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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

OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO WESTPORT INSURANCE CORPORATION'S MOTION FOR PROTECTIVE ORDER

[Related to Docket No. 978]

Judge: Hon. William J. Lafferty
Date: April 26, 2024
Time: 10:00 a.m. (Pacific Time)
Place: United States Bankruptcy Court
1300 Clay Street, Courtroom 220
Oakland, CA 94612

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The Official Committee of Unsecured Creditors (the "**Committee**") of The Roman Catholic Bishop of Oakland (the "**Debtor**") files this objection (this "**Objection**") to the *Motion for Protective Order* [Dkt. No. 978] (the "**Motion**") filed by Westport Insurance Corporation, formerly known as Employers Reinsurance Corporation ("**Westport**") and *Certain Underwriters at Lloyd's, London's Joinder to Westport's Motion for Protective Order* [Dkt. No. 1035] (the "**Joinder**") filed by Certain Underwriters at Lloyd's, London, subscribing severally and not jointly to Slip Nos. C 1001 and K 66034 issued to the Roman Catholic Archbishop of San Francisco, and Nos. K 78138 and CU 3061 issued to the Roman Catholic Bishop of Oakland ("**LMI**"). In support of this Objection, the Committee states as follows:

PRELIMINARY STATEMENT[1]

1. Ignoring several of this Court's prior rulings, which followed hearings during which Westport remained silent, Westport insists that it should be excused from producing unredacted documents relating to reserve information which are responsive to the Requests approved by this Court.

2. Yet, each of Westport's arguments supporting its inappropriate refusal to comply with the Court's orders is meritless. In fact, this Court *already ruled* on multiple occasions that reserve information is relevant, within the parameters of Bankruptcy Rule 2004 discovery, and will be useful to a mediation process. Westport's arguments regarding privilege, confidentiality, and public policy are similarly unavailing and should be overruled.

3. Along with the Motion, Westport submitted testimony from two witnesses—one fact and one (purported) expert—but indicated that it expects the Court to accept the testimony and argument relying on the testimony while refusing (i) to present the witnesses for cross examination or (ii) present the witnesses for a deposition. The testimony by the witnesses (in the Declarations), and the related legal argument relying on that testimony in the Motion, should be stricken and not considered by this Court. Attached hereto as **Exhibit A** is a copy of the brief included in the Motion, which highlights the statements and arguments that are dependent on the

[1] Capitalized terms not defined in this Preliminary Statement shall have the meanings set forth herein.

untested and inadmissible evidence submitted by Westport. The Committee requests that the highlighted portions of the brief, along with the full Declarations, be stricken and not considered by the Court, and that Westport, and any other Insurer, be precluded from referring to, commenting on, or introducing any evidence relating to the Declarations at the hearing on the Motion.

4. Alternatively, if the Court is inclined to consider the testimony contained in the Declarations, and the statements and arguments based thereon, the Committee must have the opportunity to (i) depose and cross examine the witnesses live, and (ii) submit testimony of one or more competing witnesses. Although the Committee *does not* believe evidence is necessary for the Court to rule on the Motion, the Committee must be given the opportunity to probe and respond to the evidence submitted by Westport if the Court is inclined to consider it.

5. For the reasons set forth herein, the Committee requests that the Court deny the Motion and require Westport to produce documents responsive to each of the Disputed Requests. Westport should be further ordered to reimburse the Debtor's estate for the costs associated with the Motion.

RELEVANT BACKGROUND

6. The discovery dispute started over six months ago and involves a myriad of motions and machinations summarized in the following pages.

7. On October 5, 2023, the Committee filed *The Official Committee of Unsecured Creditors Ex Parte Application for Federal Rule of Bankruptcy Procedure 2004 Examination of Insurers* [Dkt. No. 502] (the "**Rule 2004 Motion**").[2]

8. Despite the Court having entered the *Order Approving Revised Confidentiality Agreement and Stipulated Protective Order* [Dkt. No. 331] (the "**Original Confidentiality Order**") on August 4, 2023, on October 11, 2023, certain Insurers, including Westport, filed the *Moving Insurers' Motion for Court's Approval of Confidentiality and Protective Order* [Dkt. No. 523] (the "**Confidentiality Motion**"). Through the Confidentiality Motion, the Insurers, including

[2] Capitalized terms not defined herein shall have the meanings set forth in the Rule 2004 Motion.

