goes beyond just what's in the packages, but also the communications between the claimant lawyers and the independent balloting agent that they're claiming that the communications between them is also privileged on this ground, we'd just like to know that, also. That has been an issue, and that would be part of our briefing.

THE COURT: I also do want to understand the issue that it's relevant to, so we'll include that in the briefing, as well, what issue it's relevant to, to the extent that that

-- there's a communication between a lawyer and his client, what issue is it relevant to.

MS. POSIN: Your Honor, this is Kim Posin again. I think we're getting far afield of the Court's initial question. We're getting into argument. We absolutely do object and we continue to object to the subpoena that Mr. Schiavoni served on Prime Clerk. That's the purpose -- that's one of the reasons why we're here today. So I didn't think we were getting into the argument yet, but we're happy to do so.

We don't think any of this is relevant, right? That's sort of the purpose. And we reached very limited with Johnson & Johnson to reach a resolution on that. And we don't think any of this is permissible, we don't think any of this is relevant, we think it's beyond the scope, we think it violates a court order.

So happy to (indiscernible) which why we thought that we would take them together and kind of set the table to what those issues are, and then get into it more detail. But we certainly do object to the subpoena that was served.

THE COURT: Okay. Well, what I'd like to happen since the J&J resolution was just disclosed to parties on this call, I think before we go ahead with anything with respect to discovery on solicitation, I would like the parties who filed objections or the parties who had their own discovery to have an opportunity to review it, to decide if they -- if what has

been proposed -- what has been agreed to between Johnson & Johnson and the debtors and the plan proponents is acceptable and resolves their objections or what outstanding objections there are.

But I'm not going to make those counsel provide me with that information off the top of their heads. I think they need an opportunity to understand what's been agreed to and how it affects their particular discovery issues. So we're not going to take this first, we're going to take the other parties. Then we'll take a break and we'll come back to the discovery matters after a break, so we know what is left.

MS. POSIN: That's certainly fine, Your Honor.

One thing I wanted to note is, so there's sort of -- as Ms. Steele noted, there's a couple of categories. The other related categories are the 3018 motion, the motion to disregard. I don't know if the Court wants to take that after the break, as well, because it does have some relationship to the discovery that we're talking about. But obviously, I defer to the Court on whether you'd want to go forward with that now or prefer to wait until after we've had a -- you know, everyone has had a chance to digest the J&J settlement.

THE COURT: Well, I'd like -- I think they're related, and so I'd like to have the movant's view on whether and how that needs to go forward, depending on whether they agree with the discovery. So we're going to put that one

aside and we're going to go back to other matters.

MS. POSIN: The other matters that are on the docket for today, Your Honor, are the acquisition motion, where the debtors have sought to use up the $12 million in estate assets to purchase an ongoing business. There's also -- I believe it's later on the docket -- the insurance-related disputes with respect to the -- I think the TCC's subpoenas that were issued on the insurers and the insurers objections to those. I think those are the other two significant items that are on the docket.

THE COURT: Okay. Let's take the solicitation -- I mean let's take the 363 motion.

MS. TSEREGOUNIS: Good morning, Your Honor. Helena Tseregounis on behalf of the debtors, from Latham & Watkins. Can you hear me okay?

THE COURT: I can.

MS. TSEREGOUNIS: So up today is the debtors' motion to -- for certain notice procedures, which would permit the debtor to pursue acquisition of certain business lines, subject to (indiscernible) that are established in the motion. That's Docket Number 3561.

We've also filed a reply, Docket Number 3715. And in connection with that reply, we did file a motion for leave to file the reply on Friday, which was Docket Number 3716.

I don't believe I've seen an order entered on that

motion for leave. I don't know if Your Honor has questions on that, but I'm happy to answer them, so ...

THE COURT: I don't. I've read the reply.

MS. TSEREGOUNIS: I think you're on mute, Your Honor.

THE COURT: I've read the reply. I don't have any questions. What -- I'm sorry --

MS. TSEREGOUNIS: I'm sorry, Your Honor. I'm having trouble hearing you.

THE COURT: You know, and I'm having trouble hearing you, too. So this has not been the best connection I've had.

(Pause in proceedings)

THE COURT: Brandon?

MS. TSEREGOUNIS: Okay. I can hear you now.

THE COURT: Okay. Okay. So I think you were just giving me the motion and the reply and the debtors' request to file a reply.

MS. TSEREGOUNIS: Correct.

THE COURT: And that's granted, I've read the reply.

MS. TSEREGOUNIS: Great. Thank you, Your Honor.

The debtors also have a witness here today in support of their motion, Eric Danner, who is the CRO and President of each of the debtors. He has submitted a

declaration in support of the motion, which was attached to the motion as Exhibit C. Today, we'd also like to put him up for some additional direct testimony.

If it's okay with Your Honor, I'd ask that we start with the evidentiary presentation.

THE COURT: Yes.

MS. TSEREGOUNIS: Great. Thank you.

So, for that, I will hand it over to my colleague, Mr. Salerno.

MR. SALERNO: Good morning, Your Honor. Can you hear me okay?

THE COURT: I can.

MR. SALERNO: Excellent. This is, for the record, Matthew Salerno on behalf of the debtors.

Your Honor, we'd like to call as our witness Mr. Eric Danner.

THE COURT: Mr. Danner, I need to swear you in. Can you raise your right hand, please?

ERIC DANNER, WITNESS FOR THE DEBTORS, AFFIRMED

THE WITNESS: Good morning.

THE COURT: Good morning.

Please state your full name and spell your last name for the record.

THE WITNESS: Eric Danner, D-a-n-n-e-r.

THE COURT: Thank you.

MR. SALERNO: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. SALERNO:

Q Good morning, Mr. Danner. Where are you currently employed?

A Good morning. I'm currently employed at CohnReznick, LLC.

Q What is your title at CohnReznick?

A I am a partner.

Q Now do you have any -- what is your title with respect to your work with the debtors?

A I have several times with the debtor, including Chief Restructuring Officer, President, and -- and Treasurer, for each of the (indiscernible)

Q When was -- sorry. I interrupted you. Keep going.

A I -- I apologize. I was just clarifying that I am -- I hold those -- those capacities for each of the (indiscernible)

Q When was CohnReznick -- when did CohnReznick in -- sorry. Let me start that over.

When was CohnReznick engaged by the debtors?

A CohnReznick was engaged at the tail end of January 2021.

Q And just generally, can you just describe CohnReznick's role working with the debtors, what that role is?

A Certainly. The debtors -- the debtors retained myself in the capacities I just described, as well as my team from

CohnReznick, to engage in a number of business managerial activities, to shepherd the -- the financial day-to-day responsibilities of the debtors, as well as oversee the post-sale of the debtors' operations (indiscernible) the other basic activities that (indiscernible)

Q Mr. Danner, are you familiar with the motion filed by the debtors seeking approval of certain procedures related to a potential acquisition of one or more businesses?

A Yes, I am.

Q And why, in your view, is it important for the debtors to achieve the streamlined notice procedures set forth in those motions?

A Because the sale processes that surround these types of business acquisition opportunities are quick-moving, typically measured in periods of weeks. And so, for the debtors to be competitive in those types of situations, it is important to be able to move rapidly, so as to not miss critical dates in those sale processes.

Q One of the portions of relief sought relates to making deposits. Can you speak to the reasoning behind that requested relief?

A Yes. It is typical and customary in the types of acquisition processes that debtor is contemplating to be able to make an earnest money, good faith, refundable deposit, which serves several purposes, including solidifying that the

debtors have not just the intention of trying to move forward with an acquisition, but also have the financial wherewithal to (indiscernible) demonstration (indiscernible)

Q Mr. Danner, you submitted a declaration in support of this motion, correct?

A That is correct.

Q And I'm going to ask my colleague Jared Friedman to put up Exhibit 1 for you to review.

(Pause in proceedings)

Q And he's probably punishing me because I pronounced his name wrong. You know what I'll do is I will share my screen with you, Mr. Danner, and I'll show it to you. Give me one moment.

MR. SALERNO: Your Honor, it actually says that screen sharing is disabled. So what I will do instead is simply refer the Court to Mr. Danner's declaration, which is filed at Docket Number 3561-4.

THE ECRO: Mr. Salerno, you should be able to share now.

MR. SALERNO: Excellent. Thank you very much.

THE ECRO: You're welcome.

BY MR. SALERNO:

Q All right. Mr. Danner, can you see my screen?

A Yes, I can.

Q Okay. Is this the declaration that you filed in support

of this motion?
A Yes, it appears to be.
Q And have you reviewed the contents of this declaration prior to filing?
A Yes, I have.
MR. SALERNO: Your Honor, in an effort to streamline the procedures, we'd ask that this declaration be admitted as Debtor's Exhibit 1, with one exception, which is that, with respect to Paragraph 16, that Paragraph 16 be admitted up to and including the phrase "the best interests of the debtors' estate," but that the rest of that sentence not be admitted. And we admit this -- or request it admitted subject to cross-examination by all parties.
THE COURT: Does anyone object to the entry into evidence of the Danner Declaration as just modified?
(No verbal response)
THE COURT: I hear no one. It's admitted as modified.
(Danner Declaration, as modified, received in evidence)
MR. SALERNO: Thank you, Your Honor.
BY MR. SALERNO:
Q Now, Mr. Danner, when you signed this declaration and submit it on May 14th, 2020, in the five weeks since then, have the debtors continued evaluating potential acquisition opportunities?

A Yes, the debtors have.
Q What have they done as part of that evaluation?
A The business acquisition process is one that the debtors have continued to refine over time, in terms of looking at various industries, various geographies, and that refinement has continued in the weeks subsequent to the submission of it, including the debtors having an increased focus on triple-net lease opportunities and the various acquisition sale opportunities that are on the market right now.
Q Okay. So you mentioned refinement and triple-net leases, in particular. What is a "triple-net lease"?
A A triple-net lease is a contractual engagement between landlord and tenant, where the primary cost of maintaining the facilities are paid by the tenant. So the -- the primary cost stream that a tenant in the triple-net lease environment would assume includes payment of rents, would include payment of insurances on the building, as well as utilities and the real estate.
Q When you talk about the income stream on a triple-net lease, how would you characterize that, as compared to certain other types of acquisitions?
A So the anticipated income stream around a triple-net lease construct is -- is what I'll characterize as fairly stable, in that there's not a high degree of variability in the expected revenue from -- on the part of the landlord

because all of the underlying operating (indiscernible) of a business that might operate out of those premises would be borne by the tenant.

Q And you said "borne by" who? Just you broke up.

A I'm sorry. Borne by the tenant.

Q Are there any other notable characteristics of triple-net leases relevant to your analysis?

A They tend to be fairly stable and predictable. They are typically revenue streams that are entered into for a period of years, so there is a high degree of projection certainty, in terms of what the income stream will look like on a go-forward basis to make them attractive.

Q Have you located any such triple-net opportunities as part of your diligence?

A I have.

Q What stage of diligence or negotiations are you in on those particular types of opportunities?

A The particular opportunities that we're currently contemplating that have a triple-net lease element to them are what I would characterize as fairly early stage. The opportunity has been identified and initial dialogue has been established with either the selling party or representatives of the selling party. Typically, in these cases, brokers are involved, representing sellers. So the initial identification of the opportunity, as well as preliminary information

surrounding some of the qualitative (indiscernible)

Q Okay. Is there any reason you haven't moved forward on any of those opportunities at present?

A Yes. I thought I want to be careful, as I have been throughout the process, of not being able to -- with not being over-representative of the debtors' ability to consummate a transaction because, as I mentioned previously, the time tables around the acquisition opportunities we're looking at are fairly abbreviated and move quickly with critical deadlines (indiscernible) intent, date by which deposits are due, and then final and best offers tend to evolve pretty quickly. And so the debtor has only been able to participate in those conversations (indiscernible) point. I have not wanted to overreach, in terms of mismanaging expectations (indiscernible) debtors' ability to participate in the process.

Q And Mr. Danner, just so the record has it, please repeat your last sentence just for the court reporter. I think you broke up a little bit.

Q Okay. I'm sorry. I can turn up the volume if that would be helpful.

I was just saying that we had not wanted to misrepresent what degree the debtors could participate in that process. And I thought it prudent to hold off on those conversations, pending this court hearing, which might bring clarity as to

the go forward.
Q Are you familiar with the criticisms that have been leveled with respect to the debtors' proposed acquisition motion?
A I believe I'm generally aware of the criticisms.
Q So certain objecting parties have suggested that the up-front cost of this type of endeavor just won't be able to bear out over time and make up for the potential benefits of these acquisitions. What do you say to those concerns of cost in seeking out and acquiring these businesses?
A I think the debtors have been and will continue to be judicious in not spending unnecessarily estate monies. We've tried to be cost conscious throughout this process and will continue to do so in any sort of go forward context of continuing to pursue those assets.
Q So you mentioned cost consciousness. What are the types of things you are doing to be cost conscious in pursuing this course of action?
A The -- the immediate next step, in terms of continuing on with an acquisition process, would be to launch diligence efforts around specific opportunities that met the initial gating criteria, and therefore would, on the surface, warrant deeper diligence and understanding that there is cost sensitivity to that process.
At the debtors' request, I spoke with my real estate

partners inside of CohnReznick and have agreed upon a fixed fee arrangement with regard to diligence procedures that would be enacted going forward around specific (indiscernible)

Q Okay. When you say "fixed fee," is it -- sometimes that means different things to different people. What is -- is there a -- just explain this a little bit more. What is that number that is the threshold number, and how, in fact, will that fee or cap be incurred?

A So my colleagues within the real estate practice at CohnReznick have agreed that the fee for the diligence efforts, regardless of the number of entities that would ultimately be diligenced, would be capped at $55,000. Now those -- those fees would be billed on an hourly basis, but if the expense of that cap was not reached, there would be savings for the debtors below that fifty-five-thousand-dollar number. But to the extent that the activities were such that the fifty-five-thousand-dollar threshold was reached, that would be a ceiling; and so, therefore, CohnReznick's efforts would continue beyond that -- beyond that threshold and the estates would not be (indiscernible)

Q So it's fair to say $55,000 is a ceiling, but the number actually incurred in terms of those fees could be less than $55,000.

A That's correct. I was careful to construct it that way.

Q Okay. What other types of fees do you anticipate as part

of this process going forward?
A If a potential acquisition target were to move successfully through the diligence phase that I just described, then the next phase would logically be the final phase, and that would be the actual consummation of the transaction, papering the deal, if you will, which is largely a legal exercise.
Q And what do you anticipate those legal fees and that legal process incurring in the way of fees?
A The debtors have been in contact with a law firm that we would consider engaging as special real estate transaction counsel that would put, I think, proactive cost parameters around what is spent of actually consummating any given transaction.
Q What would those cost parameters be?
A So the firm that we've been in touch with has estimated range of ten to $12,000 (indiscernible) and to be clear, that additional cost of ten to $12,000 per transaction would only be incurred in those instances where a specific opportunity did actually survive the diligence process and would then logically move to that next stage of actually papering the transaction.
Q Certain objecting parties have also said that there's just too much inherent risk in acquiring businesses at all. What's your response to that criticism?

A Well, I think there is risk in any business and any business transaction. A risk-free proposition doesn't exist in my experience, so there is always an element of risk. But the debtors have been and will continue to be judicious in trying to balance risk versus reward to come up with a solution that I think would make sense for the debtors on a go forward basis.

Q So, when you say coming up with solutions to manage that risk, what are those solutions?

A Well, one of them we've touched upon in the form of a triple-net lease arrangement, where the underlying profitability and revenue risk that an enterprise may have is borne by the tenant, not by the landlord. And so that takes a high degree of variability of revenue off the table.

We've also been careful to apply various business criteria to the identification of these various acquisition opportunities, including finding conservative businesses that have a real estate component, such that there is a hard asset that the debtors would be acquiring. So, even if the business operating from any given premises were to experience financial difficulty, there would still be an enduring value aspect to the debtors' acquisition in the form of real estate that would hold its value.

The -- another criteria that we've been careful to employ is identifying mature businesses that have a track

record of profitability. In other words, we're not stepping into the shoes of a start-up type situation that would require launch capital to get going. Rather, there would be a track record of profitability, of stability that the debtors could look to, to ascertain and project out what future revenues might look like.

Q It's under --

A There's also -- there's also a diverse -- if I might, there's also a diversification aspect to what the debtors are considering doing. Instead of making just one acquisition, the debtors are seeking authority to -- to acquire up to approximately three businesses to introduce that portfolio diversification as a risk mitigation strategy, such that, if any one acquisition were to experience financial difficulty, there would be other acquisitions that could be looked to, to provide a support to the struggling acquisition.

Q Including sale proceeds, how much do the debtors currently have in their bank accounts?

A The debtors currently have cash on hand of approximately $205 million.

Q How much are the debtors earning on that cash on hand currently?

A The cash on hand is primarily in savings account vehicles that are earning 0.1 percent interest.

Q On a percentage basis, meaning as a percentage of the

entirety of the debtors' assets in those accounts, what percentage of the sale process are you currently proposing to use in connection with potential acquisitions?

A It totals approximately five to six percent of the debtors' cash on hand.

Q Are you familiar with Section 524(g) of the Bankruptcy Code?

A I am generally aware of it.

Q So certain objecting parties have criticized the debtors for only pursuing an acquisition because of certain requirements, in order to certify -- satisfy Section 524(g). What's your response to that?

MR. PFISTER: (Not identified) Objection. Calls for a legal conclusion.

MR. SALERNO: Your Honor, I'm actually --

THE COURT: Overruled.

MR. SALERNO: -- just asking --

THE COURT: Overruled.

MR. SALERNO: Thank you, Your Honor.

BY MR. SALERNO:

Q I'll ask the question again, Mr. Danner.

What's your response to the criticism that the debtors are only pursuing acquisitions because of certain requirements, in order to satisfy Section 524(g) of the Bankruptcy Code?

A I -- I don't agree with that characterization.
Q Why not?
A Because upon my arrival at the debtors and in receipt of the -- of the debtors receiving the approximately $223 million worth of net proceeds from the sale of the mining operations, I immediately started looking at alternatives for the debtors to deploy that capital, knowing full well that the savings vehicles I just described were earning a pretty paltry 0.1 percent interest income return; and, therefore, I embarked on looking for a series of different alternatives that might conceivably be employed by the debtors to do something that would result in a higher rate of return for the debtors, and acquiring a business was one such alternative.
Q Mr. Danner, I'm going to put your declaration back up in front of you. Please let me know when you can see it.
A I can see it.
Q Okay. I'm showing you Debtors' Exhibit 1.

If you could, I'd like to direct your attention to the first half of Page 5, Paragraph 16, beginning "it is my belief." That paragraph reads, in part:

"It's my belief that making one more purchases of businesses on the terms outlined herein is in the best interest of the debtors' estates."

Do you see that?
A I do.

Q Sitting here today, do you still believe that to be true?
A Yes, I do.
Q Why?
A In large part for the reason that I just outlined, that the debtors are currently only making 0.1 percent by way of a return on funds that are in the savings vehicle. So, if the debtors were successful in acquiring one or more businesses that would yield even a fairly modest business return of something like 3 percent per annum, that would be a result that would be 30 times greater than the return that the debtors are currently experiencing right now. If you could achieve a portfolio of businesses with a blended average of 5 percent, that would be 50 times greater. So there is a significant delta in the order of magnitude that the debtors' money could be put to work for the benefit of the debtors in the form of acquiring these businesses.

MR. SALERNO: Your Honor, I have -- subject to cross-examination and the right to recross, we have no other questions at this time.

THE COURT: Thank you.

Cross examination?

MR. PFISTER: Your Honor, this is Rob Pfister for Aylstock, Witkin, Kreis & Overholtz. I have just a few questions of the witness if I could go first.

THE COURT: Yes, Mr. Pfister.

CROSS EXAMINATION

BY MR. PFISTER:

Q Mr. Danner, you had testified that you were retained in January of 2021. Is that correct?

A Yes, that is correct.

Q Just a few months ago. This motion that is before the court today was filed last month, May of 2021, correct?

A Yes, I believe so.

Q And in the motion that you presented, that was filed, and in the declaration that you tendered in support of the motion there's no mention whatsoever of these triple net lease opportunities, is there?

A I don't believe there is specific reference to triple net lease opportunities.

Q But, in fact, the motion does describe certain businesses that the debtors propose to acquire on pretty specific terms, right? It specifically calls out laundromats, right?

A Laundromats was one such industry, yes.

Q You have self-service storage facilities, right?

A That is correct.

Q Quick serve restaurants you mentioned, in particular.

A Correct.

Q Car washes?

A Yes.

Q Gas stations?
A Yes.
Q But no reference to the triple net leases. And, in fact, prior to the debtors' filing of its reply on Friday the notion of this triple net lease acquisition had never been raised in the filings in connection with the motion. Isn't that correct?
A I am not aware if it was or not. I don't believe so.
Q And then finally you testified there's approximately $205 million in cash in-hand with earning a 0.1 percent rate and you want to use 5 to 6 percent of the cash on-hand to invest in businesses. Is that right?
A That is correct.
Q And under any circumstances in terms of the possible profitability of these businesses that you are proposing to invest estate funds in, isn't it the case that if the debtors had instead sought leave under 345 or other authority to ask the court to permit the debtors to invest that $205 million in, for example, a very conservative bond fund or some other type of investment that was earning, say, a 2 percent or a 3 percent return.

If that relief was sought the debtors would actually receive and were granted, rather, the debtors would actually earn a far greater return then leaving the bulk of the $205 million in cash-in-hand at a 0.1 rate and investing 5 to 6

percent in these other businesses. Is that right?

MR. SALERNO: Objection, Your Honor. Aside from it being a very long question this calls for speculation and it's an incomplete hypothetical that Mr. Danner can't speak to.

THE COURT: Sustained.

MR. PFISTE: Thank you, Your Honor. I have no further questions.

THE COURT: Thank you.

MR. PLEVIN: Your Honor, this is Mark Plevin. May I go next?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. PLEVIN:

Q Good morning, Mr. Danner. Nice to see you again.

A Good morning.

Q Did you understand that your declaration was to provide evidentiary support for the debtors' motion when it was filed?

A Yes, I did.

Q Did you draft that declaration?

A I drafted it in connection with the debtors' counsel.

Q You did sign it, correct?

A Yes, I did.

Q And you did read it before you signed it?

A Yes, I did.
Q When you signed your declaration did you understand that it didn't say anything at all about the fact that the Niagara sale proceeds were held in money market accounts making 0.1 percent interest?
A I don't recall if there was a specific reference to where the debtors' funds were currently situated.
Q You understand that in terms of justification for the motion that your declaration said nothing about wanting to take actions to increase the rate of return from what you had in the bank accounts to what you might get in another vehicle?
A I don't recall if there was specific reference to that, but certainly the idea was to deploy the capital in a way that would yield a better return for the debtors.
Q That is not what my question was. My question was do you understand that it didn't say anything about that as to justification for the new acquisition opportunity that the debtors are seeking to pursue?
A I would have to look at the declaration to know definitively one way or the other.
Q Okay. Did you also understand that your declaration said nothing at all about the fact that one reason for the debtors' interest in new acquisitions was to address objections that the debtors lacked an ongoing business?

A The declaration sets forth the business reasons, in my view, that supported the business judgment of the debtors and the wisdom of moving forward with the business acquisitions.
Q And one of the business -- the declaration did not site, as a business reason, an interest in acquiring businesses for 524(g) purposes. Is that correct?
A That is correct.
Q You are familiar, sir, with the compensation and staffing reports that CohnReznick files each month with the bankruptcy court?
A Yes, I am.
Q And, in fact, you sign each of those. Do you not?
A I do.
Q And you understood that each one of those would be filed with the court?
A Yes.
Q You intended that each of those would be correct and accurate, right?
A Yes, I did.
Q And each report contains an exhibit that shows the time entries for each member of the CohnReznick team working with the debtors, correct?
A That is correct.
Q And do you recall that you and I looked at several of those reports going to your deposition on June 9th?

A I do.
Q And do you recall that we went over many time entries in the March report in which you and your team listed the work that you did and stated in one way or another that the work regarding business acquisition opportunities was being done for 524(g) purposes?
A I recall that there were references in the time entries to 524(g).
Q And that you spoke with your staff about the fact that the work regarding the business acquisition opportunities was being done for 524(g) purposes?
A I spoke with my staff and conveyed my conversations with debtors' counsel that the acquisition of businesses along the lines of what the debtors are seeking to acquire could be helpful for resolving certain objections to the debtors' plan.
Q In all of those reports there were no time entries saying that the work regarding business acquisition opportunities was being done for purposes of finding a better return on investment then the debtors' money market funds, correct?
A I don't recall.
Q In all those reports were there any time entries saying the work regarding business acquisition opportunities was being done for purposes of identifying a stable ongoing

business stream?
A I don't recall if there was specific reference to that. That certainly was a general criteria that my team and I established as being one of the gating factors to identify potential acquisitions.
Q You don't recall seeing any of the time entry reports that stated that as a purpose to what you were doing?
A I don't recall. As I'm sure you are aware, time entries are fairly abbreviated versions of what any individual is spending time on. So I don't know how lengthy or short the time entries are that you referenced.
Q Mr. Danner, as president of the debtors you are responsible for understanding the terms and provisions of the plan, correct?
A That is one of my areas of responsibility.
Q You would also be responsible for implementing the plan should it be confirmed, correct?
A As currently contemplated I would have a role in the post-effective date implementation of the plan.
Q Have you read the plan?
A Yes, I have.
Q Do you understand that under the plan the proceeds of the Niagara sale are to be turned over to the trust if the plan is confirmed?
A My understanding is that some of the debtors' funds

will be turned over to the trust on the effective date.
Q Well doesn't the plan say that all of the sale proceeds shall be turned over to the trust on the effective date?
A I don't recall the exact wording of the plan in that regard?
Q Does the plan say anything to the effect that the debtors can use some of the Niagara sale proceeds for other purposes before the effective date?
A I don't recall.
Q You said that the Niagara sale proceeds total about $205 million are in the debtors' bank accounts?
A That is correct.
Q Those are bank accounts that are approved by the U.S. Trustees Office?
A Correct.
Q Those accounts are federally insured?
A Yes.
Q So they are very safe places to put money, are they not?
A I believe "safe" is a relative term, but I would certainly characterize those types of banking institutions on the safer end of the spectrum.
Q Can you think of anything safer than a federally guaranteed account?

A Not much.
Q You understand that the debtors, as debtors-in-possession, are subject to U.S. Trustee guidelines that restrict what debtors can do with cash that they are holding as debtors-in-possession?
A That is my general understanding, yes.
Q And as a result of that investing in risky financial instruments such as high yield bonds are not permitted?
MR. SALERNO: Objection, Your Honor. I think this calls for Mr. Danner's interpretation of the bankruptcy code. So I will object on it as a legal conclusion.
THE COURT: I'm going to overrule. If he can answer it he can answer it, if not then not.
THE WITNESS: I am generally aware that there are restrictions on what the debtors can (indiscernible) specific knowledge beyond that.
BY MR. PLEVIN:
Q In fact, you considered other types of investments and rejected them because you thought they would not comply with the U.S. Trustee guidelines, correct?
A In consultation with debtors' counsel I came to the conclusion that it was unlikely that that relief would be granted.
Q Now I am confused about one thing. You said that you had an increased focus now on triple net lease opportunities.

Is that a fair summary of what you said in your direct examination?

A It is. I think the debtors' criteria that were previously employed identifying conservative businesses in stable industries still remains true, but we have now the additional element of seriously considering employing a triple net lease construct to further engage in risk litigation on behalf of the debtors.

Q Did that increased focus begin on or after June 9th when your deposition was taken in this case?

A Real estate opportunities had been part of what we had -- what the debtors had considered all along, but I think it's fair to say that subsequent to conversations in early June that the attractive risk mitigation aspects of triple net leases were of increased focus going forward.

Q Now when you say increased focus are the debtors limiting their search for business opportunities to triple net lease transactions or is that just an increased focus?

A No. The primary focus now continues to be identifying triple net lease opportunities in various of the stable industries that the debtors had previously identified.

Q So my question actually is whether that's just an increased focus or is that a restriction that the debtors are offering to the court in their reply brief and in support of their motion?

A The debtors are focused on triple net lease opportunities at this point. We had a couple of opportunities that we had looked at before that carried over, but on a go-forward basis the debtors acknowledged that a triple net lease environment is what we want to be operating in.

Q So you are not going to be looking any further at things like, say, golf courses?

A Likely not.

Q Residential real estate?

A Probably not because residential real estate typically does not employ a triple net lease construct. That is largely reserved for commercial real estate opportunities.

Q Now are triple net lease opportunities also state investments in your view?

A As I said before I don't believe there is any utopia where an enterprise is risk free, but in terms of an acquisition of a business where the tenant and the landlord engage in a triple net lease arrangement that does do a lot to mitigate any risk that the landlord would have.

Q So let's just talk about these triple net lease arrangements for a moment. So in a triple net lease arrangement if Imerys were to buy the property it would own the land, correct?

A That is correct.

Q And the land would be subject to a building that would be on the land?
A Yes, that's correct. The debtors would be seeking to acquire land that had already been developed. So as to avoid any sort of startup cost or capital expenditures to launch a business.
Q So, for instance, let's assume that if the debtors borrow land on which there is a McDonald's restaurant who owns the building in a triple net lease situation?
A The debtors. The landlord would own the building.
Q And then the tenant, in this case, in the assumption case the McDonald's franchisee would pay the debtors rent for the land and the building?
A That's correct.
Q And the tenant would also operate the business, correct?
A The tenant would operate whatever the underlying business would be.
Q So the debtor -- so the tenant, rather, would own the equipment of the building, correct?
A There -- that would need to be determined. There are permanent fixtures that typically are part of any premises that would be permanent in determination and, therefore, part of the actual physical building. There might be portable equipment that could be owned by the tenant.

Q And you said the tenant is the one who would hire the employees, pay the employees, and have the risk of the business is or is not profitable, correct?
A That is correct.
Q And what the debtor would get out of it in this assumed scenario is a monthly payment, correct?
A The debtor would on a monthly basis receive payments or revenue scheme from the tenant and would also, to the estate the real estate appreciated in value, would also receive that benefit.
Q Triple net lease arrangements tend to be single occupancy arrangements, correct?
A Triple net lease constructs can be employed in a physical space that can be sub-divided so that if you can envision a small strip mall, for instance, with five different businesses operating out of that strip mall each of those businesses would likely have their own leasing arrangement with a landlord which could, conceivably, be triple net leases. Alternatively, you might have single standalone facilities where just one business operates that premises.
Q Either way there's a risk to the landlord of a vacancy when the lease is up and if the tenant is not renewed and the space is vacant, correct?
A The landlord typically engages in renewal

conversations with the tenant well before the expiration date of the lease takes place so as to anticipate exactly what you just described. So to the extent that the tenant is not going to re-up the business lease for whatever reason that the landlord has sufficient timeframe to be able to go to market and find a replacement tenant.