Westport, sought the Court's approval of a confidentiality order in a different form and with different protections than that in the Original Confidentiality Order.

9. On October 11, 2023, Westport, Insurance Company of North America, Pacific Indemnity Company, and Pacific Employers Insurance Company, filed the *Insurers' (I) Preliminary Statement & Response to Committee's 2004 Motion and (II) Request for Court to Abstain Entry of an Order in Connection Therewith Pending Further Discussion* [Dkt. No. 521] (the "**Insurer Preliminary Objection**").

10. Prior to the Hearing (defined below), the Committee met and conferred with the Insurers and the Debtor in an attempt to consensually resolve the Rule 2004 Motion. At the conclusion of the meet and confer, a resolution could not be reached.

11. On October 12, 2023, the Debtor filed a response [Dkt. No. 532] in support of the Rule 2004 Motion and requested that any order granting the Rule 2004 Motion "require all responsive, non-privileged documents produced to the Committee be contemporaneously produced to the Debtor" [Dkt. No. 532 at 2].

12. On November 1, 2023, the Insurers, including Westport, filed the *Insurers' Objection to Committee's Rule 2004 Motion Seeking Discovery from Debtor's Insurers* [Dkt. No. 571] (the "**Insurer Objection**").

13. On November 7, 2023, the Committee filed a reply in further support of the Rule 2004 Motion [Dkt. No. 583].

14. On November 10, 2023, certain insurers filed a sur-reply in further support of the Insurer Objection [Dkt. No. 604].

15. On November 14, 2023, the Court held a lengthy hearing during which it considered the Rule 2004 Motion, among other motions (the "**Hearing**").

16. At the conclusion of the Hearing, the Court granted the Rule 2004 Motion with respect to a narrower subset of documents than originally requested in the Rule 2004 Motion, without prejudice to the Committee's ability to request the remaining documents at a later date.

17. The Court specifically found that certain categories of documents—namely, claim files, underwriting information, and reserves—were relevant to the Committee's investigation and granted the Rule 2004 Motion with respect to those categories, along with other categories which the Insurers agreed to (as set forth on the record at the November 14, 2023 hearing, the "**Rule 2004 Ruling**").

18. Following the Hearing and Rule 2004 Ruling, the Committee narrowed the requests in the subpoenas attached to the Rule 2004 Motion in accordance with the Rule 2004 Ruling.

19. On December 7, 2023, at the Court's direction, the Committee met and conferred with the Insurers regarding the form of the subpoenas and made certain changes based on input from the Insurers. However, the parties did not reach complete agreement regarding the form of the subpoenas.

20. On December 15, 2023, LMI filed a motion for reconsideration of the Rule 2004 Ruling [Dkt. No. 697] (the "**Motion to Reconsider**"). No other Insurer joined in the Motion to Reconsider.

21. During a hearing on January 9, 2024, the Court held a status conference in connection with the Rule 2004 Motion and Motion to Reconsider, during which the Court reaffirmed that it had already ruled on relevancy issues with respect to the Rule 2004 Motion but determined that it would leave the Motion to Reconsider on the calendar for the January 31, 2024 hearing date.

22. On January 18, 2024, the Court entered the *Order Granting the Official Committee of Unsecured Creditors' Ex Parte Application for Federal Rule of Bankruptcy Procedure 2004 Examination of Insurers* [Dkt. No. 796] ("**2004 Order**"), which approved the form of subpoenas to be served on the Insurers containing requests for documents and information as approved by the Court (the "**Requests**").

23. The 2004 Order requires Westport to produce documents responsive to the Requests within forty-five days of entry of the 2004 Order.

24. On January 19, 2024, the Committee sent a subpoena as permitted by the 2004 Order (the "**Subpoena**") to Westport's counsel via email. On January 22, 2024, Westport's counsel confirmed acceptance of service of the Subpoena [Dkt. No. 838 at 2].

25. On January 30, 2024, after objections and a hearing relating to the Confidentiality Motion, the Court entered the *Confidentiality and Protective Order* [Dkt. No. 832] (the "**Confidentiality Order**"), which governs the "production, review, disclosure, and handling" of any material designated as confidential or highly confidential in the Chapter 11 Case and related adversary proceeding [Dkt. No. 832 at 1].

26. On February 5, 2024, Westport served its responses and objections to the Subpoena (the "**Responses and Objections**"), whereby Westport refused to produce documents responsive to Request #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."), Request #7 ("Documents sufficient to show Your current reserves for each of the Abuse Claims tendered by or on behalf of RCBO to You."), and Request #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.") (Request #4, Request #7 and Request #8 are referred to collectively herein as the "**Disputed Requests**"). *See Declaration of Blaise S. Curet in Support of Motion for Protective Order* [Dkt. No. 978-1] (the "**Blaise Decl.**") Ex. B.

27. On February 12, 2024, the Court denied the Motion to Reconsider. During the oral ruling on the Motion to Reconsider, the Court reiterated that the Requests were relevant and "fair game," noting that the information sought in the Requests is "the mirror image of the claim information," which the Insurers obtained based on their claim that such information was necessary to a productive mediation. *See Declaration of Betty Luu in Support of LMI's Motion for Stay Pending Appeal of Order Granting the Official Committee of Unsecured Creditors' Ex Parte Application for Federal Rule of Bankruptcy Procedure 2004 Examination of Insurers* [Dkt. No.

907-1] (the "**Luu Decl.**") Ex. A, at 13:1–3, 14:10–18. The Court further emphasized the importance of exchanging this information to assist in entering mediation with the "optimum amount of information." *Id.* at 14:14.

28. On February 14, 2024, the Court entered the *Order Denying Motion to Clarify or, in the Alternative, Amend, Alter, or Reconsider the Court's Oral Ruling on the Official Committee of Unsecured Creditors' Ex Parte Application for Federal Rule of Bankruptcy Procedure 2004 Examination of Insurers* [Dkt. No. 875].

29. Also on February 14, 2024, the Committee sent Westport a deficiency letter in response to its Responses and Objections. Blaise Decl., Ex. C.

30. On February 20, 2024, Westport sent the Committee another letter, again refusing to produce documents responsive to the Disputed Requests. *Id.*, Ex. D.

31. On March 4, 2024, Westport electronically produced certain documents responsive to the Requests, comprised of copies of insurance policies, coverage letters, and claim files. Westport's March 4 production did not include a privilege log.

32. On March 18, 2004, Westport filed the Motion. The Motion relies on, and attaches, *inter alia*, (i) a substantive factual declaration of Ken Battis, Vice President and Senior Claims Expert of Westport (the "**Battis Declaration**"), and (ii) a declaration of Scott E. Harrington, a purported expert witness (the "**Harrington Declaration**" and together with the Battis Declaration, the "**Declarations**").[3]

33. On March 20, 2024, the Committee filed the *Motion of Official Committee of Unsecured Creditors to Enforce the Rule 2004 Order and Compel Compliance with Subpoenas* [Dkt. No. 996] (the "**Motion to Enforce**").[4]

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[3] If the Court is inclined to consider Mr. Harrington's testimony, the Committee reserves the right to (i) challenge Mr. Harrington's testimony and purported expertise on the issues discussed in his declaration and (ii) seek to retain an expert to submit competing expert testimony.

[4] Westport indicates in the Motion that it has no documents responsive to Request #4. Previously, however, in the Responses and Objections, Westport indicated it would not produce documents responsive to Request #4. *See* Blaise Decl., Ex. B. The Committee intends to address this Request, including whether a sworn certification regarding Westport's search for such documents and the results of such search will be provided, and other deficiencies in

34. On March 22, 2024, Westport produced a privilege log (the "**Privilege Log**") listing approximately 100 documents. *See* Kaplan Decl.[5], Ex. A.

35. On March 28, 2024, the Committee served a deficiency letter on Westport relating to the Privilege Log (the "**Privilege Log Deficiency Letter**"). *Id.*, Ex. B.

36. On April 9, 2024, Westport responded to the Privilege Log Deficiency Letter, in which it, *inter alia*, accused *the Committee* of seeking to re-brief and re-litigate issues relating to the Subpoena (the "**April 9th Letter**"). *Id.*, Ex. C.

37. On April 9, 2024, LMI filed the Joinder.

38. On April 10, 2024, the Court held a status conference in connection with the Motion, and particularly regarding the Declarations. During the status conference, Westport acknowledged that evidence was not necessary for the Court to reach a decision on the Motion, however continued to insist that the Court should consider the testimony of Mr. Battis and Mr. Harrington, through the Declarations, without cross examination or depositions in connection with such proposed testimony. Ultimately, the Court postponed a decision on the evidentiary disputes to a further status conference set for April 23, 2024.