Q Even if that occurs there still can be a vacancy, right?

A The possibility of a vacancy exists, but that is one of the primary elements of the business relationship that the landlord pays attention to and attempts to be proactive.

Q If you walk around any city in America right now, in any major shopping street, you see vacancies, right?

A Possibly. I am not sure which facility you are referring to.

Q Basically any street in America, any shopping center in America. If the -- with the triple lease if the building needs to be reconfigured for a new tenant that's a cost that gets borne by who?

A That is typically borne by the tenants in a triple net lease environment. There are leases that are not triple net leases between landlords and tenants where that cost may inure to the landlord, but in a triple net lease environment normally it is the landlord -- the tenant, rather, that bears the cost of any reconfiguration of the space. That would

logically be a conversation between the landlord and the tenant, but more often than not that cost would be borne by the tenant.

Q Is there also a default risk in any triple net lease arrangement where the -- even if past history suggests that the landlord -- that the tenant was strong, but is not strong on a go-forward basis and has to be (indiscernible).

A It's possible the landlord typically takes steps to try to mitigate that risk in the form of obtaining a security deposit to act as a financial buffer in a situation where there might be a default and also there are in many situations where a franchise of a national chain is operating as the tenant. There can be corporate guarantees that can also be looked to so that even if the underlying franchise were to fail there could be a corporate gaurantee from the franchisor that could help defray any potential loss the landlord might have.

Q There could be that, but there might not be that as well, correct?

A That would be part of any given negotiation.

Q (Indiscernible) there might not be a corporate franchisee or a corporate gaurantee is what I am saying.

A It's possible. It will all depend on the nature of the tenant.

Q And the tenant might not be part of a corporate type

business anyway, right? It could be a standalone independent business?

A It might be.

Q Before Imerys and the other debtors sold their assets they were in the business of talc mining and sales, correct?

A That's correct.

Q They were not in the business of triple net leases, correct?

A Not to my knowledge.

MR. PLEVIN: Your Honor, I pass the witness.

THE COURT: Thank you.

Any other cross?

MR. TSEKERIDES: Yes, Your Honor. Ted Tsekerides. I have just a few questions.

THE COURT: Mr. Tsekerides.

CROSS EXAMINATION

BY MR. TSEKERIDES:

Q Good afternoon, Mr. Danner. Ted Tsekerides from Weil Gotshal for Johnson & Johnson. Just a couple of questions.

Sir, if the acquisition of properties is such a great idea why not take more than $12 million to buy properties?

A The debtors thought it prudent to make an initial investment of a modest amount of money as a proof of concept so that there would not be an objection from parties in interest such as the TCC or the FCR over the amount of money,

but yet it would still be a significant enough amount of money to require businesses that would generate a meaningful income stream to the debtors.

Q So is there an idea that you are going to come back asking for more than $12 million in a month, a week, six months?

A There are no current plans contemplated by the debtors to ask for additional funds, but to the extent that the proof of concept does work the debtor is not ruling that out.

Q Is using funds to buy properties like a laundromat, or gas station, I think I heard earlier, is that consistent with the U.S. Trustees guidelines as far as you know?

A I don't know.

MR. TSEKERIDES: I have nothing further, Your Honor.

THE COURT: Anyone else?

MS. SARKESSIAN: Yes, Your Honor. Juliet Sarkessian for the U.S. Trustee. If I may ask a couple of questions.

THE COURT: Ms. Sarkessian?

MS. SARKESSIAN: Thank you.

CROSS EXAMINATION

BY MS. SARKESSIAN:

Q For the record, Juliet Sarkessian on behalf of the U.S. Trustee.

Mr. Danner, I want to understand with respect to your declaration, at Paragraph 16, I understand that you have reconfirmed the first part of it that it is your belief that making one or more purchases of businesses on the terms outlined herein is in the best interest of the debtors' estate. Is that correct, you are reaffirming that?

A That is correct.

Q The second part of that sentence says,

"And as such constitutes a proper exercise of the debtors' businesses judgment."

Am I correct to understand that that last piece of that testimony is not being moved to be admitted into evidence?

A That is correct.

Q And could you explain why that is?

MR. SALERNO: Your Honor, before Mr. Danner takes this I think this is more appropriately a question for counsel. I'm happy to proffer that this was the result of discussions with counsel before the hearing. I believe there would have been a likely objection to the last clause of that sentence as calling for an opinion on an ultimate legal issue and for that reason we did not attempt to offer it. Of course, counsel is free to ask the witness any questions that she wishes.

BY MS. SARKESSIAN:

Q Well I would like to ask the witness do you believe that this is a proper exercise of the debtors' business judgment in your opinion.

MR. PLEVIN: Objection, Your Honor. Calls for an improper legal conclusion.

THE COURT: I'm not sure who that objection came from. Ah, Mr. Plevin.

I will let him respond for what it is worth.

Mr. Danner?

THE WITNESS: Thank you, Your Honor.

Certainly I am not qualified to make a legal conclusion, but from a business perspective I do believe that this is a good use of (indiscernible).

BY MS. LEAMY:

Q You broke up. So could you just repeat that last piece of it?

A I was saying that I'm not qualified to reach a legal determination with regard to that aspect of the statement, but from a purely business perspective, in my business judgment, yes, this does constitute good use of the debtor's funds.

MS. LEAMY: Thank you. No further questions.

THE COURT: Any other cross?

(No verbal response)

THE COURT: I hear no one else. Redirect?

MR. SALERNO: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. SALERNO:

Q Mr. Danner, Mr. Pfister asked you a few questions about whether the concept of triple net leases were in your declaration or the motion. I had a follow-up question on that. Laundromats, I believe there were a few other industries listed, could those be, in concept, triple net leases?

A Yes, they could. A triple net lease is not an industry or a business in and of itself. It is simply a contract between a landlord and tenant that could theoretically exist in any industry.

Q Mr. Plevin asked you about certain time entries that you had entered. You understood that those time entries were going to be filed publicly, right?

A Yes.

Q Did you attempt to hide any aspect of the work you're doing for the debtors?

A No.

Q There are specific references to 524(g) and I just want to understand what is your understanding of 524(g) and how it relates to the release being sought, and that factored into, if at all, this motion?

A So I had had conversations with debtors' counsel where

I was advised that the acquisition of these businesses could, indeed, be helpful to the debtors resolving certain objections to the debtors' plan. In turn, I relayed that to my team so that they were aware of the landscape of the acquisition process.

Q Mr. Plevin asked you questions about whether your primary focus or exclusive focus moving forward was on triple net leases. I just wanted to get clarification on that. If there were opportunities that were great opportunities that weren't triple net leases is that something that the debtors would still consider?

A Potentially, but we would focus on whatever course of action and whatever ultimate business construct was the appropriate balance of risk mitigation versus recovery. And all other things being equal the debtors would likely take the more conservative approach with the lesser risk profile. That would be a guiding (indiscernible) going forward.

MR. SALERNO: No further questions, Your Honor.

THE COURT: Thank you.

Mr. Danner, your testimony is concluded.

THE WITNESS: Thank you, Your Honor.

(Witness excused)

THE COURT: Does the debtor have any further evidence?

MS. TSEREGOUNIS: We do not, Your Honor.

THE COURT: Okay. Do any of the objectors have any evidence they're going to put in?

MS. DAVIS JONES: No, Your Honor.

MR. PLEVIN: Your Honor, I would like to ask the court to take judicial notice of the plan, the amended plan, the disclosure statement for the ninth amended plan and I would either ask the court to take judicial notice of or offer into evidence the March 2021 CohnReznick staffing and compensation report which was filed on the docket. Give me a moment and I can give you the docket citation. Its Docket No. 3446.

THE COURT: Any objection to --

MR. PLEVIN: The time entries are at Docket 3446-5.

THE COURT: -- my taking judicial notice of the ninth amended plan or the March 2021 report filed by CohnReznick?

MR. SALERNO: The debtors have no objection, Your Honor.

MR. SALERNO: I also mentioned the disclosure statement, Your Honor.

THE COURT: Disclosure statement as well.

MR. SALERNO: The debtors have no objection to that as well.

THE COURT: Okay. Then those -- I will take

judicial notice. You can explain to me exactly for what purpose, but, yes.

Okay. Any other objecting party have any evidence or other item they want me to take judicial notice of?

(No verbal response)

THE COURT: I hear none. Let's go to argument.

MS. TSEREGOUNIS: Thank you, Your Honor. Again, Helena Tseregounis on behalf of the debtors.

I would like to start by directing the court's attention to the revised order that was filed on the docket yesterday that was 3726. We also included a redline to the orginal as filed version of the proposed order and that was attached as Exhibit B1. We did also share with all of the parties who objected to the motion a copy of the revised order a number of hours before it was filed so that they would have a chance to review ahead of the hearing today.

Our reply does walk through the edits that we have included in that revised order. I would like to highlight some of the changes in that redline. We think it actually narrows the issue substantially before Your Honor today and would be responsive and in our view, at least, resolve quite a few of the objections raised by the objecting parties. I also want to flag that we had a number of conversations with the United States Trustees Office to

implement certain changes and those are also reflected in the revised order.

So I am not sure if Your Honor has the redline in front of you, but I'm happy to --

THE COURT: I do.

MS. TSEREGOUNIS: Great. So the first thing I would like to flag is Paragraph 31 of the proposed order, of the revised order. We have taken the steps of including all objecting parties, that is any party who filed an objection to the motion as a notice party. What this means is not only are they going to get a service of any purchase notice that advises parties that the debtors have identified a potential acquisition, but they will also have an opportunity to object before the debtors can proceed with that acquisition.

As a side note the debtors do have significant questions about whether certain of the objecting parties, specifically the insurers and Johnson & Johnson, have standing to be heard at all with respect to acquisitions. They are not holders of direct talc personal injury claims. At most they would hold indirect talc personal injury claims and the debtors have, with respect to Johnson & Johnson's claims, objected and reserved rights to do the same with respect to the insurers' claims as well.

So we would reserve the rights on those arguments to the extent applicable if we receive objections on

acquisitions and, of course, in connection with further court proceedings including the plan and confirmation of a plan. For purposes of the revised order, you know, we wanted to be responsive and include them as objecting parties at this point.

Also in Paragraph 31 we have endeavored to provide additional information on a potential acquisition. We will include, when the purchase notice is filed it will have an as an exhibit; essentially, a deal summary that includes basic information about the acquisition, a financial review of what are projected and what its applicable historical income is for the potential acquisition and also cost that we project the debtors would incur related to the business. This would be in addition to the purchase agreement that the debtors would have entered into and attached to the purchase notice as well.

We have also expanded the objection period. It was initially seven days, now its ten days. That was done at the request of the United States Trustees Office. And we have agreed to file any reply, at least, two business days prior to any hearing. That was a request from the Arnold & Itkin objection papers. We have reserved rights to seek leave in case there is a circumstance where we need an emergency hearing or to find additional time to file the reply, but the baseline is that two business days.

The final thing I want to point out with respect to the revised order is at Paragraph 6. We have included what is a broad reservation of rights and the intent of this was to make it clear that the court's ruling on this motion will not impact any party's arguments, or objections, or responses to those objections in connection with the confirmation of a plan. So the debtors' plan proponents and all parties in interest, including objecting parties, reserve all their rights to raise arguments and issues with respect to plan confirmation.

We have also tried to follow the language that was proposed in the Arnold & Itkin objection papers as well so we've tracked that and we have made some changes there. The intent was to respond to the fact that our view that many of the arguments raised in the objections are plan confirmation arguments. And it would be premature to consider those at this time, but we're also not trying to do anything that would impact party's rights with respect to those objections.

So, Your Honor, taking the relief that we're seeking in the motion which is not to make any acquisitions at this time, but to implement certain notice procedures, to pursue acquisitions up to a cap of $12 million plus the changes that we have incorporated in the revised order we really feel that the relief we're seeking today is very

narrow. The notice procedures preserve objection rights for any party who has filed an objection today and, therefore, indicated that they have an interest in potential future acquisitions, at least, from their perspective.

So a lot of the arguments I expect Your Honor will hear today, to the extent they apply to specific acquisitions, would be preserved at a later point in time. We have also reserved all rights with respect to plan confirmation objections. We think that resolves many of the objections, if not a majority that were raised in many of the papers and includes various safeguards as well including the aggregate cap of $12 million that I mentioned which is really a fraction of the debtors' current cash-on-hand and the sale proceeds.

I will also note another critical safeguard which is that the tort committee and the future claimants' representative have joined in the motion and you will hear from them today in support of the motion. Also, any acquisition before we can even file a purchase notice pursuing an acquisition would be subject to the consent of those two representatives. We think this point is critical.

Talc personal injury claimants are ultimately the ones who stand to gain from any use of estate assets. They are the beneficiaries of the trust. If the plan is confirmed by the support they will be entitled to sale proceeds held by

the debtors as of the effective date as well as through the trust ownership interest in the reorganized North American debtors who hold 100 percent of the equity in those entities. They will also own any acquired businesses.

So we really believe these are the parties who hold an interest in this case. The tort committee and the FCR are the fiduciaries who have been appointed to represent those parties. So we think a critical safeguard is that both of these entities not only support the proposed relief, but will be monitoring the process.

I'd like to move to the legal standard applicable here because I do think a lot of the papers and the objections really muddy the waters. The appropriate legal standard for the court to consider is 363(b) which is whether the requested relief is an exercise of the debtors' sound business judgment. This is a deferential standard and debtors believe that the evidentiary record developed today establishes that the standard has been met.

Generally, there is a presumption that management makes reasonable business decisions. Mr. Danner had testified and stated in his declaration, which was admitted today, he thinks the implementation of the notice procedures and pursuing acquisitions are in the best interest of the estate.

He has noted that his belief is that any

acquisition will maximize the value of those assets and provide for greater returns then the funds are currently making sitting in bank accounts that are only receiving .1 percent interest. He has delineated his criteria for identifying a business noting that his focus is on minimizing risk where appropriate. The focus is on conservative businesses with hard real property assets, established profitability and the minimal need of direct involvement from management all to minimize any potential risk.

He has also stated today that since the motion was filed on May 14th the debtors' managment has continued to think through the strategy and refine their pursuit of potential business lines with a resumed primary focus on triple net lease opportunities. These could be deployed across a range of industries but would, essentially, respond to some of the concerns that we had heard from objecting parties about the potential risk for a file.

As Mr. Danner testified triple net leases minimize the risk of -- do not pass along the risk of operating loss to the debtors, have a very limited name for day to day management in terms of the operations of the underlying business and generally have a low risk profile.

Mr. Danner has also testified of the importance of implementing the notice procedures themselves as opposed to coming to the court on a one-off basis once an acquisition

has been identified. He has testified that him and his team have identified a number of opportunities, but have found that pursuing them as a Chapter 11 debtor could be difficult without assurances to the counterparty that the release is something that the debtors could obtain and that the debtors are in a position to close on this deal subject, of course, to compliance with the notice procedures if Your Honor were to enter this motion today.

The market, in Mr. Danner's experience as he noted in his declaration and testimony today, is that in this market to be competitive the notice procedures will be of great effect including the flexibility to put down a refundable deposit at the outset which will allow the debtors to really pursue acquisitions and opportunities that they believe are value maximizing.

I'd also like to address certain objections that were focused on the cost of pursuing these transactions to the estate. I think from Mr. Danner's testimony it's clear that the debtors are focused on efficiency. The debtors' management is well aware of potential costs that will be incurred with respect to potential acquisitions and have taken steps to minimize that cost. That includes that $55,000 cap on diligence expenses that Your Honor heard about per Mr. Danner's testimony. It also includes thinking about legal fees and the best way to minimize those utilizing

outside counsel.

So Mr. Danner's testimony reflects that transactions will not be pursued to the extent they are not value maximizing. And the fees and costs will be a consideration of the debtors' as well as they move towards making decisions regarding whether they will pursue a particular acquisition.

I'd also like to respond to some of the arguments that $12 million why are you doing this is you are only -- what is your real interest if you're only utilizing $12 million. Shouldn't you be utilizing more.

I think this is an interesting argument because we have heard from objectors simultaneously that on the one hand $12 million is too small as a percentage of (indiscernible), but on the other hand it's such a large and material use of funds that it has the impact of changing the plan and disclosure statement resulting in solicitation. And I will touch on that a little bit; although, you know, the debtors' position is that those are premature arguments to the extent we're talking about plan modification and resolicitation.

I just want to note that ultimately the question of a sound business justification is not the amount of assets that the debtors intend to utilize as compared to sale process, for examples, which is a small number and it's not

the amount of assets that the debtors intend to utilize as compared to (indiscernible) either which gives an even smaller number considering the over $500 million that is currently going to the trust under the plan; not even including non-cash in terms of indemnity rights.

The right question is whether the use of estate assets is going to make sense and maximize the value of assets as compared to the status quo. So the appropriate comparison is how the funds are currently being used. And we have heard testimony from Mr. Danner that they're making .1 percent returns.

So the extent the value is going to be increased and it's in the debtors' business judgment that it will be a value maximizing use of estate assets the comparison to sale proceeds, trust funds, whatever you want to use is not really relevant to the debtors' business judgement analysis and the applicable legal standard.

THE COURT: Well isn't the comparison that my words, I don't think it was in any objection, this is a pretext for something else. Number two, that it will make the smallest bit of difference in the debtors' return on its cash because of the -- because the $200 or $190 million remaining will still be earning .01 percent or 0.1 percent.

MS. TSEREGOUNIS: Yes, Your Honor. I'm happy to address those. Let me take that second one first.

Again, I would say that the question of whether this is a reasonable exercise of business judgment should be compared as against whether the money, the $12 million will be better than it is doing now. So, you know, we wanted to draw the line here. We think coming to the court and asking to use $100 million of assets to potentially pursue acquisitions, you know, could present with more issues and concerns that its $12 million request.

As Mr. Danner testified there is this proof of concept idea as well which is we want to implement this, we want to see how it goes from an acquisition perceptive, see what opportunities are out there and then make decisions about further investments in the long term. So the debtors have (indiscernible), you know, the anticipated risk benefit is balanced by seeking an initial investment of $12 million and then seeing how things go from there.

I do want to respond to the pretext argument because we have seen that come up today in many of the objections and kind of where the lines of questioning were going in the cross of Mr. Danner.

I just want to be very clear that the debtors, Mr. Danner in his deposition, Mr. Danner here today, have readily acknowledged that one of the considerations in filing the motion was whether acquiring these businesses would be beneficial under Section 524(g) at least to the extent that

they would be responsive to objections that we (indiscernible) regarding this so-called ongoing business requirement.

The debtors have been candid that we do believe acquiring certain business assets would be relevant to plan confirmation and could (indiscernible). The reason this wasn't briefed in the motion is we just don't think it's relevant to the 363(b) standard. We think this is a confirmation --

THE COURT: So it's not part of his business judgment, is that what you are saying. So the fact that this might solve a confirmation objection was not at all a part of the reasoning and not part of a business judgment that I should consider when I am considering the 363 standard?

MS. TSEREGOUNIS: We think Your Honor could consider this. You know, the fact that the debtors want to confirm a plan of reorganization and be responsive to objections and recognize the fact that this was one of the reasons why the debtors have filed the motion here today.

We do not think one filing the motion this was a critical piece of the analysis for establishing 363(b), but I definitely think that this is something that Your Honor could take into account and I don't think -- there is nothing wrong with the debtors wanting to sure up a plan that they have spent two and a half years negotiating that provides,

potentially, over $500 million -- if its confirmed by the court $500 million of cash assets to the trust and entirely consist with the debtors' fiduciary duties in these cases to pursue confirmation of that plan.

I think its -- if Your Honor is inclined to consider that as a factor in Mr. Danner's business judgement, we think that's appropriate. From the debtors' perspective, you know, we don't think that consideration of whether the debtors are meeting the confirmation requirements under 524(g) is appropriate for today or should be viewed in a vacuum. Instead, those are better preserved for confirmation. So we would not want to have a ruling or argument on those legal points here today.

THE COURT: Well I am not going to make a ruling today on the 524(g) issues. The question is whether that was part of the business -- whether that was a reason and part of the business judgment, the exercise of business judgment. It's kind of surprising that it didn't show-up in the motion, quite frankly. The evidence, I guess, is sort of mixed on whether that was part of a consideration.

So I'm not sure why it didn't show-up in the motion that --

MS. TSEREGOUNIS: Yes, Your Honor.

THE COURT: -- the debtor -- that it sures-up. That the debtors' view is that it sures-up one of the

confirmation standards.

MS. TSEREGOUNIS: I'll note for Your Honor that we did address it in the reply. I think, you know, the initial thinking was 363(b) is about are we using the assets in a way that is value maximizing and that was the initial focus and the way that the motion was drafted. I don't think -- you know, we're not hiding from the facts at all. I'd say it's an appropriate consideration by Mr. Danner in making a determination to pursue the motion. This alternative purpose of having and being responsive to 524(g) concerns down the road in connection with the plan.

I also want to flag one thing too which is there is no concession for change in strategy from the debtors such that we're saying that the plan is not confirmable as is. Our position is that the plan is confirmable whether or not Your Honor approves or denies this motion today. So I saw that a bit in the papers and I just wanted to be crystal clear that the fact that we're seeking this relief is not concession that we want to qualify for all the 524(g) factors including, you know, whether (indiscernible) going to file or not. I just wanted to clarify that for Your Honor.

THE COURT: Okay.

MS. TSEREGOUNIS: So I do want to address a couple additional questions or objections, I should say, that were raised in the papers. The first is the applicability of

Section 345 to the 363(b) analysis and the acquisition of assets here. Section 345 on its face supplies to situations where a debtor is holding cash in certain types of bank accounts we're seeking to invest in securities. We have been unable to identify and objectors have not cited to a single case in which 345(b) has been applied to the perspective purchase of assets pursuant to Section 363(b) and our view is that the reason that no such (indiscernible) exists is because such an interpretation of 345 would effectively right Section 363 under the code.

The result would be any such acquisition would require the (indiscernible) of the U.S. Treasury Department or to up some bond, or some other financial institutions to bonds, put up a bond or surety and we just don't think that's practical or would permit any debtor to pursue these types of acquisitions.

I will note too that this argument did come up in front of Judge Fitzgerald in the Flintkote case. She was very skeptical of the debtors in that case were proposing to make an acquisition of certain triple net lease properties and she was very skeptical of this argument raised by certain objecting parties. And determined that, you know, interpreting Section 345 in such a manner would be not workable for the conflicts of Section 363(b).

The use of the colloquial term "investment" that

I have heard here today and, you know, by Mr. Danner in his deposition I mean that doesn't automatically make Section 345 applicable. The debtors maintain that it is not intended to apply to these circumstances.

One more point I'd like to address, Your Honor, is certain arguments we've heard from objectors that the court shouldn't grant the relief because any acquisitions would ultimately be the plan modifications or that the court should require some sort of further disclosure and a formal plan modification before this motion should be approved and before any acquisitions can be pursued.

Just to reiterate, the motion seeks to apply notice procedures, it does not change the status quo and if the objectors want to argue that in this acquisition that the debtors pursued down the road require further disclosure to the plan modifications we will have the full ability to do so at a plan confirmation hearing and we have explicitly preserved that right in the broad reservation of rights to have included in the revised order.

In any event, you know, I will note that the debtors' position is that the relief under this motion, including any further acquisitions, does not constitute a plan modification. The plan, itself, nothing in either the plan or the disclosure statement prohibits the cash-on-hand or sale proceeds during the case. In fact, it would be

prohibitive if the debtors could not, for example, use cash-on-hand which is sale proceeds to pay (indiscernible) as we continue to move towards confirmation and deal with various discovery and litigation that we have been managing over the past few months.

There is also nothing in the plan that says there is a minimum cash amount from the sale proceeds that it would be funded to the trust, nothing that says sale proceeds will be transferred to escrow, for example, and held for the benefit of the trust and not touch. So I submit that the plan anticipates sale proceeds would be used as needed during the first (indiscernible) days. There is provisions that seek to (indiscernible). For example, provisions in the plan that establish that administrative claims would be funded from sale proceeds, that would be consistent with this.

The disclosure statement also anticipated that sale proceeds would be utilized to pay administrative expenses from the sale closing date through the effective date and other amounts required in connection with (indiscernible). And setting that aside, even if the debtors do determine down the road a plan modification would be appropriate in light of acquisitions that would be made, you know, we would maintain that a new disclosure statement or balloting of an amended plan is unnecessary because any such acquisition could neither be material nor adverse to effect

the treatment of creditors.

In fact, what we are proposing here today is not a $12 million out the door, you know, payment that we're never going to see again, but it's a utilization of those funds to, in fact, maximize the value of the estates and present with increasing returns, and utilize those in a way that would benefit the estate.

So with that, Your Honor, unless you have further questions of me I'd ask that this court enter the motion and the -- approve the motion and enter the revised order as we proposed it.

THE COURT: Thank you.

I'll take argument in the order I heard objections.

MR. BRADY: Your Honor, Robert Brady for the FCR. Should you hear those in support first?

THE COURT: Yes. Thank you.

MR. BRADY: Thank you, Your Honor. Again, Robert Brady for the FCR.

Your Honor, we support this motion and we agree with the debtors that these objections are really not so disguised confirmation objections. They are premature. Per the revised orders all the objectors would get their chance to weigh-in on any transaction ultimately selected by the debtors. Of course, Your Honor, we know that is not what

they really want. They want to continue to delay and disrupt these proceedings to obtain any perceived leverage and negotiations or a litigation advantage.

Before you today, Your Honor, is really a 363 motion, a procedural motion. From the only testimony in the record this is being brought to improve value for the estates and to address objections to the plan. There is absolutely nothing wrong with that. This is not new. This is not novel.

As the Flintkote court found there is nothing in 524(g), 1129, 1141 or the Third Circuit's opinion in Combustion Engineering that requires a debtor to continue to engage in its prepetition business. That makes perfect sense here, Your Honor. It was important to the talc claimant fiduciaries, the TCC and the FCR that the debtor get out of the business of mining talc, a product the claimants' believe caused their very serious injuries. These fiduciaries wanted the company sold. We did not want talc assets in the trust.

Your Honor, these objections and arguments have been raised before, largely by insurers, challenging the legitimacy of the debtors' business judgment in seeking to pursue a business acquisition to bolster their 524 arguments. It has been flatly rejected. This is cited in the debtors' reply in footnote 18 from the Flintkote court. The debtor will have, and I will put it in quotes,

"A business that it didn't have before."

The debtor will have an argument about its going concern that it didn't have before. But what is wrong with that? I mean that is what bankruptcy is for, isn't it; it lets the debtor reorganize. Your Honor, the debtors' business judgment is entitled to deference and this is fully supported by the fiduciaries of the talc claimants, the TCC and the FCR.

Happy to answer any questions, Your Honor.

THE COURT: Thank you. I don't have any questions.

Let me hear from the TCC.

MR. FINK: Good afternoon, at this point, Your Honor, Mark Fink, Robinson & Cole, on behalf of the committee.

As has been noted by others, the committee, the FCR, and the debtors all stand shoulder to shoulder today, looking forward and embracing this proposed motion, which is a procedural motion only. All parties who actually have fiduciary obligations to maximize the value of the estate and to pay creditors all support this transaction.

The motion, as it's, (A), procedural, and (B), as modified by the debtors, allows for the objectors to come forward another day and to oppose a transaction, which transactions will have already overcome the hurdles of the debtors' professionals reviewing and vetting it, the FCR reviewing and vetting it, and the committee reviewing it and

vetting it, because the debtors can't move forward until the committee and the FCR look at it and approve it as going forward. This was a very important negotiation point for us because we know what our fiduciary obligations are; they are to the whole, not to an individual group of plaintiffs' counsel or to an individual client, a for-profit client who may be objecting to the transaction.

There is no guarantee that any business acquisition will ultimately be approved, though, by this Court, and the order, as modified, doesn't do anything, other than set forward an expedited feature for this Court to review a future transaction.

So, with opponents who are insurers, who have their own, at-best indirect claim, and in every interest in delaying these cases, J&J, who has every interest in delaying these cases, certain personal injury claimants who, frankly, it perplexes us sometimes why they opposed this at one-tenth of one percent of interest on the available cash that's sitting there. We eventually could leave this cash sitting in a pile in a conference room somewhere and it would be doing about as well as it is now.

And federal banks are not -- there's not 100 percent insurance on federal banks; there's a maximum and it's not 200 million. And so, there's risk in even having it in a bank.

So, with respect to the 345 concerns that were raised by the U.S. Trustee, the committee agrees with the debtors' position, one, the U.S. Trustee even said that 345, quote, may not be implicated in these cases. We don't think it is and a broad reading of 345 would eviscerate 363.

So, for the reasons set forth in the papers and arguments of counsel in support, the committee asks this Court to grant this procedural motion to the proposed modifications outlined in the debtors' reply.

THE COURT: Thank you.

MR. FINK: Thank you.

THE COURT: Okay. Now, I'll hear from the objectors.

MR. PFISTER: And, Your Honor, this is Rob Pfister from Klee Tuchin on behalf of Aylstock, Witkin, Kreis, & Overholtz.

A very brief point to make. Number one, the Court should always be skeptical when a request for relief doesn't lay out the whole story for why the relief is being sought. And no other debtor, and, indeed, I would submit, no other person who had $205 million earning 0.1 percent, would say let's keep 95 percent of it earning 0.1 percent and let's take 5 percent of it and put it in laundromats. That just is not a rational approach that would be taken, which leads to my second point, which is I think the debtors are presenting a

false choice.

They are saying we either go all-in on laundromats and pay phones with, you know, $100 million or we're forever stuck at 0.1 percent.

Well, Section 345, which does govern monies of the estates, does allow exceptions if the Court, for cause, ordered otherwise from its pretty stringent requirements. This is, to the extent this is a unique case where the debtors have hundreds of millions of dollars in cash and to echo the last counsel's point, perhaps not all of it is even insured, given the limits that are there, you know, my clients would certainly support relief that would allow the investment of that money in extremely conservative, but still, you know, non-laundromat type business, type bond, or fund or something of that nature. So, I think that is a false choice.

And, you know, what's really going on here, of course, is the 524(g) point. We shouldn't litigate confirmation today, but I don't think there's a reservation of rights that the debtors can propose that fully reserves rights. I have given this a lot of thought and the only reservation I could think of is a phrase -- I don't know if others have heard it, but I certainly heard it in high school -- but if you ask somebody out on a date and they said, let's not and say we did. And maybe I heard that more than others, but, you know, let's not and say we did.

Well, look, let's stipulate that the debtors have this pile of cash and that they, you know, were willing to engage in this silliness of Mr. Danner running around to pay phones and, you know, restaurants and looking for businesses and all of that stuff, and let's just stipulate that they were willing to do that and they were happy to do that, and let's address, at confirmation, the confirmation arguments.

And to the extent that, at confirmation, or even, you know, post-confirmation, they want to try and do this silliness again after the Court has heard all of the proper arguments on 524(g) and all related points, you know, then, maybe we can send Mr. Danner out to invest in self-serve restaurants. And I would make that point especially in light of one of the last confessions that the debtors' counsel made, which is they don't -- they disagree that they even need this to confirm a plan.

They don't think this is necessary. They are on record as saying that. They've got this Imerys Talc (indiscernible), you know, potential debtor that they have. I've always wondered why if that's going to be a debtor, that they're going to give the securities to the trust to, why -- this is their ultimate plan -- why don't they invest the money in that, as opposed to, you know, running out and buying a coin laundry or something.

But, in any event, those were my three comments,

Your Honor.

THE COURT: And why do you say no reservation of rights can be formulated?

MR. PFISTER: Well, because if, at the end of the day, there's an order granting the debtors the right to pursue these other opportunities and to invest this money, the debtors are going to do so and they are going to then have these businesses or these, you know, passive interests in the form of a triple-net lease.

Now, we get to confirmation and we're going to be arguing, well, you know, we'll still have certain arguments, you know, certainly about good faith, certainly about other points, but the fact will remain that there will be these businesses that they have. And maybe Your Honor won't find that persuasive at confirmation, that's certainly true, but the fact of the matter is, we are changing -- if the Court were to grant the relief today, we are changing the *status quo* and the debtor with only one officer, Mr. Danner is officer of all the debtors who reports to a Board of one board member, so this debtor has one officer for everybody, one board member, and $205 million in cash and that's it.

And that's the record. That's the current status of the world right now. And if the Court were to grant this motion and were to allow the debtors to go and, you know, get the soft-serve ice cream or something, then at confirmation,

they would have that business. And, again, you might find it unpersuasive, and I would think, frankly, Your Honor, you ultimately will, you know, that this is a legitimate invocation of the statute, but it does change the *status quo* and no reservation of rights can change that.

So, what I would say is, if the debtors think a reservation of rights is so great, why don't we do my reverse, you know, let's not and say we did, and just say, well, we could have done this. It's silly. We could have Mr. Danner out there, you know, finding the bicycle businesses and the like. We have the money. We were willing to do it. We wanted to it. And you know what, Judge, if you think after hearing all the confirmation arguments, if you think this is the way to go, you know, we promise, you know, a day before the effective date, you know, we will buy the, you know, payphone on the corner and we'll operate it and that's a business and we're good.

You know, why doesn't that work as a reservation of rights?

THE COURT: Well, that's not what's in front of me, obviously, but what's the policy that says the *status quo* can't change during the case?

MR. PFISTER: Well, there's certainly no -- and, certainly, statutory authority, like under 363, to use estate property outside the ordinary course of business, recognized

that the *status quo* does change during the case, right. Debtors come into court because ordinary course of business, they just do it.

Here, this debtor has no ordinary course of business, so they're coming in. And the statute says, when a debtor wants to use its property outside the ordinary course, it has to come to court, it has to make a showing, it has to give parties in interest an opportunity to object, it has to have a valid business justification, and the like.

And so, the debtors came in. They are seeking to change the *status quo*. They didn't give you in the motion their full reasons for doing so. They kept the real reason, you know, behind, you know, in their briefcase, and they gave you some reason. And the reason that they gave you is spatially implausible. It is, we want to increase returns. We want to use a tiny, tiny portion of this money that we have, which, I imagine, Your Honor, is the only reason why the TCC and the FCR and everybody else opposed it, because the debtors wanted to go all-in on this, you know, harebrained scheme, I don't think anybody else would support it.

But, you know, we want to use this tiny, tiny portion of money outside the ordinary course of business, and here, Judge, here is our business justification: it is to increase returns.

Well, we are here today and the evidence is before

Your Honor as to whether the debtors have carried that burden. I don't think they have.

Again, if it's to increase returns, there is no guarantee that this will increase returns, but beyond that is a pretextual justification. Even if it happens, it's only going to be by happenstance that there's a modestly increase return and will, by the way, there's no world in which the return increase on these investments is going to make up for the debtors' investment in doing this; that is, this motion, all the professional fees, the depositions, Mr. Danner's time, all this other stuff, right.

This will be a net loss (indiscernible). I don't think anybody has any questions about that and I don't think the debtors had any questions about that when they filed it. So, this is a pretext and you are being asked -- the Code requires the debtors to come before you if they're going to use estate property outside the ordinary course, it requires them to justify that.

And they have not done so here. So, that's my answer to Your Honor's question about the *status quo* changing.

THE COURT: Why couldn't there be two motivations?

Mr. Danner is a financial professional. He comes in and sees $200 million sitting there and says, what can I do with this? I've got to be able to do better than this, and so he starts looking around. That doesn't strike me as unusual.

Now, were we end up might be a different place, but at least initially, how does that strike you as unusual?

MR. PFISTER: I don't think there's anything unusual at all about somebody who's sitting on $205 million in cash earning 0.1 percent wanting to earn a higher level of return, but there has to be a nexus and a fit between, you know, if his -- so, if that was his motivation, and he said, Your Honor, I'd like leave to take, you know, $1,000 of this money and invest it in the Powerball. You know, now, on the one hand, I have, you know, every hope to increase returns, but it's only $1,000. So, you know, 0.5 or 0.1 percent on $205 million, that's justification to take a small amount and make a speculative investment in Powerball. You don't have a fit between the means and the earnings.

So, here, having a motivation of wanting to increase the return on $205 million, that's a fine motivation. And, again, if the debtors, you know, want to come into court and want to work with parties in interest, my clients are claimants in the tort (indiscernible) here, we have no interest in keeping the money at 0.1 percent.

So, if there's a -- you know, if something (indiscernible) on Mr. Danner, you know, an accomplished gentleman, if he has other ideas of, you know, a conservative bond fund, you know, an indemnification, you know, something of that nature, you know, even cryptocurrency, you know, we

would consider.

But, you know, then under 345 there's an established process, which is the Court can -- it says if you're investing money -- so, first, 345(a) says, you know, the trustee in this case may make such deposits or investment of the money of the estate for which as will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment.

Well, that's great. We like that. Maximum, reasonable, net return, taking into account safety.

Then (B), has a, you know, except with respect to a guaranty, an entity -- the trustee shall require from an entity with which such money is deposited or invested, you've got two options; one is a bond and then or, two, the deposit of securities of the kind required in Section 9303 of Title 31, unless the Court, for cause, ordered otherwise.

So, if the debtors came in here and they said, we've got $205 million, you know, maybe not even all of it. Maybe we want to use, you know, 30 percent of it or something like that. We want to go into a conservative fund that instead of 0.1 percent will earn 2 percent, right. Right. We're all for that.

But the notions that what they're going to do when faced with this situation is to say, let's go buy a laundromat, that's just -- it's like a Powerball ticket.

There's no fit between the means and the end.

THE COURT: Thank you.

Mr. Plevin?

MR. PLEVIN: Thank you, Your Honor.

I'm a little bit -- it's hard to know where to start, but let me start with the point that was being raised about the pretext and why that's relevant. And it's relevant because the Section 363(b) standard includes a good faith element. That's right in all the cases that you would look at. We put it in our brief. The business judgment has to be one that's in good faith and a business judgment that is pretextual or not completely candid with the Court is not one that is in good faith.

They never said in their motion, and Mr. Danner never said in his declaration, that the reason that they were seeking this relief was because they thought they were getting inadequate or low returns on the debtors' sale proceeds. They said they wanted, in the most vague, anodyne terms possible, they said they wanted to have a stable income stream. And then they talked about going out and getting things like laundromats, gas stations, and the like.

They could have, as Mr. Pfister points out, sought relief to buy other higher-performing securities in a money market bond. There's ample evidence in the record, Your Honor, that the real reason the debtors are pursuing this

motion is that they realized they have to acquire a business to meet the plan confirmation requirements under Section 524(g). I think the management report, the time entries of CohnReznick make that absolutely clear.

And it's interesting that they now are sort of trying to embrace this. I think that they just didn't realize what CohnReznick had filed. You know, Mr. Danner made a statement about not wanting to really focus on the time entries and, you know, any lawyer who has to submit bills to clients knows how horrible it is to look at all the time entries, but -- and I am sure the debtors did not scrutinize the CohnReznick time entries, but that's where they were telling the truth, that this was for 524(g) purposes. In fact, Mr. Danner even has an hour down there for reading a (indiscernible) motion.

So, that was the real reason that they were doing this, but it's not the justification they gave the Court. They didn't say anything in the motion that aligns with the justification given in the motion and, you know, that is why the good faith point is part of the business judgment rule is important.

Now, the debtors also suggest that the Court has to defer to the business judgment. That's not the law, either. The law is that the Court has to defer to a reasonable business judgment, as proven by evidence. And, again, when

the evidence is that we did this for one reason when, in fact, we're doing it for another reason, I don't think that's a reasonable business judgment.

THE COURT: Well, let me ask this question, Mr. Plevin. So, if in the motion the debtors had said, we want a greater return and even though we don't think we have a problem with our plan, this could further address confirmation-related issues around 524(g), if that had been in the motion, would there be a reason not to approve the motion?

MR. PLEVIN: Well, I think there still could be. There's the reasons that Mr. Pfister mentioned and I think Your Honor mentioned, as well, about how much you could move the needle on a rate of return when you're taking just 5 percent of the funds and putting that into something that -- you know, that's another reason why this appears to be pretextual, that even their reason that was given doesn't stand up to scrutiny.

And at least had they owned up to what they were doing, you know, the Court would have had a more candid discussion of that. I mean, that's how it came up in Flintkote. Judge Fitzgerald at a disclosure statement hearing said, I don't see a business here. I don't see how I can confirm this. You need to go out and get a business.

And what happened was they did. They filed a new disclosure statement and a new plan -- I think it was a couple

of years later. They were fortunate there in that their president and CEO had a long career in the fast-food service industry as general counsel for Roy Rogers and Hardee's, and they focused on his area of expertise.

You know, this is not that case, as much as they try to make it that case. And I don't even believe that that case was properly decided. I know Mr. Brady talked about the fact that because of Flintkote, there's no reason why you can't go out and buy a new business.

While we cited in our case, in our brief, rather, a Fourth Circuit decision, as well as decisions out of the Western District of Washington, which reach a different result than the Flintkote Bankruptcy Court and District Court and said that you can't use newly acquired businesses to satisfy the requirements of, in that case, they were talking about 1141. But because a discharge under 1141 is a prerequisite to 524(g), protection there applies here, as well.

And when you look at the whole reasoning behind 524(g), the purpose was to save jobs. It was to save the company. And at the same time, by saving the company and by saving the jobs, be able to pay the claim.

It wasn't about taking a liquidated company that had sold all of its business and said, you know, go out and buy a golf course or buy an apartment that you can rent as residential real estate or an ice cream stand or a McDonald's

or anything like that, and then say that you're reorganizing that newly acquired business, that's not what the purpose of 524(g) was. The purpose was to save the company and save jobs and provide the golden egg that that goose was going to lay that's in the legislative history.

And so, the idea that you would allow a liquidated debtor to go out and acquire a new business just for the purposes of complying with the statute is one that is, at least, arguable, because you have these cases that disagree with Flintkote and, of course, the Third Circuit has had occasion to speak about that. So, that's another reason I think you might not have a business judgment here that's reasonable.

THE COURT: But if you can do it, and I don't have a view on that yet, because I haven't had the briefing and I haven't had to think about it, and I wasn't as prescient as Judge Fitzgerald was at the disclosure statement hearing stage to throw something out there, but if you can't do it, if the Fourth Circuit and the Western District of Washington are correct, then granting this motion doesn't change that, right.

And so, if you can do it, then why shouldn't the debtors be permitted to do it?

MR. PLEVIN: Well, I don't have a dating phrase like Mr. Pfister, but I think the phrase I would use is it changes the facts on the ground.

THE COURT: Uh-huh.

MR. PLEVIN: And it does so in a way that takes away arguments that I think are appropriate and it's gambling with money that right now is in safe money market accounts, albeit, earning a low rate of interest, but they're in safe accounts approved by the U.S. Trustee and it's doing something risky with it; it's gambling the creditors' money.

And I know Mr. Brady says that only the tort claimants are creditors. Well, that's not true. There are indirect tort claimants. My clients are among those. We filed proofs of claim that have not been objected to, and so we're entitled to be presumed to be creditors. And we have an interest in seeing that the trust has money, as well, and it isn't frittered away.

And so, even if they could, or even if it's arguable that they could, they're changing the facts on the ground in a way that changes the arguments. And at a minimum, in order to do that, they ought to have an appropriate and strong business justification. I think one that is pretextual and not candid is not a strong business justification.

Let me move on, Your Honor. I could talk about the notice procedures of the new revised order. You know, we got this order and Ms. Tseregounis is correct, we did get a preview of it a few hours earlier. I actually emailed the debtors' team at that point and said, you know, as I read your

reply brief, focusing on triple-net leases, yet your order was brought, your order will allow any kind of business, including the ones that you were looking at previously, to be subject to this order.

And I was told in response that they are keeping their options open. And that's why I asked Mr. Danner whether they were now restricting themselves to triple-net leases or not.

So, I would argue that the motion, that the revised order, rather, first of all, is overbroad, because I read the reply brief to say, we're now going to focus on triple-net leases, yet the order applies to the acquisition to any kind of business or asset, other than -- including assets, other than triple-net leases.

The second thing I would point out is the debtors have still not justified their need for an extraordinary order like this. You know, ordinarily, a debtor seeking this kind of relief would file a motion. It would have the burden of supporting that motion with declarations or other evidence and parties would get whatever time they get under the rules to respond to that motion, a properly noticed motion.

It's true that if the debtors had an emergency situation, they could file a request to shorten time; we pointed that out in our opposition. But it wouldn't be flipping, in essence, the burden, where they just get to file

a shortened notice and then we have to figure out what's going on and file objections on shortened time.

And the only case they cite in support of this is the order of the Flintkote Court in 2013, but the Flintkote case does not support the unusual, truncated procedure that's being sought here. When the Flintkote debtors sought to purchase properties in that case, beginning in June of 2008, they filed a properly noticed motion and supporting papers each time, analyzing the 363 factors and the facts relating to each proposed acquisition, supported in each case by the declaration of debtors' president.

I'm just going to throw out four docket numbers from the Flintkote case very quickly in case you wanted to verify that. These four motions go from June 2008 to February 2010. They are Docket Numbers 3363, 3584, 4735, 4862, and there were a few more.

The Flintkote Court did, in 2013, which is years after the motions I mentioned, adopt truncated notice procedures. But that was after the Bankruptcy Court had already confirmed the debtors' plan of reorganization, a decision which was rendered in 2012. Look at 486 B.R. 99.

And in that motion where they sought permission of the truncated procedures, Flintkote made two basic arguments. One, they argued that because the plan had been confirmed, it was a different context, and two, they argued that because

they had now bought 8 or 9 or 10 properties during the course of the bankruptcy, all on properly noticed motions, they now had established an ordinary course of business and, therefore, they didn't need to come to the Court on a fully noticed 363 motion.

Even with that, Judge Fitzgerald did require them to give notice. And there's an order that she entered with procedures that's at Docket Number 7493 in the Flintkote case that sets out what those procedures are.

That, needless to say, is not this case. These debtors have not confirmed the plan. They have not established an ordinary course (indiscernible), a business buying triple-net leases or any other kind of business. And, thus, in reality, Flintkote is no support for the modified notice procedures that they are seeking here.

If the debtors want to acquire a business or real estate, they should be required to follow the ordinary provisions of the Bankruptcy Rules and the Local Rules, rather than some custom notice procedure that they cooked up at their convenience. And, you know, I understand that they want to do this on a streamlined way. They may have to. You know, not all acquisitions are going to be that streamlined, and if they are time-sensitive, they can file a motion to shorten time. The Court certainly sees enough of those and can judge for itself whether it's appropriate or not.

Let me move through a couple of other points. One is whether this is contrary to the plan and disclosure statement. Clearly, the plan does not say anything about investing the sale proceeds in new businesses and while Ms. Tseregounis pointed out that the plan does say that the sale proceeds can be used to pay administrative expenses, the very fact that the plan says that explicitly, according to her, is justification for why this doesn't comply with the plan. The plan may say that with respect to administrative costs. It doesn't say that sale proceeds can be used to buy a business.

The plan and disclosure statement told parties in interest, the Court, and creditors, that except for some funds being used for the DIP, a loan that never took place, the sale proceeds would be paid to the trust, and it didn't say anything about diverting a portion of the sale proceeds to engage in what could be speculative investments here. And so, if I were a creditor, that might make a difference to me. If I were a tort claimant, that might make a difference to me. At a minimum, I should have a chance to see that reflected in a plan.

If that's really what the plan is, let's do it. And one point about the plan, Your Honor -- this goes back to a comment you made a few minutes ago about how you weren't as prescient as Judge Fitzgerald -- the plan here said that ITI was going to buy. And while it didn't lay that out, it didn't

explain it, I think everybody understood that that was going to be the ongoing business that the debtors were going to rely on.

The plan was unconditional and the disclosure statement is unconditional that ITI was going to file once the requisite votes were in. Prime Clerk put in a supplemental declaration about six weeks ago saying the requisite votes are here, 79 percent, and yet here we are six weeks later and there's no ITI filed.

And I think the debtors look at the arguments that were made in the disclosure statement, which Mr. Danner construed his objections to the plan, when they were really objections to the disclosure statement, and realized that if ITI doesn't file, and there were indications as to why it would not file at this point, they needed to do something else. And so, this is what they came up with. They discussed it among themselves. We were told Mr. Danner was blocked by privilege from telling us what the reasoning was, other than the fact that he understood that it would be helpful, but then they didn't tell the Court in their motion what they were doing or why.

And so, I think the plan, really, has to be modified first and creditors given a chance to vote before we can essentially modify the plan in a material way by saying, we're taking some of your proceeds here, which were supposed

to go into the trust, and using it for a completely different purpose.

Your Honor --

THE COURT: Why isn't that a confirmation argument?

MR. PLEVIN: It will be a confirmation argument, for sure, but the Court, I think, also can say, you're not at that point. You don't have a reason that's consistent with the plan and, therefore, that's not a good business justification to buy this business when you're creating problems for yourself when making material modifications to the plan that hasn't been solicited, which are then going to cause further delay, further costs, and so on. So, again, it's another reason why the purported or putative business justification that's being given here is not the real business justification.

Your Honor, the last point I want to make quickly is really sort of a point of personal privilege. The debtors, in Footnote 19, launch a sort of personal attack on me. It's sort of a weird thing to do because they're saying that they're speaking of lack of candor, as though they're admitting that they weren't candid or justifying their lack of candor. They say I hid from the Court and parties in interest that I represent Zurich, as well as the Century insurers.

That's a huge swing and a miss. We filed a notice of appearance for Zurich. I filed a *pro hac vice* application,

which you granted. We filed six proofs of claim for Zurich, in which I am listed as the party to whom notice should be given. We objected to a confirmation subpoena sent by J&J to Zurich. I am even identified by name in the plan as Zurich's notice party in the Rio Tinto-Zurich settlement agreement, and they note that I appeared at the mediation on behalf of Zurich and they read my mediation statement.

So, there's nothing secret or hidden about any representation by me or my firm of Zurich here and I don't understand what that point was all about. The fact that the debtors make such a baseless and easily refuted assertion suggests that they're eager to do anything here to avoid consideration of the merits of this motion and, therefore, for all the reasons in our brief and we just discussed, I think the motion should be denied.

THE COURT: Thank you.

I don't remember who our next objector was.

MS. BERKOVICH: Your Honor, Ronit Berkovich from Weil, Gotshal & Manges, for Johnson & Johnson. I think we were next in line. And I will try not to repeat many of the good arguments that Mr. Plevin and Mr. Pfister made, but I will note a few points worth highlighting.

First and foremost is the lack of transparency. This is not a trivial matter and one that we should, you know, look at in a vacuum without looking back and looking forward.

Unfortunately, lack of transparency is nothing new for these debtors. You know, we've been complaining for two years about the unusual lack of transparency in these cases, from J&J being completely shut out of plan negotiations to the debtors' decision back in the spring of 2019, not to show J&J documents that had been shared with other key parties.

And the fraud, again, today, you know, the other items on the agenda where the debtors, for months, have been putting up a strong fight and relying on super, hypertechnical arguments to keep parties in interest from learning what happened in the voting and solicitation process. I think they finally realized that Your Honor would not let them get away with it and I'm happy that we were able to reach a resolution, but it's the same basic theme.

I won't get into how they haven't been transparent. I think that's, you know, very clear that their motion and declaration did not cover this major point and that it was at least a justification, if not as many of us believe, the primary justification for seeking this relief, and they should have been candid about it. To be clear, you know, all parties seem to agree that the issue of whether the plan satisfies Section 524(g) with or without these acquisitions is not before the Court today, but respectfully, the Court should not condone the debtors' attempts to come before the Court seeking relief about being candid on all relevant circumstances.

Permitting the debtors to get away with it under these circumstances is not only an (indiscernible) integrity of the bankruptcy process, it will only encourage them and the other plan proponents to be less than fully transparent with the Court and other parties in interest for the remainder of these cases, including in connection with plan confirmation.

These are real and legitimate concerns that we have, and if the Court agrees that the debtors failed in this most basic duty of candor, it should deny the relief for that reason alone. But the motion should also be denied because the debtors have failed to satisfy the requirements for transactions outside of the ordinary course of business under Section 363 of the Bankruptcy Code.

Both Mr. Pfister and Mr. Plevin got into how these business justifications don't hold up to scrutiny, whether it's the higher rate of interest that was mentioned for the first time in the deposition, or the stable income stream that was in the motion and declaration, you know, we are left scratching our heads, because it really does seem that buying a business for a few million dollars can't provide either one of those things; not a meaningful income stream and not a meaningful aggregate interest rate bond, given the dollars at issue here.

And simple math can prove this point, although, I think everyone on this thing by now has been (indiscernible)

to figure this out, but if the relief were granted and the debtors made the acquisition, the debtors and the trust would still be earning the same 0.1 percent interest rate on at least 95 percent of the sale proceeds. And assuming, for example, they could go in a high range of what Mr. Danner testified to and get a 5 percent annual rate of return on their real estate investment, you know, that's just a small amount of their money.

The blended rate, if I did my math correctly, on all of their cash, would be 0.4 percent. I checked yesterday for the interest rate on five-year Treasury bonds and that was 0.9 percent, right. The five-year Treasury bond for all of their money was given a much better rate of return than the blended rate if their businesses are successful.

By the same token, if they got the 5 percent rate of return on, let's say, a ten-million-dollar investment, this able stream of income that they mentioned in their motion as the sole justification, it would be $500,000 a year, on a trust that's expected to have over $500 million in cash.

So, you know, the point about why only 12 million that Mr. Tsekerides asked about and Ms. Tseregounis said was about -- you know, they're saying the debtor should spend more, that's not the point. The point is that, as Your Honor pointed out when Ms. Tseregounis made that point, is that this is clearly a pretext. The business justification just doesn't

make sense here.

So, we all have to ask ourselves, is it credible that the debtors went through all this effort on the motion to get this tiny interest rate bond for this relatively small annual income stream, and second, is this small benefit worth the effort and the risk of loss?

And I think Mr. Pfister did a good point on that second point.

But the motion, you know, in addition to being less than candid about the whole 524(g) issue, it also doesn't even address the possibility that the business could lose value, stagnate, or even worse, require a cash infusion that would necessarily come out of the pockets of talc claimants.

And so, the reply just proves our point on how misguided this whole business acquisition divergence is. The reply says for the first time that (indiscernible) from the objection, they're going to limit their focus to real property opportunities, including a triple-net lease component.

For the risk of why (indiscernible) pointed this out in our objection and only after they spent months and hundreds of thousands of dollars or more pursuing a transaction for operating businesses in all of these industries, and that they didn't think through this economically before filing their motion is really quite telling.

And that they're shifting focus, is now the case of the first substantive sentence of Mr. Danner's declaration is no longer true. He said that the debtors intend to use a portion of the sale proceeds to purchase one or more operating businesses.

Well, the triple-net lease real estate investment is not an operating business. So, you know, again, the reply was misleading on this point because, as Mr. Plevin pointed out, we actually all read it as saying that they would limit their focus to triple-net leases, but now they're telling you that they still want to keep their options open to operate a Taco Bell or a laundromat.

So, all of our objections in our papers on the risk of why still stand, but even if they were to focus on real property with a triple-net lease component, that actually doesn't resolve a lot of our concern. The one thing that it does resolve, they stated correctly, is that this may no longer require day-to-day supervision of the business from the debtors' management, as long as, you know, the lessee stays in business and pays all the maintenance costs of the property.

But this type of investment is not risk-free and, no, there was some testimony, Ms. (Indiscernible) admitted a quick Google search and it points out all the risks in a triple-net lease scenario, you know, for example, what happens to a McDonald's franchisee that the debtors lease their new

real estate to, goes out of business and stops paying rent and maintenance costs?

You know, all of us in the restructuring know very well that restaurants are not immune to business failure and the same is pretty much with any other industry, you know, the vacant storefronts from the streets of Manhattan to any strip mall and shopping center all over America are a testament to the (indiscernible). The tenants stop paying all of those costs are borne by the debtor and if that's the case, you know, well, the trust will have to use its own money to fund the ongoing maintenance costs, the cost to find new tenants, or potentially renovations that the new tenant will require.

They're the reason that real estate companies own and operate real estate businesses. The debtors are not a real estate company and their history of talc mining give us no special reason to confident that they will be able to manage real estate operations successfully better than a real estate company.

Is the risk of loss here worth the investment?

We don't know. We don't have any numbers in front of us. And another point, if the payment percentages under the plan are based on the assumption of a certain amount of cash in the trust, but the trust loses cash as a result of this, you know, post-disclosure statement delve investment, and maybe that happens several years in, won't that hurt

future creditors and most? It's investing one of one that the debtors cannot guess the increased rate of return that they seek without increasing the risk and the triple-net lease does not change that basic investment principle.

Maybe safer investments like money markets make more sense under these circumstances, even if they do yield a lower rate of return.

THE COURT: Aren't we dealing here with just procedures at this point? Won't all of this come out if and when the debtors put a transaction in front of everybody?

MS. BERKOVICH: Yes, Your Honor.

I (indiscernible) now because these procedures are a pretty big deal and they're actually pretty extraordinary. You know, first of all, it's pretty rare that a debtor seeks to buy up. They list a few examples in the motion and all of the examples are situations when I looked at them where it was American Airlines buying 11 extra airplanes, right, things like that. But those are all on, like, straight, regular notice and they don't -- they only cite that one single example of truncated notice, which is actually, you know, doesn't support them at all for all the reasons that Mr. Plevin said.

They're really -- in this situation, we actually think there's a greater need for scrutiny and for following the standard procedures. I mean, we have a real concern that

their need to purchase a business to resuscitate their plan renders them a desperate buyer and makes it more likely that they're willing to overpay in what many believe already is a (indiscernible) market. And if you think about it, for any business the debtor would be acquiring under these procedures, they will necessarily be paying more for that business than any other party in the universe is willing to pay, like, literal top dollar. It's very different than the more common scenario where a debtor is selling its assets, because there, if the process is good, then you know that the debtors will be receiving the most anybody is willing to pay, you know, the debtors will be receiving literal top dollar.

So, you know, this is still pretty rare and when the debtor is using what many consider its best assets, you know, paying cash to by something risky, the 363 asset purchase merits greater scrutiny, lot less scrutiny, than a 363 sale.

So, you know, the fact that they added J&J as a noticed party increased the amount of time for objections help, but we still submit that they haven't proven that they need to (indiscernible). They're only seeking to make these fundable deposit and Court approval will still be needed if there are objections. So, they really haven't shown how these procedures will help them.

You know --

THE COURT: But that's the only evidence I have, isn't it? The only evidence I have is that based on Mr. Danner's so far canvas of the possibilities of purchasing businesses, that he needs the ability to move quickly and to be able to put a deposit down, even if it's refundable, as show of good faith or an earnest deposit and he needs the ability to do that without having to come to the Court.

MS. BERKOVICH: And, respectfully, that's what shortened notice is for, right. There's something built into the (indiscernible) that allows a debtor to get shortened notice if the circumstances are justified, particular circumstances in a particular situation. It may be the case for some of the acquisitions they're seeking that it is justified and for others, it may not be, but it doesn't justify these procedures.

In my 20 years, I've never seen these types of procedures approved, except for *de minimis* asset sale procedures and that's where the reason that you're going to the Court to get it approved ahead of time is cost-related, right, which is not what they're saying here.

I'm going to give you another example from this case that I think proves why what they're doing should not be approved. Your Honor may remember in connection with the DIP motion last fall, it was this Court who denied that motion because the debtors failed to meet their burden, even when

there were no objections and the Court absolutely was right in doing so, right. They didn't really use it. They never came back before the Court for a DIP.

So, there is a role for the Bankruptcy Court in these types of transactions. The Bankruptcy Code contemplates notice and a hearing and the debtors' procedure would eliminate the Bankruptcy Court's role unless parties objected. And, you know, really, the procedures really just flip the burden, you know, they can object or come in with their reasons against the transaction before the debtors provide their evidence and reasoning in support of the transaction.

So, again, they had one case (indiscernible), very, very different from (indiscernible) and there is just no reason to start (indiscernible). And even more so, given the debtors' squishy and flip-floppy reasons over exactly what type of business they're seeking to acquire.

So, we think the Court should deny the motion. If the Court wants to allow the debtors to maybe go out and purchase businesses, then it should make them file a motion for each one and make them put their reason for filing the motion, evidence whether that particular transaction makes sense. You know, we have good reason to believe (indiscernible) not (indiscernible) but we have good reason to believe that these investments are too risky. So, with these facts, the procedures are even less justified.

And as Mr. Plevin said, you know, we don't believe the debtors are pursuing the transactions in good faith, because good faith and lack of transparency cannot coexist. They cannot and they should be denied on that basis alone.

Your Honor, just give me one minute to make sure that I've covered everything.

(Pause)

MS. BERKOVICH: Yeah, oh, there's been some talk about why aren't they just buying, you know, Treasury bonds or investing in stocks or other types of (indiscernible). And I think it's both interesting and telling that these things that plan proponents, back when they were considering solely the economics of how to best invest the trust's assets over its long life, they negotiated the trust agreement and the trust agreement addressed this issue.

It said that the Trust's cash would be invested solely in quote, unquote, diversified equity portfolios, as benchmark as a (indiscernible) market can (indiscernible), not conservative real estate assets that will provide a stable income stream. So, this relevant for two reasons. One is, you know, the change of heart on what is the most prudent investment of the sale proceeds should only be attributed to some other (indiscernible) type of new investment.

I think it's also relevant, the point others have made about the need for re-solicitation because, again, this

is exactly contrary to the plan. And maybe, you know, if it's less than 12 million, maybe it's not material.

And here's where Mr. Danner's testimony that this is a crucial concept and maybe if this is successful, they may want to invest more of the trust's money in additional property. This could be more than just a small investment if this proof of concept thing is real and creditors should know that before they vote on a plan.