OBJECTION

I. The Court Should Not Consider the Declarations or Argument Based on the Declarations.

39. Westport conceded in its statements both to the Committee and the Court that it does not believe evidence is necessary for a decision on the Motion, yet Westport attempts to submit evidentiary support in the form of the Declarations.

40. Westport seeks the Court's consideration of testimony of both a fact witness and an expert witness relating to its refusal to comply with the Court's 2004 Order. However, Westport

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the production through its Motion to Enforce, if the outstanding issues cannot be resolved consensually in advance of a hearing on the Motion to Enforce.

[5] Citations to the "**Kaplan Decl.**" herein refer to the *Declaration of Michael Kaplan in Support of Official Committee of Unsecured Creditors' Objection to Westport Insurance Corporation's Motion for Protective Order* filed simultaneously herewith.

further asserts that such evidence should be accepted by the Court without challenge—either through a deposition or through cross examination. This proposed procedure is improper and prejudicial to the Committee, and it should not be permitted.

41. Initially, the Declarations are hearsay—out of court statements made for the truth of the matter asserted. *See* Fed. R. Evid. 801(c). As such, they cannot be considered by this Court. Fed. R. Evid. 802.

42. Without the opportunity to further understand and/or to challenge the statements made in the Declarations (or the qualifications of the witnesses), the Declarations should not be considered. *Cf. Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). However, ***the Motion can be decided without consideration of the Declarations or the statements and arguments based thereon.*** To do so, however, the Court must strike and not consider (i) the Declarations, (ii) statements and arguments in the brief relying on the testimony contained in the Declarations, or (iii) statements and arguments of counsel parroting or relying on the Declarations. Attached hereto as **Exhibit A** is a copy of the brief attached to the Motion which highlights, in yellow, the portions of the brief that must be stricken and not considered as they are based on the Declarations. This is the most cost-effective and straightforward procedure for making a determination on the Motion.

43. However, if the Court is inclined to consider the statements made by Mr. Battis and/or Mr. Harrington, the Committee has the right to investigate and probe the statements and opinions made in the proposed testimony. *See, e.g.*, Fed. R. Civ P. 26(b)(4) ("A party may depose any person who has been identified as an expert whose opinions may be presented at trial.").

44. The Court should not accept the testimony of Westport's witnesses, and in particular its purported expert witness, without question. For example, and especially troubling, the Harrington Declaration purports to attach Mr. Harrington's curriculum vitae and list of materials reviewed in preparation of the Harrington Declaration, but neither are actually provided.

45. Mr. Harrington's qualifications as listed in the Harrington Declaration require further context, and opportunity for questioning and impeachment as well. For example, Mr. Harrington has already been found *unqualified* to offer opinions he submitted in other cases. In *In re Boy Scouts of America and Delaware BSA, LLC*, Judge Silverstein found that "[a]s a life-long academic, Professor Harrington has never advised an insurance company on risk, assisted or participated in insurance coverage litigation or advised whether to pay a claim and he does not know how insurers actually participate in the defense of any claim." *In re Boy Scouts of America and Delaware BSA, LLC*, No. 20-10343 (LSS), Dkt. No. 10136, at 225 (Bankr. D. Del. July 29, 2022).

46. With respect to Mr. Battis, the Committee has had no opportunity to question, for example, Mr. Battis's involvement in preparing Westport's reserves, or to further inquire regarding the statements made in the Battis Declaration.

47. As such, if the Court does not strike the Declarations and portions of the brief highlighted in **Exhibit A** and prohibit Westport from relying on such statements at the hearing, (i) Mr. Battis and Mr. Harrington must be presented for deposition prior to the hearing, and (ii) Mr. Battis and Mr. Harrington must be made available for live cross examination at the hearing on the Motion. In addition, the Committee expressly reserves the right to seek to submit competing expert testimony, if it deems additional expert opinion is necessary or would be beneficial to the Court.

II. Westport's Request for a Protective Order Should Be Denied.

48. At its core, the Motion asks the Court to (again) reconsider its prior rulings—a request which was already denied when sought by LMI. Considering the Motion for its true purpose as a request for reconsideration, Westport cannot meet its high burden.