And, you know, their argument about the cost of the re-solicitation not being an issue for today, you know, it ignores that it's the debtors' burden to establish that this acquisition makes business sense today is (indiscernible) if we're proving the motion that costs months of delay, millions of dollars in additional professional fees, that should certainly weigh in (indiscernible) about a good use of the debtors' assets. You would think that the debtors themselves would want (indiscernible).

So, their proposal (indiscernible) makes no sense even from their own perspective and it's actually, you know, furthers this whole scheme of lack of transparency that they don't think that (indiscernible) creditors should know about this new line of business that the debtors want to get in.

So, unless Your Honor has any questions, we submit that the Court should deny the motion at this time.

THE COURT: Thank you.

Ms. Sarkessian?

MS. SARKESSIAN: Yes, Your Honor. Thank you very much. For the record, Juliet Sarkessian on behalf of the U.S. Trustee. I'll be short. I just have a few points to make.

With respect to 345, I heard somebody say something along the lines of, you know, even where a bank is FDIC insured, it does not mean that all of the money deposited in a particular account is insured and therefore safe. That is true, however, that is why the uniform depository agreement that the United States Trustee Office has with various banks, requires them to comply with 345(b)(1), which requires posting a bond for the amount. I'm not sure if it's the (indiscernible) amount or all the amount above the 250,000 that is insured by the federal government, but funds over 250 are protected by way of a bond or securities or the other items that are within 345.

I also, I wanted to say that one of our concerns was that there is really no financial information being provided with respect to the businesses that might be acquired in the future. Now, the debtors did make an improvement with respect to the revised papers. The proposed notice will be attaching a business acquisition opportunity profile that will include things such as anticipated annual income and anticipated ongoing annual costs.

So, that is a move in the right direction of

providing some -- and I just mentioned two of the things. There's a number of pieces of financial information that's on that, I think it's a one- or a two-page rider that would be attached to the notice.

And I am happy to hear that they will be focusing on triple-net leases, because that does carry a lower risk. And I am also happy to hear that they're taking steps to try to limit professional fees because we are very concerned that the professional fees, in connection with this entire process of acquiring businesses, could end up outweighing any potential profit that was made. So, that, again, is certainly a step in the right direction.

One other thing that I want to say -- oh, I'm sorry -- and they also made it clear that any deals with insiders would have to be by way of a separate, regular motion, not subject to these shortened procedures and they made it clear that deposits would have to be returnable if this Court sustained an objection to a particular purchase. So, that would be a requirement that it be returnable in that instance. So, I am, again, glad those changes were made.

The other change that was made at my request was that the debtors, initially, were not going to serve the notices from the 2002 list and I ask that they serve. The debtors did not want them to be considered quote, unquote, noticed parties and debtors' counsel has implied that the only

parties that will be allowed to object to any particular acquisition are those defined as noticed parties, which is essentially those who have objected to this particular motion and a few -- my office and a few governmental entities.

I don't think the order says that, the proposed order says that and it should not say that, and it should be up to -- any party in interest should have the opportunity to be heard and if the debtors want to argue they do not have standing for some reason, then, of course, they can do that, but I wanted to address that, because I think it's important that the debtors not be able to argue later that the only parties in interest that are able to object procedure notices of acquisition are those who are defined as noticed parties in the order.

Your Honor, unless you have any questions for me, my argument is included, and I also have confirmation hearing at 2:00 p.m., so I would ask that I be able to be excused a few minutes before that. Linda Richenderfer of my office, I believe, will be able to continue at the hearing after that.

THE COURT: Thank you. I do not have any questions and, of course, you may be excused.

MS. SARKESSIAN: Thank you, Your Honor.

THE COURT: Okay. Ms. Tseregounis?

MS. TSEREGOUNIS: Thank you, Your Honor.

I do want to take some time to respond to some of

the objections that we've heard today. I think it probably goes without saying that the debtors disagree with most, if not everything that's been said, but I'll limit my remarks to a few of the notable points.

We've heard a lot about, again, candid (indiscernible), the debtors' purported lack of being transparent or, otherwise, not being candid. And I just want to reiterate, I think I said this in my remarks, but I want to reiterate that we did not include a Section 524(g) analysis in our initial motion because, one, we didn't think it was necessary under the standard, but, two, and I think this has been reflected in a lot of the arguments we've heard today, is we didn't want to go down the route of bringing confirmation issues before Your Honor at a premature time and in a vacuum before Your Honor has had a chances to review the plan in its entirety for confirmation purposes.

And I think, you know, we've heard a lot about pretext from the debtors, pretext in pushing this motion forward. I think it's interesting that it's become very clear to me that at least that the pretext behind the objection, that this is not an appropriate use of the debtors' business judgment is really that the objecting parties are seeking to take any steps at this time to block confirmation down the road.

I don't think this is an appropriate objection to

take in connection with the motion we have proposed here today. We have heard from various parties here that we shouldn't be able to do anything in the interim. We should be sitting, since we filed and balloted our disclosure statement and doing nothing to improve the debtors' chances of plan confirmation or to maximize the value of the estates, pursuant to a confirmed plan. And I just don't think that is the standard at all under the case law and I don't think it's inappropriate. I actually think the debtors have an obligation to do what they can to maximize the value of the estates for their creditors, for ultimately, holders of talc personal injury claims who will benefit from the trust if the plan is ultimately confirmed.

So, I think the basis of this argument is it's inapplicable here and is in direct conflict with what the debtors submit is an appropriate use of estate assets.

THE COURT: Well, did the debtors think it was not necessary to meet the standard of 363 or it wasn't a reason? Those are two different arguments.

MS. TSEREGOUNIS: Yeah, I mean, I think we've been clear and Mr. Danner has been clear in his testimony that it was a reason that we could give responses to objections and, particularly, (indiscernible) in pursuing this, the motion to approve the debtors' procedures. That was a reason. That was a consideration that the debtors have taken into account and

is a reason for the motion that we filed.

The analysis was that it was not a -- that 363(b) and the analysis is focused on our using the estate's assets, are they going to increase the value of the estate. And, you know, we took a literal read of that and compared it as against what assets are doing now and applied that analysis across the motion. But, I mean, I think we fully briefed in the reply and it's clear from Mr. Danner's testimony that an alternative purpose is definitely being responsive to objections that we've heard on the 524(g) issue, as well.

THE COURT: Okay.

MS. TSEREGOUNIS: We've heard a lot here, as well, today, Your Honor, about what the debtor should be doing, alternatives the debtors could be pursuing, why are the debtors doing X, not Y. I think this is all kind of, exactly goes against the case law which indicates that business judgment decisions of the debtor should not be second-guessed. The debtors' management has a right to make determinations as to how to best utilize estate assets and, Your Honor, I submit it's not appropriate for third parties, including parties that represent insurers and Johnson & Johnson, who owe obligations to the estate, to impose their decision-making and their own views in terms of what the best use of estate assets would be.

Mr. Plevin also made a number of theories about what is happening with Imerys Talc Italy and how the debtors

have completely changed force. I think we addressed this in reply, but I think it bears repeating.

There's nothing in the plan that says Imerys Talc Italy would file Chapter 11 immediately after the plan was solicited. We obviously have objections to that solicitation raised by Mr. Plevin and his clients and others here today. There's been no change from what was explained in the disclosure statement and the plan.

Where I think a lot of this is coming from is a deposition testimony from Imerys Talc Italy's 30(b)(6) witness where the witness indicated that the Board would have to ultimately approve the Chapter 11 filing. I don't think this is surprising to anyone and it's ordinary course in terms of how (indiscernible) generally proceed with Chapter 11. Definitely not a basis to start speculating about what the debtors' plans have been and that plans have changed so significantly that everything is now subject to a material modification under the (indiscernible).

I'll also note that Ms. Berkovich threw out the number that we've already, the debtors have already spent a hundred thousand dollars or more in pursuing this motion. There's no evidence of that on the record. I'd just say that I'm not sure where that number came from.

And we are talking about expenses of the estate incurred in litigating this motion. The proposition that we

should file a motion for each acquisition would have the exact opposite result. It would increase professional fees for debtors in terms of their (indiscernible) to prepare and presumably litigate a lot of these same objections that have been raised here today. And it doesn't really make sense when we're already preserving the right of every party who has raised an objection to object to a future acquisition.

And to Ms. Sarkessian's point regarding adding additional objecting parties so that it would basically be any party in interest who could raise an objection to the acquisition, we think that any party who would have had an interest under the motion or a concern about potential acquisitions have appeared here today, so we think rights are fully preserved by limiting the scope of objecting parties to those folks.

THE COURT: Actually, I don't want to forget that, but if I were to approve this, I'm not going to limit who can object. This was a procedural motion, so some people may have taken it at face value that it's procedural and get an opportunity to object later down the line or we'll see what acquisitions the company actually brings before us, so I'm not going to limit who can object.

MS. TSEREGOUNIS: Okay. Understood, Your Honor.

And I will just say a final note, which is I think some of the arguments lose sight of what the debtors are

trying to do here on a global basis. We are pursuing confirmation of a plan. We have a plan that incorporates significant settlements with third parties, a big amount of cash, over $500 million, not including any non-cash assets that are also going to be (indiscernible). That cash has been contributed through settlements that are predicated on the debtors being able to achieve 524(g) relief, as well as the channeling injunction and protected party status for many of these settling parties.

And, you know, I'm sorry that Mr. Plevin was offended by the language we included in our reply. I think that where that is coming from is, frankly, surprise regarding, you know, a firm representing one settling party that has pushed for protected party status and presumably wants the 524(g) channeling injunction to now be arguing against that and to be putting (indiscernible) in the debtors' way so they're able to keep that relief.

So, I think, overall, I mean, we think this motion is entirely consistent with the debtors' fiduciary obligations and strategy and (indiscernible) throughout this case that we've described to the Court since the first day that we filed two and a half years ago, you know, to pursue a 524(g) bankruptcy filing with the channeling injunction, and we would ask that Your Honor approve the motion here today.

THE COURT: Thank you.

Okay. It's 10 minutes to 2:00. We've been going for a while. Let me ask before we're going to -- and we're going to take a break -- but let me ask, have any of the parties who had the discovery issues in Matters 2, 3, 5, might have been 6, have had a chance to take a look and narrow issues while this other discussion has been going on or where do we stand on that, I just want to have a sense of what I've got when we come back.

MS. DAVIS JONES: Your Honor, this is Laura Davis Jones on behalf of Arnold & Itkin.

We have been trying to, and I say this with all due respect, been trying to (indiscernible) while we're here in court, but we had taken a position on this last motion and there are obviously things we need to be paying attention to.

Your Honor, we do need the time to gather with our client, as well as, then gather with Ms. Posin and her team, with respect to this proposal that is there. Your Honor, I think subject to people being readily available, we'll try to move that along as quickly as we can, but, Your Honor, have we made much progress during this last motion; no, we have not.

THE COURT: Fair enough.

And I recognize people are multitasking and it makes it more difficult when you're not in the courtroom to be able to do that, as well, so I understand that.

Okay. So, we're going to take a break until three

o'clock. We will reconvene and we'll see where we are in the discovery motion, but I also want to make sure we get to the insurers' motion for a protective order.

But I want to give people a chance to talk and see if, in fact, the discovery issues are resolved, or at least narrowed, so I know what I have to address there.

So, we are in recess until three o'clock, that's Eastern.

MS. DAVIS JONES: Thank you, Your Honor.

THE COURT: Thank you.

(Recess taken at 1:52 p.m.)

(Proceedings resumed at 3:33 p.m.)

THE COURT: This is Judge Silverstein and we're back on the record in Imerys.

Ms. Jones?

MS. DAVIS JONES: Thank you, Your Honor. Sorry, I couldn't find my mute button.

Your Honor, Laura Davis Jones of Pachulski Stang Ziehl & Jones on behalf of Arnold & Itkin.

Your Honor, thank you for giving us the time to talk with the plan proponents counsel about the issues of discovery that we have raised. Your Honor, we were able to make a little bit of progress.

We do have some open issues, but I think, Your Honor, what we have talked about with Ms. Posin is that she

would go ahead with one other matter that is on the calendar, then we would come to the issue of what is still open on the voting discovery, and then lastly we would pick-up our 3018. We do not have a resolution on that, Your Honor, so we will have to talk about that with the court. I expect that to -- at least my comments on that, Your Honor, will be brief. And I would expect the argument on that could be brief.

THE COURT: Okay. So my understanding then is we're going to Item No. 1 on the agenda?

MS. POSIN: Your Honor, we had anticipated moving to the motion to quash, but we could do 1 first if the court would prefer; that is the insurance subpoena, the subpoena of the insurers.

THE COURT: As opposed to the Prime Clerk motion to quash?

MS. POSIN: Correct. I'm trying to find where it is on our -- yes, No. 3 is the debtors' motion to quash. That is the other item that is still on the calendar for today.

THE COURT: I thought that was bound-up in the more general voting discovery. So there have been no discussions on that one?

MS. POSIN: So we had a little bit of dialog with Mr. Schiavoni. That motion relates to subpoenas that were served by J&J and by the Cyprus insurers on Prime Clerk. We, obviously, had resolved our issues with J&J. We had not

resolved our issues with the Cyprus insurers and multiple parties joined in that motion or the opposition to that motion and in some of those subpoenas. So there is other parties that may want to have a say with respect to that particular motion.

We have largely resolved, as Ms. Jones noted, the Arnold & Itkin motion and we would want to take that second, if we can, and walk the court through what the open issues there are.

THE COURT: Okay. Let's go to the motion to quash the subpoena served on Prime Clerk.

MS. POSIN: Great. Thank you, Your Honor. Kim Posin of Latham & Watkins, counsel for the debtors.

As we just noted for the record, unfortunately, we weren't able to reach a resolution with all of the parties during the break and we do appreciate the court's time in allowing us to do that. I would characterize our resolution with Arnold & Itkin as substantial. I think Ms. Jones said partial or something, but I like to be much more optimistic. So I think we made great progress there and, again, I do thank the court for that time

Unfortunately, what remains before the court now is the motion to quash, the debtors' motion to quash and, again, this is subpoenas were served by Johnson & Johnson and by the Cyprus insurers on Prime Clerk. The debtors subsequently moved to quash those subpoenas. We have resolved, again, our

issues with Johnson & Johnson with respect to those subpoenas and the other discovery that they had propounded. Have not, however, resolved our issue with the Cyprus insurers. I do know that others joined in. I believe that Mr. Plevin emailed me during the break. I think his clients joined in and may want to speak as to this topic as well.

So, unfortunately, I think, there is still a --

MR. PLEVIN: Your Honor? I'm sorry, Kim. Your Honor, I am just scanning the Zoom pictures and I don't see any counsel for the Cyprus insurers. I have no idea whether they are on by phone or with their video off, but I just don't have -- I think Janine is coming on.

MS. POSIN: Ms. Panchok-Berry is on. I don't know if I see her. Oh, there is Mr. Schiavoni.

MS. PANCHOK-BERRY: I'm reaching out to Tank. Oh he's on. I see him.

THE COURT: Okay. I think we have everyone.

MR. PLEVIN: Okay. So, you now, the remaining issue, Your Honor, and unfortunately we kind of have to go through and set the table to explain to the court the background even though we have narrowed the issues down to this one because the scope of the subpoena that was served on Prime Clerk is very broad.

In the document that we filed with the court with respect, frankly, this matter and the others, the J&J letter

and the Arnold & Itkin motion, to the extent the court reviewed those, I know there is a lot to review, those papers expressed a myriad of reasons why we think that the discovery that is now being sought now just as to the Cyprus insurers and various joining parties is its untimely, its improper, we believe its overbroad and ultimately unduly burdensome as well.

Given the court's approved discovery deadlines that have been set back when we had the disclosure statement order entered on January 27th the deadline to serve written discovery was February 15th. We believe that as a result of that no additional written discovery should be permissible and we stand by that, but in any event even if the court were to determine that there was excusable neglect or cause to allow additional written discovery at this point in time we believe that the discovery that has been served on Prime Clerk is very, very overbroad.

We believe ultimately, we did have Prime Clerk run a few searches just to see what the magnitude of the documents were and we believe that it would be hundreds of thousands of documents, and not only is the magnitude sufficient or significant, but we also believe that because of the relationship between Prime Clerk and the debtors, Prime Clerk is a professional of the debtors with respect to their balloting responsibilities. A lot of those documents likely

are privileged or subject to a common interest. It doesn't make sense to make Prime Clerk or the debtors', probably both of us, review, you know, hundreds of thousands of documents just to put them onto a privilege log. So we believe that there is significant over prep here.

If the requesting parties here, again the Cyprus insurers, want relief from that February 15th written discovery deadline then our position is that they need to meet the standard and we don't think they have done so. To be clear --

THE COURT: I am not persuaded by the timeliness, the untimeliness argument. I believe certainly with respect to voting issues, this came up subsequent to February 15th, I think it's an appropriate topic. I think the debtor recognizes that because they have already worked on agreement with J&J and with Arnold & Itkin with respect to voting issues. So at least with respect to those issues I am not persuaded by the timeliness/untimeliness argument. So we will move on from that.

MS. POSIN: Fair enough. I will move on. Yes. Thank you.

I do want to be clear to the court, though, that we, the debtors, and the other plan proponents have already responded to a literal mountain of confirmation related discovery. I realize that voting is separate and distinct,

but I think there has been a lot of aspersions cast in some of the briefing as to, you know, a lack of transparency kind of common theme and the debtors hiding in the shadows and the like.

In reality we responded to over 400 requests for production, 80 interrogatories, 160 RSA's, we produced 300,000 pages of documents and we have agreed to sit for 17 hours of depositions. So we are clearly not hiding behind anything. We're happy to provide relevant information. We don't want irrelevant information to be required period, but in addition there is a concern that if this could delay confirmation even further then it's already been delayed.

The cornerstone of the remaining requests that are before the court are really an alleged issue, again, with respect to the transparency of the solicitation process and alleged improper and unfair treatment with respect to certain master ballots. These are, sort of, amorphous issues that have been raised for all of the discovery, frankly. Like you said, Your Honor pointed out we have resolved some of those issues, thankfully, but there is still new out there. We don't think there is any evidence to suggest that there is any impropriety here or anything that is out of the ordinary or at all unusual.

One thing and maybe the only thing that all of the parties can agree upon is that the integrity of the voting

process is fundamental to plan confirmation. We absolutely agree with that and that is the reason why we ran a very clean process so we completely and strictly complied with the terms of this court's solicitation procedures order and the solicitation procedures themselves.

We also filed or Prime Clerk filed two declarations. There was one filed, initial one filed on April 7th, a subsequent declaration filed on May 7th that provide a fulsome description of exactly how the votes on the plan were collected, how we tabulated, and how Prime Clerk dealt with all kinds of votes, many of which have been raised by the moving parties or, I guess, the opposing parties here which include things like duplicative votes, inconsistent votes, defective votes and how those were treated by Prime Clerk and the debtors pursuant to the solicitation procedures. We believe fully in compliance.

While the debtors and Prime Clerk had no obligation to do so we did work with the objecting parties and we ultimately agreed to provide them on a highly confidential basis with a voting summary. It was created by Prime Clerk and it lists, basically, all the information you could want other than social security numbers from the ballots. So the name of each voting party, the date that they voted, the firm that may have been responsible for the vote, whether it's a master vote or an individual vote, and whether they voted to

accept or reject the plan. So all of that information is already within the possession of the insurers.

Ultimately those declarations show that we received about 105,000 votes; however, the declarations also show that about 20,000, I think it was something like 19,600 or so of those votes were superseded by later filed ballots. So you wouldn't count those; otherwise, you would be literally duplicating your efforts and duplicating the votes.

As noted by certain of the requesting parties here today the initial voting declaration did have an error in it and we regret that error. It is what it is, it was typographical and it wasn't fixed in the supplemental voting declaration to make clear that about 18,000 of those votes were superseded by accepting votes by the same firm that had previously voted to reject the plan. So those superseding votes were the votes changed from a rejection to an acceptance.

Of the remaining votes we ended up with about 7,800 defective votes and they were defective for a variety of reasons including they accepted and rejected the plan, or they didn't accept or reject the plan, or missing signature pages, and also, significantly for this group, missing social security numbers. Of these defective votes about 1,900 were comprised of inconsistent votes and what we mean by that is these are votes where more than one law firm voted on behalf

of a single talc claimant and inconsistently. So, you know, where two firms voted on behalf of an individual one firm voted to accept and one firm voted to reject.

And there is a lot -- you know, 1,900 of those ultimately and in some cases we had three, four or five firms voting on behalf of a particular plaintiff. Obviously, we couldn't count all five of those votes or two of those votes and so further investigation was required.

Of the remaining defective votes, again this is more applicable to Arnold & Itkin, but I just wanted to raise it for the court, is we had about 5,600 of the defective votes didn't include social security information. And of those about 3,600 rejected the plan and about 2,000 accepted the plan. So ultimately we had 78,357 votes in the final tabulation including about over 62,000 votes that accepted the plan for a total acceptance percentage of 79.83 percent.

So the requesting parties make allegations that the solicitation process was somehow improper as a result of the number of defective ballots, the sheer magnitude of the votes that came in and a number of other things, but there is just absolutely no evidence or factual support for any of these proposed or suggested improprieties.

Moreover, we don't think -- we keep hearing the term "highly unusual," "red flags," "inconsistencies." From my experience, and I am not nearly experienced as many of the

people on the phone call today, but these are not unusual things. You always have defective ballots. There is always ballots that are missing social security numbers where required.

Inconsistent ballots, especially in a mass tort situation like this one are not all that unusual. Again, that can be evidenced further by the fact that we allowed for all of these kinds of votes and we established, in fact, protocols to deal with them in the solicitation procedures that were filed last May. Nobody objected to them, at least not as to these issues, and the court ultimately entered them on January 27th.

Again, we complied with the solicitation procedures in every way. There are a couple of particular issues I wanted to raise for the court with respect to the treatment of ballots.

The first is the treatment of defective ballots. So the solicitation procedures provide, and I don't think there is any dispute to this, there shouldn't be because it's in black and white on Page 15 of the solicitation procedures, that they provide that Prime Clerk has the discretion, but not the obligation to try to contact voters to cure ballot defects. That is what it says. That provision, to my recollection, was never objected to by any parties and ultimately became part of the procedures. Exercising this

discretion Prime Clerk determined not to seek to resolve those defects as, frankly, is very typical in the ordinary course of Prime Clerk's engagement as a balloting agent.

While the requesting parties make it seem like these votes were not counted for an improper purpose that's simply not the case. There were lots of reasons why ultimately the votes were not included. One is there was discretion and it was appropriately exercised.

The second is there were 8,000 defective votes and while mainly Arnold & Itkin, you know, really focused on the social security number defects, which is less than 8,000, this is not a situation where we would only go out to the folks that submitted ballots that are missing social security numbers and try to cure those defects, but ignore all the other defects.

If we were going to try to resolve defects we would try to resolve all of them that only seems fair and even-handed. I think there were 70 law firms that submitted master ballots that had defective votes and that does not include a number of individual voting parties that we would have to reach out to try to resolve those defects.

Third, with respect to the social security number defect, again, there were 3,600 votes to reject that were missing social security information and 2,000 to accept. Ultimately if you were to allow all of those in or you were to

allow all of those to get stored it wouldn't change the votes. So we think this would be a pretty time consuming and expensive exercise to potentially make the vote closer.

Finally, there are multiple references in the solicitation procedures, and the order, and the ballots, and the voting instructions for the ballots, and the directives, etc., that make it abundantly clear and (indiscernible) I think she dropped for another call, but we had extensive discussions, her and I, about these provisions and she was adamant that we make it very clear that the social security number information was required to the extent somebody has a social security number. Obviously, if you don't have one you could not provide it, but we spent a lot of time making sure that was crystal clear. I don't think there is any dispute to that.

It's not credible, from my perspective, that -- so the firms that have argued this point have raised or the objecting parties have raised is that Prime Clerk should have reached out to these parties with the defective ballots and asked them to please comply. My response to that is I find it very difficult to believe that these very sophisticated parties, these are the master ballot submitters, didn't know there was a requirement to include a social security number and if they did know they had ten months to provide it, right. The original motion and plan were filed back in May,

surprisingly in 2020, and people had, you know, ten months to gather that information.

So I find it hard to believe that if Prime Clerk had reached out to them they would miraculously be able to produce that in a moment's notice. Mr. Itkin, by the way, at his deposition did testify to that that he was aware of that requirement. And when we asked him why he didn't include it for 1,800 of his clients his response was that he was not able to respond due to privilege, but he did say that it was probably the case that they didn't have social security numbers for all their clients.

That is the social security number issue and the defective ballots. With respect to the treatment of ballots that were filed after March 25th, the March 25th voting deadline, this is a big issue for all the parties and I realize that we're kind of down to a narrow group, but for those who are continuing to object or to join in other parties objections.

As reported in the voting declaration the plan proponents permitted all votes that were received before April 7th to be included. Whether they were in excess or they were to reject we received a couple of requests for additional time. We did not inquire at the time as to whether those were to accept to reject votes. We gave everybody the same opportunity and ultimately we ended up with 3,120 with one

firm voting late. It was a few minutes late, but a deadline is a deadline. That was one firm that voted 3,120 reject votes and the rest were acceptances, and that was 18,500 acceptances.

Eight of the -- so there is nine total law firms that submitted late master ballots, meaning after the four o'clock p.m. Eastern deadline on March 25th. Eight of those law firms submitted their late ballots within one day. So this is not a situation where we gave people months and months and months to think about these things, they had one day or less then one day.

What really people have been focusing on is the one law firm, seven, and I don't know his counsel was supposed to be on today, I don't know if he is or not, but they submitted 15,719 votes accepting the plan on April 6th. They had previously voted to reject the plan on March 25th, the voting deadline.

So this is really the focus of the massive -- most of the discovery really focused on this issue why was Mr. Bevan and his firm given more time, what was he given in exchange for, you know, this change of vote. And while I don't believe Mr. Bevan is on the phone today he did submit a declaration, for what it's worth, in connection with a separate motion that we will be dealing with in a moment, the 3018 motion, where he describes the reason for his vote

change.

Similarly, one of the other law firms that changed their master ballot votes to accepting votes after March 25th, Williams Hart, they had filed a separate objection to the 3018 motion expressing continued support for our plan.

So, Your Honor, I apologize for the lengthy background, but I wanted to make sure the court understands, and we can kind of set the table about this process, it wasn't done with any nefarious purpose. It was completely even handed. We were respectful, and honest, and truthful with every voting party. We want to make sure the court understands that.

So with that backdrop let's take a look at the actual requests that Mr. Schiavoni has served on Prime Clerk. If you look at the request they're very, very broad. They, essentially, request all documents, and this is just directed at Prime Clerk, so documents, obviously, in their possession that relate to the plan, solicitation of the plan, balloting, voting, the tabulation of votes, ballots, data bases of claimants, inquiries regarding all of those things, all client lists that were provided by any law firm that submitted a master ballot and all communications from any claimant in connection with the plan.

It's very, very broad and, you know, Prime Clerk is not only, as the court is aware, our balloting agent, they're

also our claims agent. So if you're asking for any communication you've had with any talc claimant in the past two and a half years it's a lot, it's a lot for Prime Clerk to have to review. Some of that will be privileged. Obviously not with claimants, but to the extent that there are communications with Latham we've spent a lot of time with our claims agent making sure that they had solicitation correct, making sure that the worldwide publication program that we put together, you know, went off without a hitch, etc. So they are very, very broad.

What it comes down to is what do they really want. What do they really need here. They don't need all of that from our perspective --

(Audio interruption)

MS. POSIN: I think we can really focus on the two issues I mentioned before. One is the social security and the defective votes issue. From our perspective there is no further discovery that should (indiscernible) point. It was considered discretionary. Nobody ever objected to Prime Clerk having that discretion. They exercised that discretion appropriately. There is really nothing else with respect to discovery that should be permitted on that topic.

Next, a lot of the parties have objected to the inclusion of any ballots. And we're going to get to the 3018 motion in a moment. They were filed after the March 25th

voting deadline; however, nobody argues that we didn't have the ability. So under the plan it is -- sorry, the solicitation procedures, it is very clear that the debtors with the consent of the plan proponents may extend the voting deadline. There is no dispute about that and that is exactly what we did.

Again, we were even handed. We extended it for everybody who asked, whether they were going to accept our plan, or reject our plan, or hadn't decided. So there is no evidence to support that there was some nefarious intent here, that there was some deal we were working out, or we were trying to pay people up. There is no evidence of any of that. It didn't happen.

And we had the ability. Again, nobody argues that we didn't have the ability to extend that voting deadline. So what we believe is that the information in the discovery that we have agreed to with Johnson & Johnson on these topics which include all communications between Prime Clerk and, basically, all of the late voting parties which would include the three changed votes of the parties will be produced with certain -- I think it said January 27th to May 7th.

So, essentially, the date that the solicitation order was entered to May 7th which is the date the final Prime Clerk declaration was filed. so for that scope of time any communication between Prime Clerk and these folks with the

domains that we laid out will be produced with a search term limitation of Imerys because Prime Clerk, obviously, has lots of other cases and some of these folks could be involved in those other cases, obviously, not responsive.

So we believe that what we have agreed to with J&J and a couple of additional things that you will hear from Ms. Davis -- sorry, Ms. Jones in a moment that we have agreed to with Arnold & Itkin we believe are more than sufficient and as we noted at the outset of this hearing we were actually happy to provide whatever it is we end up providing to J&J, and to Arnold & Itkin, to all the other parties. So we believe that that fully and completely should resolve all of the requests that Mr. Schiavoni has served on Prime Clerk.

I did want to reference, though, Your Honor, that the issue we started with at the outset of this case, Mr. Schiavoni talked about, and this is his discovery is very broad, as I just mentioned to the court. It is, obviously, much broader then what we have agreed to produce to Johnson & Johnson and to Arnold & Itkin.

One of the things he raises is this letter point. I did want to raise it to the court. It is actually in the solicitation procedures and this is at Page 10, Docket No. 2863-1. What it says is this relates to the directive, so you may recall that we had this very, I thought, creative way of insuring that all of the plaintiff law firms are represented

in large numbers of talc claimants could make a decision as to whether they wanted or had the ability to vote on behalf of their constituents or they preferred that Prime Clerk sent direct solicitation to those folks.

So we gave them options. We said you can submit a master ballot, you can ask -- you know, you can submit individual ballots or your clients can and you can do that directly like we will give you the ballots and you can send them off to your clients or you can do that indirectly which means you gave us your clients' addresses and we will send them individual ballots.

So with respect to that, Your Honor, this is B3 on Page 10, the procedures provide that a firm, again, one of the law firms that is submitting a master ballot, may elect to include a letter or other communication from the firm to its clients with the solicitation packages. So I believe this is the letter and Mr. Schiavoni will certainly let me know if I am incorrect.

I think this is a letter that he is referring to and I will proffer to the court that there were a few votes, they were very limited, but there were a few of them and, in fact, one of them was Arnold & Itkin. So I will let Ms. Jones or Mr. Morris, if they choose to, respond as to what they think of those letters. We don't think they're relevant to anything.

Whether or not a -- for one thing they may be privilege and that is not my privilege to hold, but I certainly wouldn't want to breach anyone else's privilege, but we don't understand the relevance behind if some law firm wants to send a cover note to its constituents they would be able to do that anyway, right. We can't get in the middle of an attorney/client communication. So we don't think that these are relevant to anything. They don't relate, necessarily, to late filed ballots or to people who changed their vote; they're just a couple of people who decided to take us up on this offer and ask Prime Clerk to send out these letters.

So I know Mr. Schiavoni over the course of the hearing has been asking me to agree to briefing because I know at the outset of this hearing the court had mentioned that (indiscernible) briefing on this. I think it's an interesting issue. I understand. But it is our position, you know, the briefing may not be necessary because I don't think it's relevant, to begin with, this stuff anyway; although, intellectually interesting.

Mr. Schiavoni has asked for a privilege log and I don't understand the relevance of that either. I will represent to the court that my understanding is its about ten law firms that provided these letters to Prime Clerk. We could produce them if the court determines there is not a

privilege issue and that they are relevant to something. I don't understand what they are relevant to. So that is why we have been a little bit confused by that request.

So, essentially, Your Honor, just to wrap-up we think that the information that we already agreed to provide to the other parties is more than sufficient here and should be completely satisfactory and should be able to address the issues that Mr. Schiavoni has raised.

Thank you, Your Honor.

THE COURT: Thank you.

I don't know if anyone else chimed in on the side of the debtors before I go to Mr. Schiavoni.

(No verbal response)

THE COURT: Mr. Schiavoni?

MR. SCHIAVONI: Your Honor, you heard an enormous number of factual assertions about what is normal, what was done, what the intent was, what -- how the parties, in fact, acted. None of that, of course, is supported by evidence here. The one piece of evidence that was submitted on these motions was Mr. Bevan's declaration. Mr. Bevan's declaration was not moved into evidence. Immediately after Mr. Bevan's declaration was filed we contacted Mr. Bevan's office to ask for his deposition.

We asked for copies of the documents referenced in Mr. Bevan's declaration, most notably the letter that he says

that he got that somehow caused him to change his vote. We were told that Mr. Bevan is very busy, he's the only -- the only time he had available was mid-day on Father's Day. Then when we said we would change our plans he said that he could only do it for 50 minutes on that hour in the middle of the day on Sunday.

There is something not right about that. There is something not right about the fact that the very documents he refers to in his own declaration aren't there, but there are much more fundamental problems here and they go to Mr. Bevan and they go to some of the others.

Mr. Bevan, if you look at who his clients are on the vote and you look at how he voted the same people in the Garlock case, you see that majority of his claimants are unimpaired claimants. In other words, these are claimants who don't have compensable claims in this bankruptcy so that what we have, if we only focus on him, is someone who voted a large number of folks who don't have compensable claims he voted no, which one might make sense I suppose. Then he was convinced to vote the same number of large number of people who don't have compensable claims under the plan yes.

It's like there is something not right about that and he's -- I think when Your Honor looks, when you get into the rest of these ballots and when you get to confirmation evidence you're going to find a very significant number of the

balloted claims that don't have compensable claims. You will see that that is evidenced --

THE COURT: Let me, Mr. Schiavoni, parse this out. So, first of all, I thought Mr. Bevan was going to be the subject of discovery, and you're going to get his deposition, and you're going to get documents. So at least that is how my notes read that he is somebody who changed -- and that is what I just understood Ms. Posin to say, he is somebody who changed the votes for his clients, all the parties who filed -- whose votes were accepted late are going to be subject to discovery. So you are going to get Mr. Bevan, that's my understanding.

MR. SCHIAVONI: Right. Your Honor, I'm sorry if I spent time even on this, but I was addressing just simply first the issue of whether there's sufficient evidence here to indicate that the discovery sought is likely to lead or could lead to admissible evidence and there is.

So going just to the other issue, which I think we could have saved a huge amount of time on was I, obviously, did not see what J&J agreed to beforehand. It was helpful to see that, that's very helpful and significantly narrowing our request. I think we just come down to just this is all we want in addition to -- and the first item here I'm not sure whether it's even covered by J&J, but it's like we would like the deposition of Prime Clerk. I think that is being offered. I am not certain, but we would like that.

Then the only other two things we want is to the extent the solicitation packages included as part of the package documents authored by the claimants, we would ask for those. There is no burden on that. There is only ten of them. Okay. If there is briefing required on that we can brief it, but we're also prepared to limit that to those firms that changed their votes. So that would be even more limited here to the extent they had things in the package that would be something short of ten, okay.

The other thing we would ask for is just copies of the master ballots themselves. The master ballots will, in fact, verify that who voted and when, and that they, in fact, had authority to vote those claims. There should be no burden on producing the master ballots. We pursued this from a solicitation agent before. They have a very organized way to keep the ballots all in, sort of, one set of binders or folders, you know, or electronic files now.

It should be very straight-forward to produce the actual master ballots. That is all we want in addition to just joining in the discovery from J&J and Arnold & Itkin itself.

THE COURT: Okay. So let me hear a response, Ms. Posin, to those three requests.

MS. POSIN: So I only got two, Your Honor. So I'm not sure what the third one is. Let me know which one I

missed.

So with respect to the ten letters that went out none of them were sent out by people who changed their votes. So maybe that resolves the issue. I think that is what Mr. Schiavoni just said.

With respect to the master ballots, so multiple people asked for the master ballots. There is a couple issues with that. There is a specific provision, I probably won't be able to put my hands on it quickly, but in the solicitation procedures it says that Prime Clerk cannot provide those. They're confidential. I mean I can see why they can't. So they're not permitted to do that.

With respect to the master ballots this was the whole issue. We were originally, J&J and other parties said we want the ballots and we said, look, the problem with giving you 75,000 ballots is we have to go through and redact every social security number. Its personally identifiable information. What if we give you the voting data base that has all of that information in it, when they voted, who they voted on behalf of. It has the master ballot information. All the information that Mr. Schiavoni is looking for. The only thing it doesn't have is the social security numbers.

So he already has all the information. I don't understand why the additional paper that says master ballots that we would have to redact would be helpful, or necessary,

or appropriate.

THE COURT: How many master ballots are there?

MS. POSIN: I don't know off the top of my head, but certainly more than 100. There are master ballots where somebody submitted three votes. There are some where there are 17,000 votes and then there's some where there is three, eight, five, seven, ten. So there is a lot of them and some of them are very small numbers.

THE COURT: And do we not have a protective order in this case that would permit parties to get confidential information including social security numbers?

MS. POSIN: We do have a protective order. I think we have been very sensitive to social security numbers just because, you know, it's us or Prime Clerk kind of putting their neck out and saying here I'm giving your social security numbers to all these people that have signed the paper. I don't know why it's necessary. I don't -- if that is what Mr. Schiavoni is asking for, he wants those social security numbers we can talk about that. I don't know why they're relevant. We could maybe provide the last four digits or something like that, but that is the concern.

MR. SCHIAVONI: We can go with the last four digits, Your Honor. That would work.

MS. POSIN: I think I'm getting a note her that that's already included in what we produced. Somebody can let

me know if that is incorrect, but I believe that the spreadsheet that Prime Clerk provided to all the objecting parties does, in fact, include the last four digits of social security numbers. So maybe you already have -- Mr. Schiavoni already has what he needs.

THE COURT: Okay. Let me ask --

MR. SCHIAVONI: Well, what --

THE COURT: -- this, what about the deposition of Prime Clerk. My understanding is that that's already agreed to.

MS. POSIN: That's correct. I will say I also heard a lot about Mr. Bevan at the outset. Yes, Your Honor, we are working with Prime Clerk, as the debtors' professional, and they will sit for a deposition. We have no control over Mr. Bevan, obviously, or any of the late voting parties. You know, we will not object. What we agreed to with J&J is we will not object to them noticing those depositions or serving limited discovery on them with respect to the voting process. So we would, obviously, extend the same to Mr. Schiavoni.

THE COURT: Mr. Bevan submitted a declaration. I don't see how you get to submit a declaration and not submit yourself to a deposition. So if there is an issue parties can come back to me, but I do understand that the debtors don't control Mr. Bevan.

So my understanding then of where we are is that

the only thing remaining is copies of the master ballots because deposition of Prime Clerk that is going to happen. The solicitation packages that included additional letter none of them were from parties who changed a vote. So we have copies of the master ballots.

Mr. Schiavoni, why do you need the master ballots themselves if you have all the information in the spreadsheet, I assume, Excel spreadsheet that was sent -- that is available from Prime Clerk.

MR. SCHIAVONI: The master ballot, Your Honor, is essential because it contains the -- I forget the rule number. I should be an authority on it at this point, but for the signature that there's actual authority to vote on behalf of these folks, the folks that are being voted.

So we will know when we look at them, you know, but I'm guessing here the vast majority of the vote here was delivered by lawyers signing on behalf of large inventors of individual claimants and the verification that they, in fact, have individualized authority to vote for them. It's supposed to be on the master ballot.

MS. POSIN: Your Honor, if I may respond to that. I think that is absolutely correct. They had to check a box and Prime Clerk would not have permitted ballots, they would be deemed defective, if somebody did not check that box saying I'm an authorized -- so they had to say I'm an authorized

representative of this claimant and that claimant has a claim. So both of those things each of the law firms had to check that box and if they didn't then those would be defective and they would not be -- it would be included in the spreadsheet that we provided.

THE COURT: So all that you would be seeing, Mr. Schiavoni, is a check of a box and somebody's signature on it?

MR. SCHIAVONI: Your Honor, there is another case in the District where the signatures and the box checking, you know, led to significant problems about whether those signatures were actually of the people who were delivering them and not aggregators involved in collecting these folks or third parties with interest in the claims.

So I do think those signatures are not just perfunctory anymore in these kinds of cases. I think they bear some significance and if we could have them at an absolute minimum to the claimants whose votes were changed I would ask for those. I don't think there is any real burden in verifying a larger set of those here since we're talking about a list of 100 or less, but at an absolute minimum I'd ask for the ones that changed their votes.

THE COURT: Okay. I'll permit the ones who changed the votes. You will have to redact if they need to be redacted and I'll let the parties talk about whether there is anything additional on that such as master ballots where

people who voted more than X thousand, you know.

MS. NORMAN: Your Honor, this is Lisa Norman from Andrews Myers representing the Williams Hart Plaintiffs.

My only concern with regard to the master ballots would echo the debtors regarding the social security numbers. I don't think there is a problem with the initial pages that identify who is signing on behalf of and have the authority to submit the ballot or even the names of who is on the ballot because, quite frankly, the names are going to match-up with the 2019 statement names anyway that everyone already has.

The social security numbers we would be especially sensitive to that information being provided. We would want that redacted. And I don't see why anyone would need that particularly when they can compare the 2019 statements to the names on the master ballot and see that everything matches up. So I don't see a need to reveal our personal injury clients social security numbers, even the last four digits.

MR. SCHIAVONI: We just need the last four digits. The last four digits are essential to identify who they are.

MS. NORMAN: But the court has those already. The court already has the last four digits of the social security numbers in the 2019 statements that were filed under seal. I can see why the court would need to see those. I do not see why any attorneys would need to see those.

MR. SCHIAVONI: If the court -- well here is the

problem, Judge, it's like you may have it, but it might as well just be buried ten feet underground.

THE COURT: Might as well be because I am not going to do the comparison. If someone is suggesting that I'm going to do the comparison I'm not going to do the comparison, but I guess what I still want to know is, is, Mr. Schiavoni, what is the -- you're contention here is that some of the plaintiffs' law firms that signed the master ballots and checked the box are not who they say they are or didn't have authority or which?

MR. SCHIAVONI: Well first of all, Judge, one thing is that I think large numbers of these folks are going to show-up with not having compensable claims under the plan. That is one thing. And we need the last four socials to run that down.

The other thing is it seems like it should be uncontroversial, but like the master ballot is like the proof of claim signature page. It's like it is the "evidence" of the vote. It's not something that this balloting agent who accepts documents from the claimants, like can generate on its own. This is the vote. This is the proof of the vote.

So I don't -- there is not many of them. It's not burdensome to produce 100 documents or certainly not burdensome to produce a subset of them. I mean to have to redact, you know, it's just running a redaction line down and

cutting the socials in half so you just have the last four numbers. It's not a big issue to do this.

MS. POSIN: Your Honor, what I would suggest --

THE COURT: Go ahead.

MS. POSIN: Thank you. Kim Posin, again, for the debtor.

One (indiscernible) I had, and my suggestion will not be for the court to do the review by any means, but he already -- Mr. Schiavoni and the other parties already have this information in the spreadsheet that we provided. They already know who Mr. Bevan voted for. They have -- he has the last four digits of each of their social security numbers to the extent they provided them. What if we just provided the master ballot without the client list because that information he already has. If he just wants the signatures and to understand who actually signed for these three parties that seems reasonable and I think we could certainly work with Prime Clerk to provide that.

MR. SCHIAVONI: Why would -- it's like this, the ballot is the evidence of the vote. Why would we be redacting who they are voting on behalf of and signing for.

THE COURT: I guess you already have that information. I assume the spreadsheet would say Bevan and then it would have -- it would list 3,000 clients. Then it would say some other law firm and list another 5,000 clients.

So you have that information.

Here is what we're going to do. The debtors are going to provide or Prime Clerk, whomever is going to provide Mr. Schiavoni with the master ballot itself with the signature page on it, whatever it is, however many pages that master ballot is with the check boxes and the signature and all of that. Then once that is received, Mr. Schiavoni, if you need something other than that then I will hear from you. If there is something when you get that that suggests you need something further then I will hear from you again on that.

I think he is entitled to the master ballot front sheets, if you will, and all the other information, it's my understanding, that is in the Excel spreadsheet.

MR. SCHIAVONI: Thank you, Your Honor.

MS. POSIN: We can work with Prime Clerk on that, Your Honor. Thank you.

MR. TSEKERIDES: Your Honor, Ted Tsekerides.

I just wanted to point out one thing. Even though we did work out a deal what we're not waiving is at some point at confirmation the debtors is going to have to put on evidence and, you know, summaries aren't evidence. Rule 1006 says you actually have to have things that I can review.

So, you know, even though we have an agreement on discovery we're not waiving any rights on evidentiary submissions down the road. So I just put that out there for

folks to remember that there is a rule on summaries and we're going to reserve all our rights on that.

THE COURT: Okay. Everybody is reserving all their rights.

MS. POSIN: Yes, Your Honor.

THE COURT: Anything further then in terms of anyone who joined into the deposition requests?

(No verbal response)

THE COURT: Okay. I don't hear anyone. So that one is resolved.

MS. POSIN: Your Honor, I think we have two more items on the docket. One is the 3018 motion -- actually, excuse me, let's go back to, if it's okay with the court, to the Arnold & Itkin motion. We were going to put on the record the resolution and the open issues with respect to the Arnold & Itkin motion if that is okay with the court.

THE COURT: Yes.

MR. MORRIS: Good afternoon, Your Honor. John Morris, Pachulski Stang Ziehl & Jones for Arnold & Itkin.

Can you hear me okay?

THE COURT: I can.

MR. MORRIS: Your Honor, I, on behalf of Arnold & Itkin and Pachulski Stang do appreciate the court's time and allowance to let us work through some of these issues. We have done that successfully. I don't want to argue the

entirety of our motion at this point other than to point out, just to make a couple of observations.

First, I don't think there is any question, at least in our mind, that the motion was brought for all of the proper purposes. Ms. Posin takes issue with the concept of red flags, but I think there were a whole host of red flags that prompted this motion and, frankly, entitle us and the other parties to discovery here.

I heard from the debtors that everything is fine, and everything is normal, and there is nothing unusual here, and that they're fully compliant with the solicitation procedures and they're entitled to that view, Your Honor, but I will tell you just in preparing for today's hearing, as I was reading the Bevan and the Williams Hart oppositions to our motion today, yet another new issue sprung up in my mind that I think really calls into question the legitimacy of this vote and that is we've heard from the plan proponents that they have the full authority under the solicitation procedures to extend the voting deadline. In fact, at least with respect to Williams Hart and Bevan that is not what happened. What happened was they didn't extend the voting deadline, they reopened the voting.

If you just look at Paragraphs 7 and 8 of the Williams Hart opposition that is filed at Docket 3688, for example, they say that they timely voted no and then I'm

quoting from their document. Subsequent to the expiration of the voting deadline the deadline was extended. So I would say, Your Honor, if a claimant came to the court and said I understand the bar date passed last week, but can I extend the voting deadline you would say, no, I can't extend the voting deadline, but you can make a motion under an excusable neglect standard to have your late claim validated, right, or allowed.

So what happened here for both Bevan and Williams Hart, and it's their words, it's not ours, it's their facts, it's not my argument, the deadline passed. They voted no. The plan proponents lost and it was subsequent to the voting deadline that conversations took place and the votes changed. That is why we want discovery, but I don't think that the voting -- that the solicitation procedures permit that to extend the deadline after the deadline has passed. That is for another day, but I'm just raising the point, Your Honor, to say there is a lot here that needs to be investigated.

With that I want to focus on the areas of agreement and the areas of disagreement that remain. We do appreciate the work that Johnson & Johnson and the debtors did. We did our best to review it under some time constraints and I'm just going to take these issues in order.

As we understand it with respect to third parties the plan proponents don't speak on their behalf. They are not able to bind them, but the agreement is that they are not

going to object to the Arnold & Itkin or anybody else's attempts to take discovery from Bevan, Williams Hart and Trammell.

There are two that Arnold & Itkin wants to add to that list. Steve Baron in his individual capacity. Mr. Baron represents certain claimants including, at least, one who sits on the TCC. Chris Placatella [phonetic], if I'm pronouncing it correctly, if not I apologize, who is also a lawyer who represents a TCC member.

We had sought Mr. Baron's discovery from Mr. Baron in our initial motion. Mr. Placatella is someone who we hadn't' raised until today, admittedly, but the reason that we hadn't raised his name before is because we were unaware of his involvement in these issues until we got Mr. Bevan's declaration. And you will see both Mr. Baron and Mr. Placatella referenced in Paragraph 5 of Mr. Bevan's declaration. And in Paragraph 5 Mr. Bevan says voting no he spoke with those two individuals and, I guess, he got comfort and then he changed his vote.

So I think the plan proponents are okay with us seeking discovery from those two individuals, but I just wanted to add those to the list of folks from whom Arnold & Itkin, at least intends to seek discovery. So that is issue number one.

Issue number two relates to the time that is being

provided for the inquiring parties to pursue the voting and solicitation discovery. Right, there are three plan proponents. The agreement with Johnson & Johnson is that the TCC would extend from 12 hours to 13 hours the total time available to take discovery. There is no extension of time at all for the debtors or for the future claims rep. So that between the three plan proponents all inquiring parties have been given a grand total of one hour of additional time to pursue inquiry into voting and solicitation issues.

Given the number of parties who want to inquire Arnold & Itkin does not believe that is sufficient. We had asked the TCC to add not one hour, but three. We were prepared to compromise at two, but they wouldn't do that. I really do regret, Your Honor, bringing to the court a request for basically one additional hour from each of the three plan proponents, but I feel like we're carrying the burden here not just for Arnold & Itkin, but for all of the folks who want to inquire. I think giving one additional hour for each of the three plan proponents to cover the voting and solicitation is fair and reasonable. So that is the second issue.

I would also point out that Mr. Baron is going to be the 30(b)(6) witness for the TCC and we have absolutely no objection to that, but that is something that wasn't -- the deposition of Mr. Baron in his individual capacity was not part of the Johnson & Johnson stipulation. So I think that

that is simply another reason why we should get not one, but two additional hours on the TCC side. That would cover both, from Arnold & Itkin's perspective anyway, Mr. Baron both as the 30(b)(6) witness as well as the totality of his testimony in his individual capacity.

The third issue, Your Honor, and it's nothing that we're asking the court to decide today, but it's an observation that we feel would be helpful to put on the record and that is we're supposed to have the deposition tomorrow and Thursday of the future claims representative. Obviously, we haven't gotten any documents from them on this topic. We're asking the court to add an hour to the allotted time for the future claims rep and I just want to make clear that if we're going to go forward tomorrow and Thursday with that deposition we are going to -- we are going to specifically request that we have the opportunity to recall the 30(b)(6) witness or the future claims rep because we are just not going to be prepared to address these issues this week.

The next one is, again, in the nature of a reservation of rights. Currently there is a July 23rd discovery deadline and Arnold & Itkin has made clear to the plan proponents that we're not seeking to adjust that deadline, but we are mindful of the fact that it's now June 22nd and we're looking to complete all of this discovery, this additional discovery in just one month and that would require

the service of subpoenas, the production of documents and the taking of a number of additional depositions, third-party depositions.

What we had suggested to the plan proponents is that we agreed to extend the deadline not for the plan proponents, not for any purpose other than for making sure that we have sufficient time to complete the third-party discovery on voting and solicitation issues.

I think the suggestion was made by the plan proponents that we don't need to take that step today, that we would work cooperatively in the future if it came up, but I just want to alert the court that that issue is out there. It makes sense to us to simply extend the deadline by two or three weeks to take Bevan, Hart, Baron, Placatella and Trammell because it won't impact the rest of the plan discovery, but we couldn't reach an agreement on that point. So Arnold & Itkin simply reserves its right to seek additional time if necessary because it's only 30 days away.

The next issue, again, I think is -- I would actually ask the court for guidance, if it's possible, I don't think it's been briefed here, but the issue of Prime Clerk who has been the subject of discussion. Initially we were told that all communications between the plan proponents and Prime Clerk would be subject to privilege. I think we heard something a little bit different when we spoke to the plan

proponents just prior to getting on the call and it gave us some comfort; that is the plan proponents and Johnson & Johnson had identified some specific areas of inquiry including late voting, voting changes.

I don't have the list in front of me right now. I think what I was told, and I would ask for confirmation from the plan proponents, is that they're prepared to give the communications between the plan proponents and Prime Clerk that address those very specific topics that were agreed upon with Johnson & Johnson and as will be supplemented in a moment by me.

To the extent that there are any communications between plan proponents and Prime Clerk that deal with these issues that the plan proponents nevertheless contend are privileged they will specifically log those on a privilege log, not a categorical privilege log, but an actual because we can't be talking about a whole lot of communications here, right. Dozens, maybe. It would shock me if there were hundreds of communications on these topics. So I don't think it's terribly burdensome and I believe that we have the agreement of the plan proponents to specifically log any communications that they're withholding on privilege grounds.

That really just brings me to the last issue and that is the scope of the discovery. As I mentioned, there is an agreement between Johnson & Johnson, and the debtors, and

the plan proponents that we're signing onto that specifically identifies certain categories of discovery which is going to be pursued. We had raised the issue because it seemed implicit, but not entirely clear that issues of timeliness and extensions of time would also be part of that and I think we have an agreement on that.

The one place that we don't have an agreement, and this is -- I will summarize for Your Honor the areas of disagreement. The last areas of disagreement is that we would like to be able to pursue discovery on the question of the rejection of the ballots due to lack of social security numbers. I did hear a passionate argument that Prime Clerk had the discretion to do that and the procedures speak for themselves, but nevertheless given that the overwhelming number of ballots that were rejected on the basis of a lack of social security number were no votes and there is no dispute about that.

We simply want to inquire as to whether or not there was -- how did they use their discretion. Were there any discussions with the plan proponents on whether to use the discretion, how to use the discretion. Did anybody say don't do it. And it's really just one last, very modest area of inquiry we would like to pursue. I can't believe it's terribly burdensome and if all is as Ms. Posin says it is I'm not sure what the objection should be.

So just to summarize for the court because I know I have said a lot, the areas of dispute right now are whether the inquiring parties will get thirteen or fourteen hours total with the TCC. Arnold & Itkin believes it should be fourteen hours.

Number two, whether the inquiring parties will get an additional hour of inquiry with both the debtors and the future claims representative.

Number three, I have Placatella written down, I am going to leave it to the plan proponents to let me know whether or not they object. I think they might have objected during our call, but I would just repeat, Your Honor, very briefly that in Mr. Bevan's declaration he specifically identifies Mr. Placatella as one of the attorneys for a TCC representative with whom he spoke and obtained the information that caused him to change his ballot. So we believe that is valid.

Then the last issue is just can we get some discovery on the issues surrounding the social security numbers and the rejection or the lack of exercise of discretion in permitting, you know, either an opportunity to cure or some other remedy.

That is all I have, Your Honor. Thank you for your patience.

THE COURT: Okay. Thank you.

Ms. Posin.

MS. POSIN: Thank you, Your Honor.

I think, with respect to the debtors, there's really two issues. The first is the deposition. So our -- the reason why we do not believe additional time is required is we've already agreed -- and it was a heavily, heavily mediated resolution -- we've already agreed to 17 hours of 30(b)(6) deposition testimony from the debtors. That's in addition to a full day that Imerys Talc Italy has already sat for depositions, which what happened to be -- so that's like 3 full days of the four debtors/potential debtors.

And in addition to that, voting actually was included in the list of deposition topics when we determined, when we settled on that 17 hours. So I can't imagine why we would need additional time with respect to the debtors, in connection with what you've heard today, given the massive amount of time we've already agreed to sit. So that's our concern with, you know, it's here -- it's an hour here, and then there will be another dispute and people want another hour, and that's how we ended up with 17. So we'd really like to limit that to the 17 hours that we've already agreed to.

With respect to the Social Security number issue, I guess my biggest concern with this is it's more -- you know, more that we have to deal with. The fine -- this is not a -- it's like you put in a search term and it comes back with an

answer. It's we have to look at a substantial amount of discovery documents that Prime Clerk may provide, or they do, and look for this issue, which is a bit amorphous, right? It's like their lack of deciding to exercise discretion and going out to people and trying to resolve these defective votes.

I also -- it doesn't matter in the -- because of the 5,600 defective votes, there's not enough to swing the vote, right? So, even if -- again, if everybody was able to cure and they -- those votes were accepted, it wouldn't change the outcome of the vote. And so it seems like a lot of busy work and a lot of effort for the debtors and for Prime Clerk to not really any end, and so that's really the concern with that.

It may end up there was no emails, it may end up there's one or two and they may be privileged. But it's -- you're going to -- it's the amount of work that's required to look at everything that could be responsive and try to find exactly what Mr. Morris -- or, you know, within the realm of what he's looking for, and that's really the concern.

MR. MORRIS: Your Honor, if I may respond just really briefly?

THE COURT: Okay.

MR. MORRIS: With respect to the first issue, it's true that it was heavily negotiated for 17 hours. That's

before any of these issues came up. So I -- you know, again, they're trying to say that somehow this was included in the contemplated agreement, but it just wasn't because these issues didn't exist at the time that we reached that agreement.

And secondly, within the Social Security issue, they've agreed on search parameters. We're not asking them to do any additional searches. They're going to do these nice, broad searches with the word "Imerys." I forget what the other search term is. They're going to have to look at every one of those documents to see if they fall into one of the other categories. If the word "Social Security" is in there, they should just put that, you know, in the pile to be produced. There's really no additional burden. They're not running any additional searches, and they have to look at every single document anyway to see if it's responsive to the agreed-upon categories as it is. So I just -- I'm not quite sure that I understand.

THE COURT: Okay. With respect to the debtors' deposition, I'm going to permit the additional hour.

And with respect to the Social Security numbers and the discretion, because it does not require any additional search terms, I'm going to require those to be produced. You're going to have to review the documents anyway.

MS. NORMAN: Your Honor, this is Lisa Norman on

behalf of the Williams Hart Plaintiffs.

If I -- just a point of clarification. I think that the agreement that was reached between the debtors and J&J may involve taking the deposition of my client. And if so, I just want somebody to clarify that because I'd like to be able to chime in, at least on the time limitation on that because I haven't been consulted on that particular issue yet.

MR. TSEKERIDES: Yeah, Your Honor, it's Ted Tsekerides from Weil Gotshal for J&J.

Yes, we do plan on taking your client's deposition. And one of the things for today was, because some issues were raised, that we granted leave to serve a subpoena. So, since you're here, we're going to ask if you would accept service of the subpoena, and then we're happy to talk with you about timing. I don't know if Mr. Morris had that discussion, but I think we had discussed maybe four hours --

THE COURT: I'm going to --

MR. TSEKERIDES: -- but that was the plan.

THE COURT: I'm going to let you all, in the first instance, take that offline. I've given permission to take it and we'll go from there.

MR. TSEKERIDES: Very good.

THE COURT: See if you --

MR. TSEKERIDES: Thank you --

THE COURT: See if you --

MR. TSEKERIDES: -- Your Honor.

THE COURT: -- can agree.

MR. TSEKERIDES: Okay.

MR. MORRIS: Your Honor, the only other issue that we would ask for your guidance is the 13 versus 14 hours for the TCC.

THE COURT: I haven't heard --

MR. MORRIS: They've given us --

THE COURT: -- from the TCC yet.

MR. MORRIS: I apologize.

MR. LOMBARDI: Good afternoon, Your Honor. This is Stuart Lombardi of Willkie, Farr & Gallagher for the Official Committee of Tort Claimants.

So there are two issues that Mr. Morris mentioned that are specific to the TCC that I'd like to go through. The first is A&I's request for more time to depose the committee and Mr. Baron, counsel to a committee member.

And the second is we understand that A&I wants discovery from Mr. Placitella, counsel to another committee member. Mr. Morris initially misspoke when he said that we agreed to that; we don't.

But before I discuss those two issues, I'd like to talk for a few minutes about how we got where we are today. A few months ago, the committee agreed with all of the objectors, including A&I, that the committee would sit for a

30(b)(6) deposition of up to 12 hours.

On April 17th, A&I filed its motion to extend discovery deadlines and permit additional discovery, and that is Docket Number 3425. The motion did not seek discovery from Mr. Baron or Mr. Placitella.

On June 9th, J&J filed a letter that sought leave to depose, among other targets, Baron & Budd. J&J explained that Steve Baron of Baron & Budd represents a member of the committee, and that Mr. Itkin, Jason Itkin of objector A&I, Arnold & Itkin, testified about communications that he had with Mr. Baron about voting on the plan.

Nearly a week later, on June 14th, A&I filed its reply in support of its motion to extend discovery deadlines. And I apologize, Your Honor. I want to make sure I'm referring to the right motion here. A&I filed its reply in support of a different motion that it is filing about disregarding certain votes. But in that motion, it made no indication that it sought to depose Mr. Baron. That same day, the committee filed its response to J&J's letter. And in our letter, we noted that we intended to meet and confer with objectors about possible resolutions to discovery disputes, and that's exactly what we did. We're trying to.

We worked with the other plan proponents to craft a global proposal, which the debtors then sent to all of the objectors, the plan proponents' joint proposal. And we then

followed up with A&I's counsel one on one and offered to talk about the proposal. That offer was not accepted.

And we did the same thing with J&J. We emailed J&J's counsel one on one and offered to talk. And J&J, unlike A&I, did take us up on the offer. That led to extensive negotiations. And early this morning, we and J&J ultimately agreed to the discovery resolution that the debtors announced at the beginning of today's hearing.

As part of that resolution, the committee agreed to extend its 30(b)(6) deposition by 1 hour, for a total of 13 hours; agreed that Steve Baron will be a committee 30(b)(6) witness, agreed that he will testify in a 30(b)(6) capacity and an individual capacity, and agreed that J&J can question him about solicitation and voting during that deposition.

So, with that background, Your Honor, that takes me to A&I's first committee-specific issue. During today's lunch break, we heard, I believe for the first time, that A&I wants an extra, extra hour to depose the committee and wants to depose Mr. Baron individually. In other words, the 13 hours that we and J&J agreed to isn't enough for A&I, they want 14 hours. We disagree. We think that 13 hours is more than sufficient.

And I would submit, Your Honor, that we're a little bit differently situated than the debtors were on the issue that you addressed a few minutes ago. The deal with J&J

announced this morning had not included an extension of the deposition of the debtors, but it did include a one-hour extension of the deposition of the committee. And we submit that that extra hour is more than sufficient to cover Mr. Baron's representative and individual testimony about voting-specific issues.

So that takes me to the second committee-specific issue, which is also something that we heard for the first time about over lunch. On a call this afternoon, counsel to A&I told us that they want to take discovery from Mr. Placitella, counsel, as I mentioned, to another committee member. That was entirely new to us and, frankly, something that we would have heard earlier if A&I accepted our invitation to talk before today.

When we asked A&I why they hadn't raised that until today, their desire to take discovery from Mr. Placitella, their explanation was that they didn't know that they wanted discovery from Mr. Placitella until Mr. Bevan filed the declaration a week ago that referred to conversations that Mr. Bevan had with Mr. Placitella. There are two problems with that logic:

First of all, the Bevan declaration was filed a week ago today. Where was A&I in the weeks since then? We made a proposal. We identified proposed custodians. We offered to talk.

Second, adding Mr. Placitella as another deponent puts us solidly in the universe of duplicative depositions. The committee already agreed, subject to certain terms, not to object to leave to seek to depose Mr. Bevan. So, if A&I wants to ask about conversations between Mr. Bevan and Mr. Placitella, they can ask Mr. Bevan.

The committee also agreed to sit for a thirteen-hour deposition. And if A&I wants to ask about actions that Mr. Placitella may have taken in his capacity as a representative of a -- representative of a member of the committee, they can cover it in that 30(b)(6) deposition, as well. Having an additional deposition of Mr. Placitella would be the third deposition on that subject.

This is also a prime example, Your Honor, of a real concern that the plan proponents have here and -- the plan proponents have here and have throughout the process that, for objectors whose goal is delay, no amount of discovery will ever be enough. There will always be some new string to pull; every deposition, every filing, every production will lead to more requests, and we'll be back in front of you again next month and then the month after and the month after with requests for even more depositions and even more subpoenas and even more doc requests.

So we're asking for your help, Your Honor, on two issues:

We're asking for you to find that the thirteen-hour committee deposition that we already agreed to with J&J, as described this morning, is more than enough, and that A&I doesn't need another hour.

And second, we're asking for a finding that the request to add Mr. Placitella as a custodian or deponent, a request that we heard for the first time this afternoon, should not be granted. Thank you, Your Honor.

THE COURT: Thank you.

MS. RICHENDERFER: Your Honor, if I may?

THE COURT: Who is this?

MS. RICHENDERFER: Linda Richenderfer from the Office of the United States Trustee.

THE COURT: Yes.

MS. RICHENDERFER: Your Honor, we did not file anything specific because we were not a proponent for any specific body of discovery requests that were outstanding. We weren't going to take a position with J&J. Arnold & Itkin, the insurance carriers, we didn't go through the specifics of all that.

However, as a general matter, as I stated much earlier today, we believe that transparency is required here. The scenario here where Prime Clerk, with all of its years of experience, would misrepresent in a declaration the reason why 17,000 votes were discounted and take a month before it

basically fixed that misrepresentation leads itself to questions and questions that need to be asked during discovery.

And maybe Arnold & Itkin only has an hour's worth of additional discovery or questions to ask. But when we have sworn deposition testimony, we have declarations, and we have declarations from Mr. Bevan that mention people that specifically were involved in the process of changing votes, it's important that all relevant parties have the ability to ask necessary questions for the transparency of this system. And an hour to ask Mr. Baron questions, when his name has come up many times from Mr. Bevan and from Mr. Itkin, asking for two hours I don't think is a great imposition on justice, in order to ensure the transparency of this voting system here, Your Honor --

THE COURT: Thank you.

MR. LOMBARDI: May I --

MS. RICHENDERFER: -- or --

MR. LOMBARDI: May I speak to that, Your Honor?

MS. RICHENDERFER: -- or Mr. Placitella, whose name has also appeared as somebody who was involved in a period of time. And these are specific requests having to do with the changing of votes.

And in the end, it may be that there was nothing here. But Your Honor, the record, as it currently stands,

just begs for some transparency to be added.

MR. LOMBARDI: May I speak briefly to that, Your Honor?

THE COURT: Mr. Lombardi.

MR. LOMBARDI: I appreciate the trustee's comments on that issue, and I'd like to offer a clarification. And this is something that we've spoken about with J&J, we've spoken about with A&I, we've spoken about with Mr. Pfister, but have not had an opportunity to speak about with the U.S. Trustee.

The thirteen-hour deposition that is part of the agreement with J&J that we announced this morning, the objectors can decide among themselves how to allocate that time between themselves and between the issues and between the committee and Mr. Baron. And if they tell us that they want to -- and I'm going to make something up -- spend 11 out of the 13 hours on solicitation and voting, they can do that. That's completely fine.

So, to the U.S. Trustee's comment, the agreement that's in front of this Court is not 1 hour, full stop, capped on solicitation and voting; it's 13 hours on solicitation and voting and everything else and allocated as you wish.

THE COURT: Well, I understand that. But J&J is not the only objectors, and I don't know that the objectors will come to an agreement upon how they are going to split

their time. And I agree with the Office of the United States Trustee and objectors that questions have arisen from the record that I have in front of me that should be explored. I don't have a view as to how that exploration comes out, but I think they should be explored.

So I'm going to permit the additional hour and I'm going to permit the deposition of Mr. Placitella, since he had communications with a party who changed their vote and put it in a declaration. I don't consider it duplicative to hear directly from parties who had communications, they are the percipient witnesses. They also might remember it differently. I don't know. But these are not third-party, down the pike witnesses. These are percipient witnesses.

And the vote is something I'm going to have to rule on. It is a -- it's also an 1129 standard. So I'm going to permit inquiry into the voting. As I said, I have no view on whether the voting, the change of voting, the extension of time, the exercise of discretion, or even my solicitation procedures order was appropriate; I have no view on that, but I'm going to permit the exploration.

MR. LOMBARDI: Thank you, Your Honor.

MR. BRADY: Your Honor, the FCR might be next.

THE COURT: Mr. Brady.

MR. BRADY: Yes, Your Honor. Robert Brady on behalf of the FCR.

You know, Your Honor, no one from Arnold & Itkin talked to us at all about this, so the first we heard of a request to have an additional hour on the Mr. Patton* deposition was clearly a few moments ago, during this hearing. And that makes sense, Your Honor, because our constituency doesn't vote, so you can see why we may have fallen through the cracks.

Mr. Patton's deposition starts tomorrow, it's tomorrow and Thursday. It was agreed long ago to be ten hours, five hours each day.

We agreed just this morning to conduct the searches J&J agreed to with the debtors, and we'll do that.

Your Honor, we think it would be far more efficient to allow Mr. Patton's deposition to go forward as planned at ten hours. We'll produced the documents that we've agreed under the J&J agreement.

If any objectors sees anything in those documents that they makes sense for a followup deposition, we can discuss it at that time. But we expect to produce very little, there will be little out there, we're pretty sure of that, and so we think it makes sense. But if anyone sees anything there, we can talk about it later. But we don't see any reason to change the longstanding timing of Mr. Patton's deposition, which, again, starts tomorrow.

MR. MORRIS: Your Honor --

THE COURT: Mr. Morris?

MR. MORRIS: -- just very quickly.

THE COURT: Yeah.

MR. MORRIS: The reason that there was not prior discussion is that, until we got the J&J settlement, Arnold & Itkin had been seeking discovery from all of the plan proponents. So now we proposed an hour simply because we had context and we're trying to get to a global resolution, and we thought that was a very fair and reasonable and un-burdensome compromise. So that's what we think is fair.

I hear Mr. Brady. I'm happy to reserve my rights, in order to defer the issue for the future claims rep. We didn't -- I want to be clear, we weren't suggesting that we kick the deposition, but we wanted to make sure that, if we had questions on these topics of the future claims rep, that we'd have an opportunity to do that. And I think Mr. Brady is agreeing that we can address that issue when we get the documents and if we need to. And I'm happy just to stand at that point.

THE COURT: Okay. I think that makes sense to me. Mr. Patton's deposition should go forward. If something surfaces through the documents that are produced, we'll deal with it then if the parties can't agree.

MR. BRADY: Thank you very much.

MR. MORRIS: Thank you, Your Honor.

THE COURT: I'll also note that Mr. Patton's name, at least to date, has not come up in any of the -- in any of the declarations or anything I've reviewed, in terms of having discussions with parties and vote changing. But you can ask questions, and if something surfaces, we'll deal with it.

Okay. I think that's all the issues, correct, Mr. Morris?

MR. MORRIS: Yes, Your Honor. I was just fumbling for the mute button. But yes, that's all I -- that's all I had, Your Honor, and I think that resolves our open motion for discovery.

THE COURT: Thank you.

What's next?

* MS. DAVIS JONES: Your Honor, I think that brings us to the 3018 motion filed Arnold & Itkin, if that's correct.

THE COURT: Okay.

MS. DAVIS JONES: Your Honor, we did file a motion to -- well, for the record, Your Honor, Laura Davis Jones, Pachulski, Stang, Ziehl & Jones, on behalf of Arnold & Itkin.

Your Honor, we did file a motion to disregard certain vote changes without complying with Bankruptcy Rule 3018 and a required showing of cause. Your Honor, we do seek the parties who changed their vote after the voting deadline, and that term is defined as March 25, 2021 in the solicitation procedures as a fixed date. We're asking that they be

directed to comply with Rule 3018. As Mr. Morris pointed out earlier, some of the changed votes came after the voting deadline. And there was an extension having been given to the party and then they made that change from the date that the deadline came and went, and then they made a change and the change was accepted.

Your Honor, under 2018 -- 3018, the parties file a motion, set forth the requirements of Rule 3018. They have a rebuttal presumption under Your Honor's solicitation order that, if they change their vote before the voting deadline, and it changed -- and it changed their vote after the -- I'm sorry. They have a rebuttable presumption if they change their vote before the voting deadline; and, if they change their vote after the voting deadline, they do not. The burden is with the party that's filing the 3018 motion.

Interestingly, Your Honor, there's a lot of push-back by the debtors of Bevan, and we impart to the request that they follow the rule. The rule is straightforward. They file a motion, the parties and the Court will review. They -- discovery may be requested. And if there is a need for a deposition, we can schedule that.

Your Honor, what we would propose is that, if there is discovery, that that be issued and responded to immediately. And then, with respect to the deposition, because there are other depositions that are going to -- have

to be taken here, rather than asking a party to come sit for a deposition twice, we will wait on that deposition under 3018 until we -- we'll wait on the voting discovery deposition, which will probably be done first, until we have the 3018 documents, and we can just do it all at once, rather than having somebody come twice. But we would like the documents to be produced as soon as they can.

Your Honor, one thing that I saw in the papers -- and it's just totally inappropriate -- you cannot try to shoehorn in a 3018 motion through an objection. The debtor tried to do that. Bevan and others need to file a motion on notice. 3018 doesn't have any outs for that, if you will. And then there's the opportunity for discovery and a hearing before the Court.

Your Honor, the debtors do not and they cannot provide any authority to the contrary. You can't write around Rule 3018. To their credit, the solicitation -- in the solicitation procedures, the debtors submitted that and they didn't try to do so, but now they're trying to do so under -- in their response and in their objection.

Your Honor, there's -- Your Honor, I think that if -- just it's been a long day. I think, Your Honor, it's just very simple here that there's a 3018 rule, it needs to be followed. There is no basis in the law to be able to write around it. If it slipped through solicitation procedures --

and I know people have cited Your Honor to various cases where it's been done. But Your Honor, I don't -- I haven't -- when I looked at those cases, I didn't see that the issue had been litigated or that there were issues around that the Court had to decide.

So, Your Honor, I think we should just -- people should just follow the rule. Let's have the document discovery happen immediately. And as I said, we'll work with people so that they don't have to sit twice for depositions.

THE COURT: Thank you.

Let me hear from objectors.

MR. HANSEN: Thank you, Your Honor. Can you hear me okay?

THE COURT: Mr. Hansen.

MR. HANSEN: Shawn Hansen of Latham & Watkins on behalf of the debtors.

Your Honor, as with the discovery motion, Arnold & Itkin is attempting to call into question the integrity of the voting process. In this instance, they're going as far as to claim that the debtors hid the ball and persuaded three law firms to switch nearly 18,000 votes from votes to reject the plan to votes to accept the plan. Your Honor, these claims are baseless.

Although the debtors have conducted themselves strictly in accordance with the solicitation procedures, which

were approved by this Court, Arnold & Itkin is seeking, you know, not only to have these parties file 3018 motions, but in their motion, they are seeking to disregard the votes cast by these parties and to reinstate the previous votes cast by these parties in the ballots that were subsequently superceded. The justification for this extraordinary relief, Your Honor, is that these parties did not file Rule 3018 motions.

Arnold & Itkin is glossing over and ultimately disregarding the operative provisions of the solicitation procedures, which allow for:

One, the submission of superceding ballots after the voting deadline, if approved by the plan proponents.

And two, create a rebuttable presumption that any party submitting a properly completed superceding ballot on or before the dead -- voting deadline has sufficient cause within the meaning of Bankruptcy Rule 3018(a) to change his or her vote to accept or reject the plan. And you know, we refer to the latter provision as the rebuttable presumption provision in our papers, Your Honor.

And because the voting parties submitted ballots that fell within the scope of the rebuttable presumption provision, you know, they -- we -- our position is that there was no requirement that they file a 3018 motion prior to changing these votes. And you know, Arnold & Itkin, in their

papers --

THE COURT: So what do you this requires, this rebuttable presumption provision? What do you think it does?

MR. HANSEN: I think it gives the voting parties a rebuttable presumption that they complied with Rule 3018.

THE COURT: So what --

MR. HANSEN: And our position is --

THE COURT: So what kind of hearing is required? Because a rebuttable presumption is an evidentiary principle, right?

MR. HANSEN: Uh-huh.

THE COURT: And I'll apologize --

MR. HANSEN: Yeah.

THE COURT: -- because, for some reason -- I know I reviewed everything, but I can't find your papers. But if there's a rebuttable presumption, it doesn't mean that it goes away or that the other side can't challenge anything. It just means there's a rebuttable presumption. So somebody comes forward with some evidence, then, usually, with a rebuttable presumption, the burden goes back, the evidentiary burden goes back on the party that originally had the burden, right? So what does it mean here?

MR. HANSEN: Here, Your Honor, it would mean that Arnold & Itkin would need to file or at least propose some type of evidence that would rebut the presumption, which they

haven't done, right? And so, assuming that they are able to rebut the presumption, then I think you're right, it falls back to the voting parties in this instance. But no evidence has been filed to rebut this presumption.

THE COURT: So they should take depositions, is that what you're saying, and then we'll come back on this motion? Because if you want them to have to submit evidence, then aren't they entitled to some ability to obtain evidence?

MR. HANSEN: Well, we think that that ability to obtain evidence would fall within, you know, what we've been discussing, what Ms. Posin discussed and the issues that we've been discussing on the discovery issues.

To the extent that those -- to the extent discovery that's been agreed to by the parties does raise facts that rebut the presumption, you know, Arnold & Itkin and other parties are able to, you know, put forth those facts. But until then, it's our position that, you know, the solicitation procedures allow for this rebuttable presumption.

THE COURT: If they do, I'll have to confess it wasn't something I focused on. And I guess I question whether I'm entitled to do this, given the rule, whether I can, in fact, vary -- this appears to vary from the rule. Maybe I can; maybe I can't. I don't think anybody cited me to a case that discusses it, as opposed to an order, such as somebody taking my order and then giving to it some other judge to say,

ah, Judge Silverstein, you know, she must have really thought about this. But I can tell you she didn't.

So I guess what I hear you saying is it's premature for me to grant the motion, and we at least ought to grand discovery. But I will let you know that I don't know what a "rebuttable presumption of sufficient cause" means in this context, assuming it was appropriate for me to enter solicitation procedures orders with this provision in it, which I have never explored before or given, quite frankly, any thought to.

But I will say I'm not prepared to deny the motion today. I'm prepared to let discovery, in the context we've just discussed it, go forward, and then we're going to have to figure out the proper procedure, assuming there's an issue. Assuming, after the discovery is taken, someone believes there's an issue, that there was an improper change of vote, as opposed to a change in vote that's permitted under the case law, assuming there's an issue, we'll have to decide the proper context and who has the burden.

But I actually don't even really know what that --

MS. DAVIS JONES: Your Honor --

THE COURT: -- rebuttable presumption means in this context.

MS. DAVIS JONES: I apologize, Your Honor. If I may. I think counsel, though, has the procedure a little

backwards. There are -- Rule 3018 puts the burden on --

THE COURT: Uh-huh.

MS. DAVIS JONES: -- the party to file a motion asking for authority to have changed that vote. And there's -- that has not been followed at all. And while this -- and I heard him about the rebuttable presumption; and, if he heard me, I acknowledged that in my opening comments, that they had in the solicitation order this idea of a rebuttable presumption if the vote changed before the voting deadline and not if it was after the voting deadline.

But there's a first step that the parties are missing, Your Honor, and that's that they need to file a motion under 3018. That then makes the matter a contested matter. We then can decide whether we want to take discovery. I'd suggest that we would start immediately with the written discovery. And with deposition, what I offered was to put the depositions off until the voting discovery depositions are had and we can have the depositions together, so I'm not calling parties twice.

But Your Honor, counsel is just glossing right over, and there's -- and Your Honor does have the authority, when people miss by a longshot what the Code provides. You do have the authority, even if I have to go to 105. But you do have the authority to straighten out all of us on what is -- what the Code provides for. And here, 3018 is very clear that

it's on notice and a hearing.

THE COURT: What I --

MR. HANSEN: Your Honor --

THE COURT: -- think I heard --

MR. HANSEN: -- if I can?

THE COURT: Yes. What I thought I heard Mr. Hansen saying -- but I'll ask him. Are you saying that this rebuttable presumption provision means that, in fact, no Rule 3018 motion has to be filed?

MR. HANSEN: I'd say that's what I'm saying, Your Honor, unless the presumption is rebutted. Otherwise, why would it have been included in the solicitation procedures?

THE COURT: Well, I don't know. That's what I'm asking. Why was it included --

MR. HANSEN: To --

THE COURT: -- in the solicitation procedures? What was it meant to do and what authority is there for it to be in the solicitation procedures? Because -- just because I signed it doesn't mean it's correct.

MR. HANSEN: No, I think, Your Honor, it was meant to avoid situations where we're running to the Court to change votes, provided they were properly submitted in accordance with the solicitation procedures, as was done here.

And in terms of authority, you know, I do believe and we've cited cases -- I know we just cited orders -- but we

cited various cases where this has been done in this circuit and in other circuits in the mass tort context.

THE COURT: Okay. I understand that. And I will also say that I have signed solicitation procedures orders which have discretion in them, like this one does. And I've always tried to be very clear with people that I want to know, I want a report from the solicitation agent as to what was done because I don't think just giving discretion -- which I really am rethinking.

And I've had questions about it, but it's never come up before, I've never had this type of issue before. Giving someone discretion, at the very least, means they have to exercise their discretion in an appropriate fashion. But it brings to light this whole idea of what's a balloting agent. Are they a neutral, are they not a neutral, should they not be a neutral, right? But it raises a whole host of issues.

And that's why I asked what should this do. My gut reaction -- and it's just a gut reaction, so I'll take further briefing on this. My gut reaction is, if all this does -- and the language says it creates a rebuttable presumption within the meaning of Rule 3018. That doesn't suggest that you don't have to file a Rule 3018 motion; it suggests you do, but there's a rebuttable presumption. That's the language that I'm reading.

On the other hand, I understand that parties do change votes. That happens. There's not necessarily anything wrong with that. And should you have to file a Rule 3018 motion every time? And I don't know the answer to that question. So, you know -- but I'm just reading my order and a provision that we did not discuss. Perhaps, you know, my bad, but we didn't discuss it, so ...

But how does having a rebuttable presumption mean you don't have to file a motion? What else would the rebuttable presumption go to, assuming I should have even entered that? I don't think it says here you don't have to file the motion. It just says, if you file one -- it doesn't say that, either. It says, within the meaning of Bankruptcy Rule 3018, that there's a rebuttable presumption of cause. If Rule 3018 isn't appropriate or is unnecessary, then what does that mean?

MR. HANSEN: Well, I think, Your Honor, you know, the 3018 motion, the purpose of it is to establish cause, right? Notice and a hearing that there is cause -- sufficient cause to change a vote.

THE COURT: Uh-huh.

MR. HANSEN: And so, again, and going back to this, our view is that, you know, the rebuttable presumption here or whatever reason you would have to file the motion in the first instance is satisfied by the provision of the solicitation

procedures order. I think we keep coming back to that. It shifts the burden on other parties to essentially show that there was insufficient cause --

THE COURT: And why --

MR. HANSEN: -- provided, of course, these votes --

THE COURT: And --

MR. HANSEN: -- were submitted -- you know, properly submitted.

THE COURT: Okay. I'll have to go back through this. But why should I be able to do that and switch the burden of the rule? What's the authority for me to do that?

MR. HANSEN: Well, I'd say, you know, as Ms. Jones is saying, you have the power under 105 to do that. You have discretion to set the solicitation procedures as you view appropriate. And I feel like that's what was done in this instance, Your Honor.

MS. DAVIS JONES: Your Honor, if -- again, if I may. I think that the rule is clear that the motion has to be filed. I kind of look at this, Your Honor, as a proof of claim, and proofs of claim are considered *prima facie* valid. It doesn't mean you don't have to file a claim, it doesn't mean you don't have to file an objection to a claim. But it describes how the burden of proof -- where the burden shifts.

And so, if the vote was changed before the deadline, then there's a rebuttable presumption that that vote

change was okay, and I would have to override that, if you will. But if it's done after, that rebuttable presumption does not exist. And then the claimant has a little harder time trying to convince the Court that changing that vote was proper. But none of this takes away the requirement of 3018 that that motion be filed in the first instance and that disclosure.

And we come back again, Your Honor, to disclosure and transparency in this case. And I'm just really surprised at how much push-back we're getting on this type of stuff. If there's nothing here, Judge, then there will be nothing here. But in the interim, the rule should be followed.

MR. PFISTER: Your Honor, this is Rob Pfister. I -- we joined in the motion. If I could be heard for just a moment.

THE COURT: In a minute, Mr. Pfister.

Mr. Hansen, what -- I'm looking at Paragraph (f) on Page 16 of the solicitation order, which is the rebuttable presumption provision. It says:

"There will be a rebuttable presumption that any claimant who submits a properly completed superceding ballot or withdrawal of a ballot on or before the voting deadline has sufficient cause within Bankruptcy Rule 3018(a)."

So are you writing out the "on or before the voting deadline"?

MR. HANSEN: Well, I -- Your Honor, as we briefed it, our view on this point is that, you know, a voting deadline is meant to include any extensions that were granted by the debtors --

THE COURT: Right.

MR. HANSEN: -- such that --

THE COURT: Then how do you compare that with 2(c) on Page 15, which has:

"-- voting deadline (or such later date as agreed by the debtors with the consent of the plan proponents)."

MR. HANSEN: Well, Your Honor, I, again, think that the way we have intended voting deadlines to work in this situation is that it includes any extension. And you know, hindsight is 20/20, and obviously, we would have preferred to have, you know, had that similar language in, you know, that provision or that section of the solicitation procedures. But unfortunately, you know, we didn't include it there.

But we do view -- throughout the solicitation procedures, you know, the debtors, with the consent of the plan proponents, are authorized to extend the voting deadline. And you know, if you look at the briefing that was filed by Williams Hart and, you know, other parties submitting late votes or votes after the voting deadline clearly thought that they were given the, you know, protections afforded by this rebuttable presumption provision.

THE COURT: So are you saying they wouldn't have changed their votes if they weren't, given that protection?

MR. HANSEN: No, I'm not saying that. But I'm saying that -- you know, I think, to reiterate or what I'm saying, Your Honor, is that it was understood or thought that late-submitted votes would also receive the benefit of the rebuttable presumption provision. I'm sure that, had this rebuttable presumption provision not been included, it may have been the case that Williams Hart would have filed a Rule 3018 motion prior to changing their vote.

MS. NORMAN: Your Honor, if I may, Lisa Norman on behalf of Williams Hart.

THE COURT: Just a minute, please.

What's the harm? What's the harm in submitting a Rule 3018 motion under these circumstances?

MR. HANSEN: Well, Your Honor, I think, from our perspective, one is that we view the solicitation procedures just, you know, allowing parties to change properly submitted votes without filing a Rule 3018 motion. And specifically and in these circumstances, I think it's exactly to avoid what -- our perspective is just we don't want to have further delay.

We think that there's going to be -- as Ms. Jones said, they want to have discovery on the voting issues, and they want to have additional discovery on the 3018 issues. And we believe that any discovery that's necessary on these

issues, voting and 3018, will be satisfied by what we've been discussing over the last few hours, right? The J&J deal with some modifications to account for Arnold & Itkin's requests. And so our view is that it's somewhat unnecessary at this point to file the 3018 motions, in that, if there are any issues, they will arise, right? We're allowing for discovery there.

THE COURT: Okay.

MS. DAVIS JONES: Your Honor, we --

THE COURT: Let me hear from others first.

MS. DAVIS JONES: Your Honor, we --

THE COURT: Let me hear from others first.

MS. DAVIS JONES: I'm sorry.

THE COURT: Ms. Norman.

MS. NORMAN: Thank you very much, Your Honor.

With respect to Williams Hart, certainly our interpretation of the solicitation procedures order is very similar to the debtors; in that, in the provision that you were just reading, continuing in that same sentence, it says, you know, there is a rebuttable presumption that any claimant who properly completed superceding ballots or withdrawal of ballots before the voting deadline has sufficient cause within the meaning of 3018 to change or withdraw such claimant's acceptance or rejection of the plan.

And we read that to mean that the cause we would

ordinarily seek by filing a 3018 motion is already established by virtue of the rebuttable presumption provision that is set forth here, and that it would be incumbent upon anyone challenging our cause to bring forth to you evidence saying we -- you know, that they don't believe we have cause. And then the evidentiary hearing would be done.

There's no problem with us filing a 3018 motion, if we thought it were necessary. But certainly the way the solicitation procedures order reads, it's not necessary. And particularly when read in conjunction with the other provisions in the solicitation procedures order that provide that multiple ballots, if they are submitted, are -- that related, dated, otherwise valid ballots if received before the voting deadline or such later date as agreed by the debtors with the consent of the plan proponents is indeed a ballot that is counted as a vote to accept or reject the plan.

Here, we submitted a ballot, a master ballot on behalf of the claimants that we represent, before the initial deadline that's in the plan -- or that's in the solicitation order. Discussions were ongoing during that period of time. And the plan proponents and the debtors extended the deadline for Williams Hart, and apparently others, which resulted in the subsequent ballots that were submitted. And pursuant to the rebuttable presumption provision in the solicitation order, we have sufficient cause to change or withdraw the

vote. And there -- we read it as not requiring a 3018 motion.

If the Court reads it -- if any other party reads it differently and this Court were to interpret it to mean that a 3018 motion has to be submitted, we don't have any problem filing one. It's just the way that the order is written, it appears to not be necessary because the cause you would be seeking by that motion is already established. And so --

THE COURT: Well, it's --

MS. NORMAN: -- one of the things --

THE COURT: -- not established --

MS. NORMAN: -- (indiscernible)

THE COURT: It's not established there's a rebuttable presumption. That means --

MS. NORMAN: A rebuttable --

THE COURT: -- that somebody --

MS. NORMAN: -- presumption --

THE COURT: -- else has to have the opportunity to rebut it.

MS. NORMAN: Correct. And I think that goes back to something that you brought up at the beginning of this hearing, which is you had asked the question of Mr. Hansen, well, does that mean that I should let this discovery go forth and that perhaps this motion is premature, and that, after the discovery takes place, should we then come back to the Court

for you to decide whether or not this motion even needs to be heard or whether a 3018 motion is required, but that perhaps the cart is being put before the horse right now, respectfully, and that all of the discovery that we've been discussing today that's going to take place regarding the very issues that would be discussed, either in a 3018 motion or an evidentiary hearing of any sort relating to the changing of votes, it would necessarily have to take place after the discovery is completed on that issue that all of the parties have just negotiated and agreed to today.

And so, at least on behalf of Williams Hart, we don't believe that a 3018 motion was necessary. To the extent the Court wants a 3018 motion and believes that that provision should be read differently, we have no problem submitting one. It's just that, by the plain language of the rebuttable presumption provision, read in conjunction with the other provisions that allow for the extension of time to submit late votes with the consent of the debtors and the plan proponents, we just -- it is not necessary just from the plain reading of it. You would have to ignore the deadline extension provisions (indiscernible) to even trigger the necessity for us to have to file one.

THE COURT: Yeah, except, as we discussed before, there is a parenthetical when they're -- in other provisions, when they are talking about extending the voting deadline. So

maybe this provision isn't as clear as people would have hoped it would be.

Does anybody else want to weigh in before I go back to Ms. Jones?

MS. BERKOVICH: Your Honor, Ronit Berkovich from Johnson & Johnson. We filed a joinder (indiscernible) with the Arnold & Itkin motion.

You know, the arguments that Ms. Jones made were very technical, in terms of why the vote changes should not be allowed without filing a motion. But you know, also think that the -- to the extent Your Honor is on the fence, I think the issue that you heard about today (indiscernible) the circumstances regarding the vote changing would, you know, support an interpretation that would suggest that perhaps allowing it to happen in an unlimited way would actually create an opportunity for mischief, and perhaps then it shouldn't be interpreted that way.

And I also think Mr. Schiavoni raised some very interesting issues, particularly as it relates to Bevan and whether they actually have claims against the estate that fit the definition of direct talc personal injury claims because that would require some sort of exposure to the debtors' products. And you know, Mr. Bevan, as I understand it, voted, you know, his inventory of 1,500 asbestos claims, some of which have (indiscernible) some of which don't have anything.

And on the ballot, the master ballot, there was a certification that, you know, these people (indiscernible) claims again, as defined in the plan. So perhaps, you know, given -- number one, I don't think Mr. Bevan filed a Rule 2019 statement. The debtors did request that of Arnold & Itkin and Williams Hart and several of the other plaintiff groups that have appeared in this case. I would -- I don't know that they've requested that of Mr. Bevan, but I think that makes -- would make sense here.

And secondly, if they were -- if I have to file a 2018 motion, maybe they would take a closer look at their 15,000 clients, to see if these people really have claims against the estate. And perhaps then the 3018 motion wouldn't just be about changing the votes, but maybe they would actually decide to withdraw some of those votes once they take that closer look. But I think there's a lot of benefits that could come from ordering them to file a 3018 motion and take a closer look at their claims. Thank you, Your Honor.

THE COURT: Well, thank you. I'm not sure that's the purpose of a 3018. If they didn't file a -- I'm getting my rules mixed up -- a 2019, and then they need to file one, then they should, as any party should.

I don't think anyone briefed to me what a "rebuttable presumption" means in probably any context. And certainly nobody suggested what it means to me in a Rule

3018(a) context. So I'm -- as I said, I'm not going to deny the motion today. I think the -- I think parties should think themselves about whether they need to file a Rule 3018. We'll get to it. If you don't file one and you needed to, well, then that might be an issue.

But I think, under -- even under the strict reading of (f), just (f), what parties have pointed me to, as to what this order says, it says there will be a rebuttable presumption that any claimant who submits a properly completed superceding ballot or withdrawal of a ballot on or before the voting deadline has sufficient cause. That's what it says.

It doesn't talk about any extension of the voting deadline, which it does in other provisions of this very order. So I think, even on the surface, there's an argument that you do not fall within this provision. And I didn't draft this.

MS. DAVIS JONES: Your Honor, just a last couple of points on that:

One, when you -- Your Honor just ended there, I think we all learned a long time ago that, when there's issues on the interpretation of a document, it's interpreted against the party that drafted it. So I think it's -- I'll leave that where it is.

Secondly, Your Honor, I'm not -- again, I'm concerned why everybody is running away from a 3018 filing. I

think all of us have done them before. This is not difficult. And I -- I have heard Ms. Norman say that they can do that and it is something that is typically done.

Your Honor, I will point out that, in our motion, we ask that, if 3018 is not complied with, that we'd ask that the votes be disregarded. That's obviously not an issue for today, we walked that back in our reply and said we have -- we'd do it without prejudice to people filing their 3018, then we'll take the appropriate discovery and take the appropriate depositions, and then we can bring the issue before the Court if there's anything there. Maybe there's nothing there. But Your Honor, I do want to reserve my rights as -- because it was in our initial motion and the Code does provide it, that, if a 3018 was required and Your Honor finds that it was required and it hasn't been filed, we can -- we will seek to disregard those votes.

Your Honor, I do think there was some suggestion by counsel, I believe it was Ms. Norman, that somehow the 3018 obligations, along with the voting discovery issues we had, should all just be conflated. Your Honor, they cannot be conflated, they are totally separate things. The only thing they probably have in common is -- to use the words of my client -- that these wave a lot of red flags. But Your Honor, the 3018 obligation is separate and part from the red flags that we're seeing in the discovery that is necessary for the

voting issues we've seen.

So, Your Honor, we'd ask that this motion be granted, that parties be directed to file a 3018, obviously, if appropriate from their perspective. And we reserve all our rights, Your Honor, once those 3018 motions are filed. We will work with the parties, Your Honor, on the discovery and on scheduling a deposition.

(Pause in proceedings)

THE COURT: Okay. I'm going to have to read the response to this. You're hearing my comments on it and you're hearing my skepticism that a Rule 3018 is not necessary, so -- but I will read the response again. Maybe I missed something, but I'm skeptical that a Rule 3018 is not required. I also have concerns as to if I'm able to enter an order that varies from the rule and even if I am, why I should. I'd like to hear more about why I should.

So this obviously -- as we have already said, this was not a focus of the hearing. I don't think it necessarily matters whether anybody objected to it or not. I think it's more of an integrity of the voting system issue. And it's -- but I can also see a situation where, in appropriate circumstances, to have to file a 3018 every time someone changes a vote might just be -- create a flurry of activity that doesn't need to be created because there's nothing inappropriate.

So I can -- I could see an argument saying that, in fact, some sort of discretion should be permitted to extend the voting deadline to permit a change of ballot. I'm not sure that's the case here, where I think there have been issues raised with respect to the change of ballots. And the language in this particular order I don't think says exactly what the debtors and plan proponents think it said or wish it had said.

Okay. What's next?

MS. POSIN: Your Honor, I think the other motion on for hearing today was the motion to quash the insurer -- or the motion of certain insurers for a protective order, Item 1 on the docket.

THE COURT: Mister -- oh, no, this is Mr. Plevin.

MR. CALHOUN: Your Honor, George Calhoun for TIG Insurance Company, International Insurance Company, International (indiscernible) Insurance Company, and a few other certain insurers. I've been nominated to take the lead on this, so the moving insurers (indiscernible) seven hours ago maybe I should have spoken up about the order in which we take things because I like being first on the docket more than being last.

Your Honor, hopefully this will be a little more simple than the other issues you've dealt with today. Unlike the voting issues, which are integral and core to the

bankruptcy process and confirmation process, the discovery served by the tort claimants on certain insurers and substantively identical deposition notices is really -- do get to the third party down-the-pike issues that you were referencing earlier.

Each of these deposition notices contain ten identical topics and when you look at those topics, which are laid out in our moving papers, it's apparent that it's just -- it's (indiscernible) petition to the legal theories and thought processes of certain insurers' counsel and information that bears only coverage issues, if it bears on anything at all. And I'll try to keep my comments brief, Your Honor, because most of the arguments are in the paper and it's late in the day.

It's safe to say, Your Honor, that the opposition gives the game away. In the conclusion in their opposition they state, "The deposition topics seek testimony from certain insurers on issues relevant to the plan objections they intend to advance, their standing to make those plan objections, and the extent of their potential liability for talc claims."

So they're quite clear that what they're seeking is testimony about legal objections and it's not yet been filed. They have some concerns about standing and insurers' liability.

As to the first of those groups, topics 7 and 8 in

particular, they're expressly seeking legal opinion of the yet-to-be-filed objections. I can appreciate why they might want that. I'd like to know what my opponents are thinking in cases also, but the time for objections is after discovery and only after insurers have evaluated that discovery, decided on what objections should be filed and what their legal issues are in connection with those theories. If an objection hasn't been filed, how can an insurer possibly testify as to facts that might support a hypothetical objection?

And, perhaps more importantly, we're not in reciprocal positions, Your Honor, because the operative facts in a confirmation hearing are the plan, the plan documents, the plan proponents' good faith, the facts that are relevant to confirmation are almost exclusively in the control of the plan proponents. Information about coverage just isn't relevant to confirmation. In fact, Your Honor has previously ruled in other contexts earlier in this case that you weren't going to permit discovery of insurance issues because it wasn't relevant to confirmation and that still remains the case today, and no amount of maneuvering alters that fundamental conclusion.

The other piece of the opposition that kind of gives the game away, the tort claimants state repeatedly that their discovery is relevant to insurers' potential liability, and they may be right about that, it may be relevant to

insurers' potential liability, but the plan is not designed to determine insurers' potential liability, nor could it be. Determination of liability requires a trial and submission of actual claims, neither of those is at issue in the plan. There already are outstanding coverage actions where the rights of insurers will be determined. That's where the coverage issues should stay. And although this is a complicated case with a number of significant and technical issues, injecting insurance liability into the mix is not necessary, nor is it appropriate here.

Topics 2, 4, and 5, Your Honor, all go to alleged efforts of insurers to estimate, project, or value talc claims. To the extent that insurer evaluated any claim -- and most of these requests are concerning prepetition efforts -- any such evaluations would be work product, they would be counsel evaluating claims. And in support of their arguments that that type of discovery might be discoverable and not privileged, they cite Your Honor to a couple of coverage cases, not to confirmation cases.

But, even putting that aside, what they're really asking for is expert testimony. To the extent that there is testimony concerning an estimate or projection of claims here, that would be the subject of expert testimony in this case. And, frankly, any estimate that may have been done, if any was done -- I don't know that any was done, but if it was and it

was done prepetition, it was done based on a completely different fact scenario than on this today where the number of claims that have been filed in this bankruptcy vastly dwarfs what existed prepetition.

The other topics they seek -- and it's in a similar vein, Your Honor -- are in topics 3 and 6 (indiscernible) that insurers provide to them information about their reserves and about reinsurance.

As we said in our papers, and I won't repeat those arguments at length, that type of information isn't even discoverable in a coverage action, both because it's irrelevant and because it's privileged. Reserve and reinsurance information, court after court after court after court has found isn't relevant to any determination of an insurer's liability because it's an accounting exercise, it doesn't have anything to do with a determination of claim. So, if it's not discoverable in a coverage action where an insurer's liability might actually be at issue, there's no reason for it to be discoverable here. It just doesn't bear on any confirmation issue.

And critically on that point, in our motion we said this is oppressive because it doesn't have anything to do with this confirmation. We're going to have to try to prepare a witness to testify about a bunch of issues that have nothing to do with the case and we made this relevancy argument. And,

in response to that, there was really no response. There was no effort to tie any of these deposition topics to any issue in the confirmation proceedings, they didn't make any.

With respect to topics 1, 9, and 10, Your Honor, those go to the insurers' claims handling limits and exhaustion of their policies and the Court has previously refused to permit discovery on those very same issues. In fact, the debtors argue that such coverage issues were wholly irrelevant to the plan, there's no reason they'd become relevant now, especially with respect to claims handling, that just has nothing to do with confirmation standards.

Although the limits and exhaustion are issues that are being litigated in the California case right now that many of the insurers are a party to, those issues aren't really an appropriate subject for deposition discovery anyway. It doesn't make any sense for us to try to figure out for each policy on a policy-by-policy basis what we think the limits are and then try to have a witness memorize that.

So if you think it's appropriate to have discovery of those issues for confirmation purposes, we suggested to the tort claimants that we provide that information in (indiscernible) response and they refused. We still think that makes more sense. We don't think it's relevant at all and we don't think you should allow it to go forward, but presume it does, under Rule 26(1)(C), you're authorized to

prescribe the discovery method other than the one selected by the party seeking discovery. They've argued that they get to pick the means of discovery, but that's just not consistent with the rule that governs discovery issues.

The last point I wanted to make, Your Honor, is that the one issue that they really seem to be going at here is that they think this discovery goes to support some sort of standing objection, none has been raised to date. What that includes is -- I think I would describe it as (indiscernible) at best.

As Mr. Plevin noted earlier today, many of the insurers have filed proofs of claim, to which no objections have been filed, to have standing as creditors. Other insurers such as my clients have entered into stipulations that their indirect claims would be filed at a later date. But the analysis of whether standing exists doesn't depend on insurers' claims handling or reserves or whether they have done anything in it prepetition with respect to particular claims.

The Third Circuit said what you have to look when evaluating standing is whether the insurers have a legally defensive interest that could be affected by a bankruptcy proceeding, and that was from the Global Industrial Technologies case in 2011. And actually (indiscernible) decision is particularly telling on this point because the

Third Circuit in that case focused on the many-fold increase in silica-related claims that were at issue there. Here, there's a much larger increase in the number of talc claims because Imerys proposes to go from a company with essentially zero liability to one in which it will establish a trust to pay billions of dollars in claims, and that's from their own disclosure statement, their own materials, that's not from insurers.

So those two facts alone, I think, are enough to establish standing, but we don't have a standing objection, there's been no effort to link any of this discovery to any sort of theory that would preclude the insurers from objecting to the plan. If insurers had somehow evaluated a claim, does that mean we don't -- we can't object to the plan? It just doesn't -- there's no linkage and (indiscernible) following that.

But in short, Your Honor, you're not going to be asked to decide any insurance coverage issues in connection with confirmation. You're very unlikely to hear from any of the excess insurers' clients as witnesses; it's not part of confirmation. And bear in mind, Your Honor, that these clients are all excess insurers for the most part, with one minor exception that we noted in the papers, and aren't called to handle claims until underlying insurance is exhausted.

So it's not clear where this is going. It seems to

be just an exercise in tit-for-tat, if you're going to take discovery of us, we're going to take discovery from you, without regard to what the purpose is, without advancing the ball. And, frankly, Your Honor, there's too much going on and too much we're trying to crowd into a very tight discovery schedule to have ten insurance depositions crowding the calendar for issues that just don't go to confirmation at all.

So, respectfully, Your Honor, we'd ask that you quash the subpoena and issue a protective order limiting the method in which that discovery is taken.

THE COURT: Thank you.

MS. FRAZIER: Hi, Your Honor, Heather Frazier, special insurance counsel to the TCC and FCR.

I think this hearing sets the table a bit --

MR. SCHIAVONI: I'm sorry, Your Honor, could I be heard for the defending parties first? Tanc Schiavoni for Century --

THE COURT: Yes, Mr. Schiavoni.

MR. SCHIAVONI: -- or for Cyprus.

Sorry. I'm very sorry to TCC, I didn't mean to interrupt them; I just had a problem working that mute button once again.

So, Your Honor, I just -- I don't want to duplicate what Mr. Calhoun had to say, but I think I'd come at this, and my clients to some extent, from a unique perspective, and that

is we twice went to the TCC and to the debtors and asked for specific discovery and specific relief related to insurance matters when we were being asked to defend cases throughout this case. We came to the Court in 2019 and we asked for the stay to be lifted at that point. There was litigation that followed and in that litigation the stay was not lifted. We were left to defend, to fund the cases, notwithstanding the issues that were pending in the California court, and in that litigation the debtors came forward and they joined the TCC in opposing lifting the stay.

And one of the things they actually said was there are three to ten causes of action in the -- this is the debtors -- in the California coverage action that specifically address which entity has coverage rights under the historical policies. And so, for that reason, the pure coverage issues that may have to do with exhaustion and interpretation of policy language, and whether or not there is actually coverage, those are exclusively in the California coverage actions. The debtors do not intend to bring those before the Court at this time.

So it's like we dealt with this very issue. They are now turning that shield -- which we wanted discovery on, to be clear, at a time where we were spending money -- they're now turning that shield into a sword. They protected themselves from having the stay lifted, us pursuing discovery

on it in the California action, by, you know, completely representing to the Court that these issues that they're now seeking 30(b)(6) on, specifically exhaustion and interpretation of the policy language, would have nothing to do with the proceedings in this court.

We then, Your Honor, came back and we said at the end of the adversary proceeding involving whether or not the debtor even owns the rights to the policies that are at issue in the case, we said, jeez, could we have copies of the transcripts of those depositions where these various debtor parties were contending that they did or did not have -- in fact have rights to those policies. And the debtors argued that the transcripts were, quote, "wholly relevant to the evaluation of the third amended plan and beyond the proper purpose of plan-related discovery."

And Your Honor granted them the relief they sought, which was to protect all of that discovery that was exchanged about whether or not the policies at issue in any way have to do with, you know, whether or not they own the policies or not -- I mean, none of that, none of that stuff would touch on coverage has anything to do with the case.

And the Court further went on to note -- or went on to note in that ruling that -- and this November 5, 2020, on line 13, "that I should be concerned that no party be given a litigation advantage in matters that aren't before this Court

by virtue of the bankruptcy proceeding."

So as I sort of read that at the time was the Court was saying, look, these issues about discovery into how the policy should be interpreted, how they should be applied, how the claims should be handled all went to issues that weren't before the Court on the third amended plan and weren't the proper scope of discovery. So having obtained the relief here, the debtors and the TCC, that they sought blocking us from access to any of that material, forcing us to defend and pay during the pendency of the case, to wait until the end of the case to go back to the California action, now they're coming and saying they want depositions on all of these topics, they want the very topics that they were precluding us from seeking discovery on. And that is most certainly a sword being turned into a shield against us on this.

But there's something else even kind of more incredible about this, from our perspective, and that is when we dealt originally at the beginning of the case with the application of Young Conaway to serve as counsel for the FCR, we brought out that Young Conaway was concurrently serving as counsel to one of our clients, had dealt on issues that were substantially related about transfers of policies in Delaware, that they were continuing to be in that engagement. In fact to this day there's no resignation from that engagement, it is sort of, you know, getting perhaps close to its end if there's

not an appeal, but that engagement is in placement. And they now have turned around and done exactly what they basically said in the engagement in -- you know, at the beginning of the case that they weren't going to do. They said then that, look, there's not an issue here about a conflict because we're not really getting into coverage issues, we're not -- they're not substantially related, we're not going to be taking discovery from our clients here. But here it's exactly -- it's like then, it's like the order was granted, and we respect the Court's order, quite obviously, that there wasn't a conflict, but the facts now are changing on the ground. They're turning and asking to depose our very client on the very issues that were in play in the Warren case. That's wrong, it would reopen the entire retention issue and create a whole nest of issues that are just not necessary here.

I'd add just two last things in closing here, Your Honor. It's not like we're sort of in a sense hiding from anything either here because we produced two witnesses. If you remember, there was an order in one -- both of them were sort of in this adversary proceeding issue, both of them were deposed about, you know, claims handling, they tried to depose them also about like questions of interpretation of policy. We've been through this. We've been down the drill already with two witnesses having been produced. Nowhere in any of the papers is there any explanation about why this isn't

cumulative, why anything else is needed beyond everything else that they already have.

The discovery that they seek, you know, from us is burdensome, but you should understand before we go down this route just how burdensome it is overall. The 30(b)(6) requests are directed specifically at the individual issuing companies. So while Mr. Calhoun represents, you know, a client here, he actually has, I think, several issuing companies, and that's true for a number of us. So there's more than ten companies here in total. It's like the notice multiples out to a number that's north of 15 for each of the individual ones. It's like we heard endless back-and-forth about whether or not an extra hour, you know, for four parties to question someone from the TCC about voting was appropriate. These are all -- these 15-plus depositions, all eight hours of inquiry into what our reserves are, our litigation reserves, these are privileged issues. How our reinsurance works, how we interpret the policies, has nothing to do with confirmation Each one of these depositions will generate further motion practice about the extent of privilege on these issues and it will reopen the issue of the retention of Young Conaway as they're pursuing depositions against their own clients here.

So we'd respectfully ask, Your Honor, that -- and, you know, specifically with regard to our client, we produced two witnesses already, they've been deposed, that should be

enough this, and they shouldn't have to carry an extra if there's anything they planned that they didn't get from us in those, but we ask for you -- that these would be quashed with our client, but also with the group in total.

Thank you.

THE COURT: Thank you.

Ms. Frazier?

MS. FRAZIER: Yes, Heather Frazier, special insurance counsel to TCC and FCR. I'll try to keep it relatively brief, I know everyone is itching to get off of here, but I think that kind of this hearing in general has set the stage for a lot of the arguments I want to make here.

The insurers just can't have it both ways. They stood up at every opportunity in this bankruptcy; they have filed 13 motions, objected to 48 pleadings, served 36 sets of discovery and asked for 18 depositions so far. We have now asked for discrete depositions of each insurer and now they are claiming that these issues are irrelevant and it is burdensome for them to produce a witness.

They are right, we have contended that insurance coverage issues are irrelevant; however, they contend that they are not, that their rights are affected by the plan, that they have objections to the plan, and we have the right to depose them about those issues.

First, I'd like to focus the Court a bit on the

standard. It is their burden seeking a protective order to point to specific reasons why that is required. It is not our burden to show relevance or why particular types of testimony should be allowed, although I will of course go through those reasons.

In general, I think we are seeking this discovery for two reasons: first, to support our case for confirmation; second, to evaluate the insurers' standing to make objections to the plan. And just to kind of take the Court through the topics as Mr. Calhoun addressed them, first with regard to plan objections and neutrality.

These requests seek the facts, facts known by insurers and are relevant to confirmation of the plan. Courts within the Third Circuit consistently hold that parties may use 30(b)(6) depositions to explore facts underlying legal theories, and every other objector in this case has agreed to testify as to the facts underlying their contentions. The insurers cannot claim that just because a fact is relevant to a legal issue it's therefore cloaked in privilege.

And I'll give the Court just one example. From the insurers' reply to this motion, that's docket entry 3962, the insurers state, quote, "The facts put forth by the tort claimants in their plan and disclosure statement demonstrate a far greater explosion in claims and talc as a new tort is much more analogous to silica than to asbestos for present

purposes."

The tort claimants might wish to question the insurers about what facts set forth in the plan support this statement, why they claim there is an explosion in claims. What do they mean by explosion in claims? What facts demonstrate that talc is more analogous to silica? All of these facts are relevant to potential objections that may be brought regarding confirmation and we are entitled to explore those issues in order to support our case at confirmation.

Topics related to basic policy information and claims handling, that's topics 1, 9, and 10, the insurers would like us to issue interrogatories here. They don't get to pick what method of discovery we do. And in fact I find it interesting that the insurers served the TCC with interrogatories and then served them with a deposition notice asking for testimony about their interrogatory answers. So --

THE COURT: Okay, but what are you going to be asking for -- well, one is super broad, but what are you going to be asking for 9 and 10? You want the name of the policy, how much is nominally left? You're going to sit there and ask some guy to go through the policies?

MS. FRAZIER: Well, and this is kind of an important point because when discussing with the insurers in the meet-and-confer process we recognized that this would be

perhaps a place where we could enter into a stipulation and we offered that up. But instead of taking us up on any sort of compromise, the insurers' position was that, if they had to present a witness on any topic, they were going to move to quash the entirety of the deposition notices.

So we did recognize that it was possible in many cases to have that type of information sought through a stipulation or some other method, but the insurers refused that offer.

THE COURT: Okay. What's topic number 1? How is that relevant to anything that's going to be in front of me at confirmation?

MS. FRAZIER: If insurers denied coverage of it prepetition, it is possible they do not have standing to object to the plan. If there is no liability under their policies, they have no interest in the proceeding.

THE COURT: Well, I'm not going to decide whether they have liability under their policies in connection with confirmation. How am I deciding that?

MS. FRAZIER: And you wouldn't have to, Your Honor, you wouldn't have to decide that. I think if --

THE COURT: Well, don't the debtors know if coverage was denied? There would have to be a letter and the debtors would have it.

MS. FRAZIER: We have some of that information, but

we don't have all of it. The debtors may have some. I know that there have been disputes about privilege, but we do not have definitive evidence from the insurers about the treatment of those claims prepetition.

I don't think -- we do not intend -- and this is another kind of meet-and-confer-process thing -- these are not eight-hour depositions, these are not complicated issues. It may be that, sure, they denied coverage, or they never received notice, there may be a simple answer, but I think we're entitled to the answer.

THE COURT: Because it goes to standing?

MS. FRAZIER: Right, because, as the insurers point out, the Third Circuit has focused on whether the insurers have a legally-protected interest that could be affected by the bankruptcy proceeding. So we are exploring what that interest is.

THE COURT: Well, the debtors think that they've got a huge interest; the debtors think there's coverage. So you want me to decide that if an insurance company sent a denial letter that they don't have standing even though the debtors say there's coverage?

MS. FRAZIER: I don't think you have to decide the coverage issue, but I think that what the insurance companies have done or the position that they have taken prepetition are relevant to considerations of whether they can object to -- if

they don't think they have any coverage obligations, why are they here? Why are we -- all day we've heard from the insurance company, but what's the objection, what's the problem if they are not going to pay for any of these claims and never were?

THE COURT: Well, because there's coverage litigation in California which has been stayed. So, until that's decided, we don't know.

MS. FRAZIER: I think that's right that they can testify about their position, we're entitled to ask them if they denied coverage; we're not asking whether it was correct, we're not asking what the Court will ultimately determine, but just like -- just like the testimony regarding what are your limits. Sure, they're going to testify about their position about what the available limits are. That's not a legal determination, that's their position.

THE COURT: Okay. So when you say handling, you're talking about did they deny coverage? Because this is a --

MS. FRAZIER: Did they deny coverage, did they reserve rights, did they --

THE COURT: Okay, did they deny --

MS. FRAZIER: -- how did they treat the claims.

THE COURT: Okay, okay.

MS. FRAZIER: So do you want to go topic by topic? I'm just trying to --

THE COURT: Yeah --

MS. FRAZIER: -- make it the most useful --

THE COURT: -- I do want to go topic by topic.

MS. FRAZIER: -- for the Court as possible. Sure. Okay.

Their topic 2, "Efforts to estimate or establish the value of talc personal injury claims."

The insurers here state that this is privileged. It may be, however, it is not always. Many times in the ordinary course of their business insurers will perform an analysis of claims in their claims handling capacity, that is not privileged. Obviously, we're not asking for privileged information, we are not asking for expert information, we made that clear.

I will note, they have not said this information does not exist, and I think it is relevant both to their standing, if they thought there was liability there, as well as to any objections they may make regarding claims value. It may also help the plan proponents to support the claim value.

THE COURT: How does it help them support the claim value?

MS. FRAZIER: Well, if the insurers have done an estimate of what their liability would be on a claim-by-claim basis, it could be supportive of what -- the values we have set and whether they're reasonable.

THE COURT: Well, I think generally other people's estimation, for example, of the value of a company is not relevant to plan confirmation, so how is this relevant to plan confirmation, what the insurance companies may have thought a claim was worth? Have they raised that issue? And I was trying to remember. As opposed to J&J, who clearly has raised valuation issues, have the insurance companies raised it?

MS. FRAZIER: We don't know. They have not raised it in the pleadings to date, but as Mr. Calhoun and Mr. Schiavoni pointed out, we don't know what objections they're going to raise. It also bears noting they have paid claims, so the amount that they've actually paid for claims --

THE COURT: Well, doesn't the debtor --

MS. FRAZIER: -- would also be relevant.

THE COURT: -- know that? Doesn't the debtor know what's been paid?

MS. FRAZIER: We have some of that information. I think that we have the right to inquire about it from the insurance company.

THE COURT: Okay. I think if the insurance company has paid claims and the debtor doesn't have that information for some reason, you can get that information.

With respect to item number 1, you can ask if they've denied coverage, if they reserved rights, but the topic of handling is a huge -- is a huge topic. I don't even

know exactly what that means. It's not a -- it cannot be used as a way to look at coverage disputes; I'm not going to permit that.

MS. FRAZIER: Understood. Okay, topics 3 and 4. And now I've added a number in my notes, so now my numbers are off. Okay, so we're on 3. Accounting treatment and reserves, as well as reinsurance, are kind of the same issue.

THE COURT: Uh-huh.

MS. FRAZIER: The topic (indiscernible) we're seeking to determine whether they believe that they have liability here. And where the insurer has denied coverage or refused to defend, the facts of a reserve has been -- courts have found is relevant to show that the insurer at least acknowledged the potential for coverage.

THE COURT: Well, but don't --

MS. FRAZIER: Here --

THE COURT: -- don't they have to set reserves in certain circumstances and what does that -- I did read some of these cases and -- that people cited to me and I don't understand how the setting of a reserve by an insurance company is an issue with respect to plan confirmation.

This talks about -- it reflects an assessment -- well, first of all, a lot of it says it's probably privileged, but I agree that you can't get the privileged information and you're going to have a lot of that. But one of these cases,

even in the coverage cases, they say this is usually irrelevant and not discoverable, and they talk about the need to set reserves for accounting purposes, the need to set reserves for maybe regulatory purposes. So how does that have anything to do with confirmation?

MS. FRAZIER: I think here where the insurers have contended, as they do in their papers, that the plan and disclosure statement have led to an explosion of claims and have inflated their potential liability for, you know, whatever an explosion means --

THE COURT: It means going from 20,000 to 80,000.

MS. FRAZIER: But if they had planned to pay their full limits, if they reserved and knew that these talc claims were going to erode the entirety of the policy, what's the objection? It makes no material difference to them.

THE COURT: Well, maybe it doesn't, but I'm trying to explain how it's relevant -- I'm trying to understand how it's relevant to confirmation. I think I had the same distinction with J&J. Historical settlement, I said yes; projections, J&J's internal, I said no. It's the same sort of thing here. Internal to the insurance companies, their setting reserves, like a prudent businessperson might or they're regulatorily required, I don't understand how that's relevant to confirmation.

Now, if the insurance companies end up filing some

objection and putting in value information, and they use this information and they give it to an expert, that's different, that's different, then it's going to be discoverable. But how is it relevant to confirmation and the plan proponents' -- the plan proponents' burden under 1129?

MS. FRAZIER: I think if Your Honor is willing to allow us to reserve our rights to the extent to, say, present the type of evidence that you just described, I think we're fine with that as to reserves and reinsurance information.

THE COURT: Absolutely, and I think the insurance companies should know that. If they're going to put their information at issue, then it's going to be discoverable.

MS. FRAZIER: Okay. So that's -- we're all the way through 6, we're moving right along.

Okay, so numbers 7 and 8, this is kind of the core of the dispute. Reasons that you contend the plan is not insurance-neutral; and, to the extent you assert or plan to assert an objection to the plan or any other plan documents, what's the basis for that objection.

And this is what I talked about at the very beginning. We're not seeking privileged information, we're not seeking legal conclusions, we're not seeking your analysis, but there are facts that underlie these contentions, just as the type of facts that I described earlier with regard to the explosion in claims. The insurers have made many,

many, many contentions in their disclosure statement pleadings, in their discovery requests, there are facts within their knowledge, I assume, that support those contentions and we are entitled to ask them what those facts are.

THE COURT: I think that's fair game. And it's limited to facts and not legal conclusions, and I think it's fair game.

MS. FRAZIER: Thank you. And then with regard to 9 and 10 -- and these are the remaining limits and erosion of limits issues, I'm happy to work with the insurers on these issues. They're going to be appearing for deposition anyway, you've established on the prior two questions, I'm happy to either ask those questions at the deposition or allow for a stipulation or interrogatory response of some sort, if that's preferable.

THE COURT: It would seem to me you'd get better information that way. And, again, I'm not thinking that these are coverage issues. I understand there's a dispute as to coverage, you're --

MS. FRAZIER: Absolutely.

THE COURT: -- I assume you're looking for here, if it was a $10 million policy, what's remaining on it? It's that kind of --

MS. FRAZIER: Exactly, what's left --

THE COURT: -- factual information without

prejudice to anybody's arguments about coverage or any other defenses that they have.

MS. FRAZIER: Absolutely right, yes. I think --

THE COURT: I think that's --

MS. FRAZIER: -- that's it.

THE COURT: -- also fair game.

MS. FRAZIER: Okay. Thank you, Your Honor.

THE COURT: Thank you.

MR. CALHOUN: Your Honor, George Calhoun for certain insurers again.

I just want to make clear, if possible, our one -- I think you suggested that they could inquire about whether or not we'd lie to reserve rights, but if the debtors don't have that information, I think it makes sense to have them confer with the debtors and then get back to us with from whom they need it because it might be from my clients, they've got all of our reservation of rights letters, it may be from some others they don't but appears somewhere else in (indiscernible) rather than waste time trying to go insurer by insurer because, as Mr. Schiavoni said, there are a lot of different insurers here and that might cut through some of this.

On 7 and 8, I just wanted to make sure that we're clear on this. We don't have any problem telling them, if there's an argument that the plan is not insurance-neutral, at

the end of the day we object to this plan, which we haven't done yet, they're asking for the reasons that we contend the plan is not insurance-neutral and that would be contained within the plan itself. It's not a fact; it's our analysis of the plan that determines that. So (indiscernible) you probably pick up that noise.

And the same is true with number 8. We haven't filed objections yet. I just don't know how to prepare a witness to testify about provisions of the plan that we find objectionable because --

THE COURT: Well, we're doing discovery here now, we're not doing discovery after objections are filed. So I don't know either and if your answer is going to be that you haven't made that decision yet, I guess you'll have to live with that, and maybe your person will get deposed again. I don't know what's going to happen, but you're in the same position that everybody else is in and you'll have to --

MR. CALHOUN: I understand that.

THE COURT: -- and you'll have to figure that out. And I am talking here about facts and if your response is, we don't have any facts, it's all in the plan, well, then that's your client's answer. I don't know.

MR. CALHOUN: Yeah, we've litigated a lot of these cases, Your Honor, and insurers have almost never testified because the burden of proof and the facts are in the

possession of the plan proponent, it just --

THE COURT: I do understand that, but these insurance companies have been very active in this case and there are some choices you have to make. And once you get active, then certainly as to any relevant information that you may have you're fair game. There's another -- you know, another way to do it too, which is just to step back and say it's going to be insurance-neutral, you know? But if it's not and you -- many of the insurance companies -- I shouldn't be that general -- many of them have been very active in these cases and I find that, as I have narrowed the topics, that the -- of the requested depositions, I find that what's remaining is relevant or it may lead -- and it may lead to some admissible evidence with respect to plan objections or standing.

MR. PLEVIN: Your Honor, this is Mark Plevin. Could I speak about topics 9 and 10 for a second?

THE COURT: 9 and 10. Mr. Plevin.

MS. PLEVIN: Those are the ones where Ms. Frazier said she would work with us. I don't know if she overlooked the fact that in February of this year she served us with interrogatories and document requests, to which we responded. And my clients, among others, responded to one of these interrogatories in March of 2021 by saying, quote, "We have not paid defense costs or indemnity for a talc personal injury

claim," unquote.

And we also said that we would and we did produce reservation of rights letters and to the FCR. And so having already said we haven't paid anything -- of course the stay has been in effect since then and we haven't paid anything while the stay has been in effect -- I don't know why that interrogatory answer isn't adequate and why would have to sit for a deposition on that.

MS. FRAZIER: Well, first of all, I'm happy to work with you, as I said, but I don't think that answers the question because your policy could have been eroded by a variety of other claims that were not talc personal injury claims that you've paid prepetition. And so the limits of that policy may or may not be the facial limits on the face of the policy that I can see.

But, again, Mark, I'm happy to work with you, and it may be that those answers are sufficient.

THE COURT: Okay. Well, I would of course expect that all of the parties will work together, that there not be unnecessary work done by any party. And if the TCC and FCR have already received information that answers these questions, then that may narrow what needs to be done.

But in the first instance, I've ruled on what I think is relevant. Whether it's already been produced, you can point to something, you can stipulate to facts, you can do

an interrogatory rather than a deposition, that's -- you all can work on offline.

Okay. So I think we've concluded today's --

MR. RAMOS: Your Honor?

THE COURT: -- hearing -- is that Mr. Ramos?

MR. RAMOS: It's Marc -- yes, it's Marcos Ramos from Richards Layton.

Your Honor, I think you're correct, we've concluded the agenda items. I was wondering if you might indulge me for two minutes for me to just give you a quick status update on one matter?

THE COURT: Yes.

MR. RAMOS: Thank you, Your Honor. The status update relates to an adversary proceeding that the debtors filed several months ago in which the Court also entered a preliminary injunction at the debtors' request. This was in connection with the Cyprus entities and the talc actions against Cyprus entities.

THE COURT: Uh-huh.

MR. RAMOS: Your Honor might recall, the preliminary injunction that you entered was set to expire at the end of June 2021, and that date was then based on the confirmation schedule that was anticipated at the time that the complaint was originally filed. Obviously, the confirmation schedule changed and earlier this month the

debtors filed a motion to extend the preliminary injunction to a date December 31st, 2021, more consistent with the expected confirmation schedule. And, in connection with that motion, the debtors also filed a motion to amend the complaint in order to add a few additional parties that had filed claims against Cyprus.

But in addition to that, Your Honor, in terms of the extended injunction, the debtors also clarified that they were only seeking the extended injunction period in favor of the non-debtor Cyprus entities, CAMC, obviously in light of the Cyprus bankruptcy filing.

So all of those filings were made earlier this month, Your Honor, and we served those out. I believe the response deadline has passed and we haven't received any responses to those. So I just wanted to alert Your Honor to the fact that those filings have been made, particularly since it's in an adversary proceeding and you may not have seen them, and the fact that we do expect in short order and in due course to hopefully file a COC in connection -- or a CNO in connection with those filings.

So I just wanted to give you that update and of course if you'd like to send the filings over, we're happy to do that as well.

THE COURT: No, I don't need them, but please contact my chambers when you file your CNO or COC, so that

it's brought to my attention and then I'll look at them. If I need the papers at that point, I'll let you know.

MR. RAMOS: Very good. Thank you, Your Honor. We appreciate --

THE COURT: Thank you.

MR. RAMOS: -- the additional time.

THE COURT: Thank you.

MS. TSEREGOUNIS: And, Your Honor, apologies, Helena Tseregounis again for the debtors. So on the notice procedures motion, am I correct in assuming that Your Honor will issue her ruling at a later time or anything else that you're waiting on from the debtors at this point?

** 1. THE COURT: No, I will get back to you. I'm not waiting for anything else.

MS. TSEREGOUNIS: Thank you, Your Honor.

THE COURT: Thank you.

Okay. Thank you very much. We are adjourned.

COUNSEL: Thank you, Your Honor.

(Proceedings concluded at 6:29 p.m.)

CERTIFICATE

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Mary Zajaczkowski June 23, 2021
Mary Zajaczkowski, CET**D-531

/s/Coleen Rand June 23, 2021
Coleen Rand, AAERT Cert. No. 341

/s/William J. Garling June 23, 2021
William J. Garling, CE/T 543

/s/ Tracey J. Williams June 23, 2021
Tracey J. Williams, CET-914

Exhibit C

to Declaration of Todd C. Jacobs
in Support of
Westport's Motion for Protective Order

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY (CAMDEN)

IN RE:	)	Bankruptcy No. 20-21257-JNP
	)	Chapter 11
THE DIOCESE OF CAMDEN, NEW JERSEY,	)	
Debtor.	)	
THE DIOCESE OF CAMDEN, NEW JERSEY,	)	Adversary No. 20-01573
Plaintiff,	)	
vs.	)	
INSURANCE COMPANY OF AMERICA, now known as C, et al,	)	Camden, New Jersey
	)	February 18, 2022
Defendants.	)	2:28 p.m.

TRANSCRIPT OF DECISION
BEFORE THE HONORABLE JERROLD N. POSLUSNY, JR.
UNITED STATES BANKRUPTCY JUDGE

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

I N D E X

(The following took place in open court at 2:28 p.m.)

THE COURT: All right. This is Diocese of Camden. It's case 20-21257.

This -- this relates to discovery disputes between the insurers and the Tort Committee. Those discovery disputes arise out of the Debtor's motion to settle -- motion to approve a settlement with insurers.

The Tort Committee has stated that it will be objecting to that settlement and has sent discovery demands to the Debtor, other Catholic entities, and insurers.

The parties have submitted, I believe mostly on the docket, but I think a couple only to chambers, letters related to those discovery disputes.

The parties have also submitted opposing proposed scheduling orders relating to discovery deadlines and filing of certain -- certain pleadings.

The Court ordered, as I said, first, for the parties to meet and confer related to the discovery issues and that meet and confer, as I understand it, led to the Committee, as well as the Debtor and the other Catholic entities, to reach an agreement related to discovery, but not as to scheduling.

The Committee and the insurers were not able to resolve their issues. The Committee and the insurers -- and the insurers submitted joint letters, but did send several

letters to the Court related to these disputes and presented argument related to the disputes at a weekly status conference, as well as at the Court's omnibus hearing -- hearing date that was February 9th. I'm considering those letters effectively as competing motions for a protective order or to compel production.

Based upon -- based upon the Committee's letter of February 7th there appear to be approximately nine areas of dispute, some of which overlap.

So going through those items from the Committee's letter, first, the Committee seeks information related to the IVCP settlements.

The insurers state that they did not participate in the IVCP program and, therefore, have no information responsive to those requests. If that is the case, the insurers can state as much in any discovery responses and the issue should be resolved.

Second, the Committee requests information related to the negotiations that were held, as well as the drafting of the settlement document, between the Debtor and the insurers. The Committee argues that this information is relevant and not privileged.

The insurers argue that the mediation privilege, FRE 408, and several other privileges, apply. I agree with both parties to an extent.

Initially, when reviewing this issue I looked at the mediation order that I entered in this case, which is Docket Number 640. The mediation order does not include any specific language related to mediation privilege, nor does it expressly or explicitly incorporate Local Rule 9019-2 which discusses mediation of adversary proceedings.

However, paragraph two of the mediation -- mediation order does provide that the mediator was appointed for the purpose -- I'm sorry, was appointed "for the purpose of globally mediating any and all issues arising in the bankruptcy case and associated adversary proceedings." And that's paragraph two from the mediation order.

Since many of the issues being mediated are directly related to pending adversary proceedings, including, as I understand it, the settlement between the Debtor and the insurers, I conclude that Local Rule 9019-2 does apply to the mediation that was held. Local Rule 9019-2 provides that any mediation communication, written or verbal, is not subject to discovery or admissible in a court proceeding. That's 9019-2(m).

Furthermore, except for an inapplicable exception, Local Rule 9019-2 also prohibits a party or participant in a mediation from disclosing to any entity or person who is not a participant in the mediation any verbal or written communications concerning the mediation, including any

document, report or other writing presented or used solely in connection with the mediation. Again, that is -- and that is unless all of the participants at the mediation and the mediator agree. That's 9019-2(k).

It's my understanding that the Committee participated in few, if any, of the mediation sessions that related to the insurers. Therefore, for the purposes of considering the local rule I conclude that the Committee was not a participant in those sessions.

Moreover, there's nothing here to suggest or has been presented to me that suggests that the mediator, Judge Linares, has consented to release of any information as required by the rule.

In In Re Tribune Company, which is at 2011 West Law 386827, Bankruptcy decision, District of Delaware, 2011, the Court considered similar issues related to multi-party mediation.

In Tribune the Court noted the strong policy in support of a mediation privilege because it encourages party -- parties and counsel to have frank discussions and to "lay their cards on the table so that a neutral assessment of relative strengths and weaknesses of their opposing positions could be made." And that's Tribune Company at page eight and it's quoting Sheldone versus Pennsylvania Turnpike Commission, 104 F. Supp. 2nd, 511, Western District of Pennsylvania, in

2000.

The Court in Tribune further noted that without such privilege parties may not agree to mediate and even if they did parties would be encouraged to be cautious and "tight lipped" which would greatly limit the effectiveness of mediation and cut against the public policy of encouraging settlements. That's from Tribune, again, quoting the Sheldone opinion.

In Sandoz versus United Therapeutic, which is 2021 West Law 5122069, District of New Jersey opinion, 2021, Judge Linares stated that the general rule is that documents prepared for and presented to a mediator are confidential and protected from disclosure.

Part of the Sandoz decision incorporated the District Court's Local Rule 301-(e)(5) which states no statements made or documents prepared for mediation shall be disclosed in any subsequent proceeding or construed as an -- as an admission.

Furthermore, documents prepared after the mediation may still be privileged if they were prepared for or in furtherance of the mediation, provided they have a clear nexus to the mediation which includes drafts of settlement proposals agreed upon at the mediation. That's from Sandoz at page three.

The parameters from Sandoz are appropriate in this

case, so I'm going to allow discovery of any discussions or documents exchanged that were not part of the mediation or do not have a clear nexus to the mediation.

In addition, I'm going to allow the Committee discovery related to the general information of the -- of the mediation such as days in which the mediation sessions occurred, the length of those sessions, and who attended those sessions.

The Committee further argues that it should be entitled to drafts of the settlement agreement and relies on the Tribune case noting that the drafts should be discoverable at least until the Debtor and insurers agree to material terms.

However, I find the decision in Sandoz to be more applicable, so the Committee will not be entitled to discover the drafts of the settlement agreements. And that was discussed in Sandoz at page three.

The Committee's third and fourth points are similar. The Committee seeks information related to the insurer's analysis of the proposed settlement and their evaluation of abuse claims.

The Committee argues that documents stating the -- stating the insurers resolve the abuse claims well below the reserve set for such claims will confirm that the Debtor is settling with the insurers for well below the policy's actual

and reasonable value.

The insurers, on the other hand, argue that the requested documents are not relevant -- relevant to the Court's analysis of the Martin factors.

I agree with the insurers. Any documents reflecting the insurer's analysis of the proposed settlement and valuation of claims is not relevant. The insurers opinions of their litigation risks or how they should set reserves for potential claims has no bearing on the factors I will consider in a Martin analysis.

Moreover, it appears from the Committee's letter that the insurers will adopt the Debtor's valuation of abuse claims. If that's -- if that's the case it resolves the issue in and of itself.

Next the Committee asks for information related to claim slotting and defenses insurers may assert.

It appears that the London market insurers have already agreed to provide this information and I do believe this information may be relevant to one or more of the Martin factors, so this information will be discoverable and should be provided subject to any other privileges that the insurers may assert.

The Committee seeks information related to other sex abuse claims, presumably from other cases that have arisen in the last 30 years. The Committee argues that this information

is relevant to the treatment and valuation of prior abuse claims and the Debtor's knowledge of the same.

The insurers object arguing the information is not relevant. I see no relevance to the claims being paid from separate cases in separate states where the payments were made under separate policies over a period of 30 years.

And I do not see how this will have any bearing on the Martin factors in this particular case and, therefore, will not require the insurers to produce this information.

The final three categories of requests relate to underwriting the insurer's reserves, potential reinsurance and claims investigation. These categories are all similar in the sense that the Committee is asking the Court to open a door to the insurance -- the insurer's business decisions.

As I previously mentioned, the insurer's opinions on litigation risks and how they set their reserves are decisions that will not impact a Martin analysis on whether this is a deal -- a deal that the Debtor should enter into.

Similarly, an insurer's decision to obtain reinsurance, their underwriting decisions, and their claims investigation are all based on similar judgments.

The Third Circuit in Mirarchi versus Seneca Specialty, which is at 564 F. App'x 652, faced a similar issue. There the appellant challenged the District Court's ruling that an insurer's loss reserve estimates were

irrelevant to the current claims and thus not discoverable.

The Third Circuit adopted the District Court's rational finding that a loss reserve is an insurer's own estimate of the amount which the insurer could be required to pay in a given claim. That's from the Mirarchi decision at 655. Both Courts deem the insurer's own opinion of their loss reserves irrelevant to the claim itself.

The final three categories of the Committee's discovery requests are there -- are similar to the requests made in Mirarchi and I do not see how the insurer's business judgment is relevant to a 9019 -- to this 9019 settlement. For those reasons, I will not require production of the underwriting of the insurer's reserves, potential reinsurance.

Lastly, everything that I deem discoverable in this decision is subject to objections of the insurers related to attorney/client work product or other privileges. If the insurers have already provided the requested materials that I'm ordering be provided they may state as much and identify when and where that information was produced.

Another issue that was between the parties, as I noted at the outset of this decision, is in regards to the scheduling of the hearing for this -- for the settlement motion.

I've reviewed and considered the parties' proposals. I've also reviewed my calendar and I'm going to set the

following deadlines. I reached the decision on these deadlines recognizing that some of the proposed deadlines that were in the parties' letters have passed. I also realize that some of these deadlines are short, but I understand that much of this discovery has already been provided.

And I note that the Debtor's and Committee's experts have both been in place and had access to many, if not all, of these important documents, for months.

Nevertheless, I encourage the parties to work together to resolve scheduling issues related to the discovery deadlines and I will consider an extension of the deadlines if cause is shown.

The following dates will be the discovery deadlines.

February 25th will be the deadline for any responses to the motion, that is either in favor of the motion or objecting to it.

March 4th will be deadline for fact discovery to conclude.

March 9th, the Committee may serve its expert report with documents that it considered or relied upon to the extent those documents haven't been provided.

March 16th, the Debtor or the insurers may present any expert reports they -- they choose to or may use, along with all documents considered or relied upon to the extent they have not been provided.

March 23rd, expert discovery will conclude.

Any discovery disputes should first be addressed by a meet and confer between the parties.

Then, if related to production of documents or responses to interrogatory, by filing of the appropriate pleadings and sending a courtesy copy of such pleadings to the chamber's email address.

If they're disputes related to scheduling the parties may submit letters. I will schedule a hearing, if I need one, as my schedule permits, but -- but will do so as quickly as possible.

March 30th, the parties shall submit their trial briefs, motions in limine, motions to preclude or any other pretrial type motions.

The parties are also to exchange exhibits. And I'm going to direct the parties to prepare a joint list of -- a joint list of exhibits and to highlight open objections to any of the exhibits where there are such objections.

April 4th at 5:00 p.m., the Debtor shall submit the exhibits to the chamber's email address and any responses -- any responses to motions in limine, or to preclude, or any other pretrial motions, those responses must be filed as well on April 4th.

I'm going to begin the evidentiary hearing on April 6th at 10:00 a.m.

I have set aside my calendar for April 6th through April 8th, but note I am not supposed to, and do not intend to, conduct an entire mini trial related to the settlement.

Finally, I am aware of the letter that Mr. Prol filed earlier this morning raising potential issues related to proper service of the motion and due process.

I'm going to ask any party that wants to file a response you may do so no later than February 22nd at noon and I will consider the due process issues at the hearing on February 23rd.

If I find that there are issues with due process the schedule that I just outlined will have to be adjusted to provide for adequate notice to all parties.

(Proceedings concluded at 2:44 p.m.)

* * *

C E R T I F I C A T I O N

I, Joan Pace, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter heard on February 18, 2022 from 2:28 p.m. to 2:44 p.m.

/s/Joan Pace February 28, 2022

JOAN PACE

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole Debtor,	Case No. 23-40523 WJL Hon. William J. Lafferty **DECLARATION OF SCOTT E. HARRINGTON**
THE ROMAN CATHOLIC BISHOP OF OAKLAND, Plaintiff, v. PACIFIC INDEMNITY, a Delaware corporation, et al., Defendants.	Adversary Case No. 23-04028

1. I am the Alan B. Miller Professor Emeritus of Health Care Management and Professor Emeritus of Insurance and Risk Management at The Wharton School, University of Pennsylvania.

2 During my long career in academia I have studied, conducted research, and taught in numerous areas of insurance, risk management, and finance, including, among others, risk management and insurance principles, insurance economics, insurance regulation, and property/casualty insurance contracts, operations, and finance. Many of my scholarly publications deal with insurance company capital adequacy and solvency regulation, including the role of property/casualty insurer claim reserves.

3. Westport Insurance Corporation has retained me to evaluate from a public policy perspective the potential effects of a ruling in bankruptcy proceedings that would require insurers to produce information regarding any reserves for potentially covered tort claims against the debtor(s).

4. Based on this evaluation and my expertise, experience, and review of materials for this matter, I conclude that such a ruling would have adverse, unintended consequences. Specifically:

(a) Requiring insurers to disclose current and/or historical reserve information for claims asserted against the debtor under policies issued to the debtor(s) or related entities in bankruptcy proceedings would be inconsistent with insurance regulation's preeminent goal of ensuring that insurers have sufficient resources to produce a high likelihood of being able to pay all covered claims.

(b) Such a requirement would provide a future incentive for insurers to select low reserve values from the range of reasonable reserves, or even to deliberately under-reserve, contrary to the goals of solvency oversight and regulation.

(c) The potential adverse consequences of requiring insurers to produce historical reserves would likely be greatest for insurers with conservative reserving practices.

Qualifications

5. I became the Alan B. Miller Professor Emeritus of Health Care Management and Professor Emeritus of Insurance and Risk Management at The Wharton School, University of Pennsylvania on July 1, 2021 after more than 40 years of studying and teaching in insurance, risk

management, and finance.

6. I have authored or co-authored nearly 90 scholarly articles and have authored or edited numerous books and monographs dealing with the economics, finance, operations, and regulation of insurance markets. I have published numerous articles on liability insurance economics and markets; on the determinants of insurance prices; on competition in insurance markets; on the effects of regulation on prices and availability of insurance coverage; on the causes of insurance affordability and availability problems; on the causes of insurance underwriting cycles and liability insurance crises; and on insurance company insolvency risk and solvency regulation. Many of my publications have dealt with property/casualty insurers' claim reserving.

7. Eight of my scholarly articles have received awards by national and international organizations. I have made research or related presentations or participated on panels concerning insurance issues at over 140 conferences. My early 2000s co-authored textbook, *Risk Management and Insurance*, published by Irwin/McGraw-Hill, contains numerous chapters on business risk management, insurance markets, and insurance contracts and design.

8. I served during 2006-2018 as a co-editor of the *Journal of Risk and Insurance,* the premier academic journal specializing in risk and insurance. I have previously served as the President of the American Risk and Insurance Association, the leading scholarly association for professors and other researchers in risk management and insurance. I also have previously served as President of the Risk Theory Society, an international association of scholars who conduct insurance and related research.

9. My expert testimony before legislative, regulatory, and judicial bodies has considered insurance company solvency and solvency regulation, the economics of insurance contract design and interpretation (including in the context of bankruptcy proceedings), insurance availability and affordability problems, and insurance pricing and underwriting, including trial testimony on six occasions.

10. Judge Jerrold N. Poslusny, Jr., United States Bankruptcy Judge for the District of New Jersey qualified me to provide testimony in the Diocese of Camden Chapter 11

Confirmation hearing on November 17, 2022. Judge Laurie Selber Silverstein, United States Bankruptcy Judge for the District of Delaware, qualified me as an expert to provide testimony on insurance and insurance economics in the Boy Scouts of America Chapter 11 Confirmation hearing on March 29, 2022.

11. I have testified on insurance matters before the U.S. Congress six times, including issues related to solvency and solvency regulation on three occasions. I served on the U.S. Treasury Department's Federal Advisory Committee on Insurance during 2011-2013. The National Association of Insurance Commissioners, the umbrella organization for state insurance regulators, twice chose me to conduct funded research projects related to insurance pricing and solvency regulation.

12. My curriculum vitae is attached as Exhibit A. Exhibit B lists the materials I have reviewed in this matter. I am being compensated at a rate of $750 an hour.

Analysis

13. Ensuring insurer solvency is the preeminent goal of insurance regulation. Insurers are required by regulation and insurance accounting principles to report estimated total liabilities, known as "loss reserves" or simply "reserves," for claims arising out of injuries that have occurred and may lead to liability but have not been paid as of the end of the accounting period.

14. The difference between an insurer's reported assets and its reserves and other reported liabilities is known as "surplus". Surplus supports writing new and renewal business and serves as a cushion or buffer in the event that the insurer's total reserves or other liabilities exceed those reported, or if the insurer's assets decline in value.

15. Reported reserves generally have three components: (1) the sum of reserves for individual cases or policies recorded in the insurer's claim files (known as "case" reserves); (2) adjustments for the extent to which the case estimates could be too low or too high based on analysis of the insurer's historical estimates, or based on other factors that could affect the difference between ultimate payments and case estimates; and (3) estimates of potential future payments arising out of claims for injuries that may have occurred but have not been reported to the insurer as of the end of the accounting period.

16. Reported aggregate reserves, or reserves recorded in the insurer's claim or other files, do not necessarily reflect the insurer's views of the merits of claims against insureds, and they do not imply that the insurer is admitting liability for, believes there is coverage for, or is waiving any rights or defenses as to those claims against insureds.

17. Reported reserves for liability coverage often depend on complex evaluations, and may be influenced by consultation with outside defense counsel for the insured and/or the insurer's own counsel. They are subject to substantial uncertainty and reflect insurers' choices from ranges of potentially reasonable estimates.

18. Conservative reserving, i.e., choosing higher values within a range of reasonable estimates, can provide a safety margin in addition to reported surplus in the event of adverse claims experience or declines in asset values. Conversely, less conservative reserving increases an insurer's likelihood of financial distress and insolvency, as does any deliberate under-reserving, which can also mask an insurer's financial weakness. Inadequate reported reserves have played a significant role in the history of liability insurer insolvencies.

19. Insurance regulators therefore pay close attention to the "adequacy" of reported reserves when assessing an insurer's financial strength. Insurance regulatory financial statements include numerous detailed exhibits dealing with reserves for different lines of insurance to facilitate assessment of reserve adequacy. Reserve adequacy is also a specific concern of insurance financial rating agencies and many insurance brokers and sophisticated corporate risk managers.

20. Requiring insurers to disclose current and/or historical reserve information for claims asserted against the debtor under policies issued to the debtor(s) or related entities in bankruptcy proceedings would plausibly increase debtor and claimant representatives' leverage in settlement negotiations and any coverage litigation with insurers. They are likely to argue, incorrectly, that the reserve information reflects the insurer's assessment of liability or the settlement value of individual claims or groups of claims. In the vein of no good deed going unpunished, insurers with more conservative current and historical reserving would likely be especially prejudiced in this regard.

21. More important, requiring such disclosure could incentivize liability insurers, whether involved in a particular proceeding or not, to be less conservative in their reserving practices in the future, or even to under-reserve for certain types of claims. This incentive would directly conflict with insurance regulation's emphasis on reserve adequacy and solvency. More generally, public policy would not be served by a ruling in bankruptcy proceedings that provides incentives for insurers to consider their litigation strategies when setting reserves. It would be best not to open this Pandora's box.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed this 18th day of March, 2024

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re: THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole Debtor,	Case No. 23-40523 WJL Hon. William J. Lafferty **DECLARATION OF KEN BATTIS**
THE ROMAN CATHOLIC BISHOP OF OAKLAND, Plaintiff, v. PACIFIC INDEMNITY, a Delaware corporation, et al., Defendants.	Adversary Case No. 23-04028

I, Ken R. Battis, declare as follows:

1. I am Vice President and Senior Claims Expert on behalf of Westport Insurance Corporation, which was formerly known as Employers Reinsurance Corporation. I am an attorney and have over 30 years of experience in these matters, having handled solely insurance-related matters since passing the Bar in 1991. Beginning in 1995, I have worked for some of the world's largest insurance and reinsurance organizations, and have handled sexual abuse and molestation claims virtually during that entire timeframe. I have been involved in every aspect of some of the most complex SAM claims, from the Boy Scouts of America, the University of Michigan and clergy cases including for Archdioceses throughout the nation, and in California. I am the claim professional with primary responsibility for childhood sex abuse claims asserted against the Diocese of Oakland under certain excess policies historically issued by Employers Reinsurance Corporation. I have personal knowledge of the matters set forth herein and, if called upon, could and would testify competently thereto.

2. In my capacity as Senior Claims Expert, I am responsible for handling legacy liability claims under policies issued by Employers Reinsurance Corporation, including childhood sex abuse claims asserted against the Diocese of Oakland that are now at issue in this proceeding. My responsibilities include setting loss and expense reserves in compliance with applicable California statutory and regulatory requirements.

3. Westport's methodology for setting loss and expense reserves is a multi-step internal proprietary process. The development of reserve forecasting philosophies and protocols is a confidential process with vital fiscal and actuarial implications that are commercially confidential, particularly given its ongoing business relationships with other insurers in this action, many of whom are Westport's business competitors. Without waiving any applicable privileges or protections afforded to this sensitive business information, generally the protocol for setting reserves will depend on the facts and circumstances of a particular claim, and may include not only my own factual investigation, but may also include consultation with outside coverage counsel, senior claim leaders, and Westport's legal, reinsurance, and/or regulatory compliance departments.

4. The particular factors impacting reserve-setting vary from case to case. Generally, factors involved in the setting reserves may include but are not limited to: the allegations of the underlying claims at issue; potential liability or damage defenses; a preliminary analysis of coverage under the policies at issue, the terms of the policies, the potential for coverage and/or applicability of coverage defenses or exclusions; potential impairment or exhaustion of applicable limits; the jurisdiction in which the case was filed; the terms of policies if any issued by other insurers; the impact of other available insurance, if applicable; actuarial or stochastic statistical predictions based on similar claims or lines of business; claim and/or policy and/or loss aggregation issues; regulatory reserve requirements in the applicable jurisdiction; and reinsurance reporting requirements, among many variables.

5. The reserve is not intended to establish the insured's liability or the settlement value of the case and does not constitute or otherwise reflect any settlement authority for a particular claim or group of claims. Rather, it is intended to fulfill Westport's statutory and commercial obligations, and to reflect the insured's hypothetical ultimate potential liability to the extent possible based on the available data. Reserves may be aggregated and/or modified from time to time as additional information becomes available or for other commercial reasons, particularly when there is insufficient factual information to evaluate reserve parameters on a claim-by-claim basis.

6. With respect to the claims at issue, my evaluation included review of the limited available materials relating to the lawsuits at issue as well as the two Westport excess policies at issue and the available information concerning policies issued by other insurers. My ability to investigate the facts of individual claims was limited by the discovery stay in the underlying coordinated proceeding, and the only factual information provided by the Diocese and its counsel was cursory at best. This prevented me from evaluating the factual basis of the claims, defenses or alleged damages in any meaningful way, and continues to hamper my ability to evaluate these cases to this day.

7. Since these cases also involved a large number of evolving liability and coverage issues, Westport retained outside legal counsel, Craig & Winkelman, LLP and Sinnott, Puebla,

Campagne & Curet, APLC to provide research and evaluation of relevant California law with respect to the pending litigation and in anticipation of the coverage litigation that soon followed. Although I was responsible for reserve-setting in consultation with others within Westport, initial reserves were based, in large part, on outside counsel's legal analysis of and advice regarding those issues, which was and continues to be inextricably intertwined with other components of my claim-handling functions.

8. As a result, the mere production of a reserve "number" would be meaningless given that it does not nor is intended to reflect "the reasonable value of these claims," as the Committee's special insurance counsel contends. To explain the actual basis of the reserve "number" would instead require Westport to disclose confidential proprietary business information, the mental thoughts and impressions of its counsel, and its outside coverage counsel's work product, among other confidential and/or irrelevant information. No court has ever ordered Westport to produce reserve information in any of the cases I have handled during my 30+ years as a claim professional for the company.

Executed this 8th day of ~~February~~ March, 2024.

Ken Battis