49. Even considering the Motion under Westport's purported purpose (for a protective order), it, as the moving party, has the burden of showing good cause and specifically "showing specific prejudice or harm will result if no protective order is granted." *Woodway USA, Inc. v. LifeCORE Fitness, Inc.*, No. 22CV492-JO (BLM), 2023 U.S. Dist. LEXIS 212479, *6 (S.D. Cal.

Nov. 29, 2023) (citations omitted). The Motion neither sets forth this standard nor attempts to satisfy it.

50. Courts in the Ninth Circuit "adhere to a fairly narrow standard," in furtherance of the public policy against allowing parties to re-argue questions that have already been decided, and will routinely deny motions for reconsideration unless they find "(1) an intervening change in the law; (2) additional evidence that was not previously available; or (3) that the prior decision was based on clear error or would work manifest injustice." *SEC v. Schooler*, Case No. 3:12-cv-2164-GPC-JMA, 2014 U.S. Dist. LEXIS 104819 at *2 (S.D. Cal. July 30, 2014) (citations omitted). Westport cannot satisfy any of these requirements and are purely attempting to re-litigate the Rule 2004 Motion—a position contrary to applicable law and public policy.

51. Instead, Westport's 640 page pleading (i) reiterates arguments that were already fully litigated before this Court and (ii) makes new arguments relating to privilege, confidentiality, and public policy which this Court should overrule.

52. Because Westport has not shown any particularized harm that would befall it if required to comply with the Court's 2004 Order, it has not met its burden to show "good cause," and the Motion must be denied.

A. The Court Already Ruled on the Permissibility of the Requests Under Rule 2004, and the Relevance of the Information Sought, Including with Respect to Mediation

53. This Court already made several clear rulings on the relevancy and permissibility of the scope of the Requests which, pursuant to Bankruptcy Rule 2004, are permitted to be in the nature of a broad, fishing expedition. *See Rigby v. Mastro (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").

54. Indeed, the Court has already ruled on multiple occasions that the information is relevant and necessary for the possibility of a consensual resolution of this Chapter 11 Case and,

in fact, limited the breadth of the requests initially sought by the Committee in the Rule 2004 Motion.

55. Westport had a full and fair opportunity to raise any and all issues relating to whether the information responsive to the Disputed Requests was permissible or would have the expected result. Indeed, Westport signed on to the Insurer Preliminary Objection and the Insurer Objection and chose to allow another Insurer to argue all the issues it found relevant at the Hearing.

56. Following that opportunity, the Court (i) issued the Rule 2004 Ruling, (ii) entered the Rule 2004 Order, and (iii) reinforced its ruling that the Requests seek relevant information. *See, e.g.*, Kaplan Decl., Ex. D (Tr. of Hr'g at 112:1–6, Jan. 9, 2024) ("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."); Luu Decl., Ex. A (Tr. of Hr'g at 13:1–3, 14:10–18, Feb. 12, 2024) (wherein the Court reiterated that the Requests were relevant and "fair game," noting that the information sought in the Requests is "the mirror image of the claim information," which the Insurers obtained based on their claim that such information was necessary to a productive mediation).

57. Westport's arguments in the Motion that the information requested is unnecessary amounts to nothing more than an untimely request for reconsideration of the Rule 2004 Order and should be overruled on that basis alone.

58. Even if Westport's arguments that producing information responsive to the Disputed Requests (and required by Court order) would not advance mediation were correct (which is not a requirement for production under Bankruptcy Rule 2004 in any event), an argument that the information sought may be unnecessary is not a demonstration of particularized harm worthy of a protective order or quashing a subpoena. *See Woodway*, 2023 U.S. Dist. LEXIS 212479, at *6.

59. As a result, Westport's relevance and usefulness arguments should be overruled.

B. The Information Withheld by Westport Is Not Privileged

60. Westport, as the party asserting privilege, has the burden to prove entitlement to withholding disclosure on a document-by document-basis. *See* Fed. R. Civ. P. 26(b)(5)(A); Fed. R. Bankr. P. 7026; *see also Brandt v. nVidia Corp. (In re 3dfx Interactive, Inc.)*, 347 B.R. 394, 402–03 (Bankr. N.D. Cal. 2006) ("A party claiming a privilege has the burden of establishing that a particular document is privileged. The information in a privilege log must be sufficiently specific to allow a determination of whether each withheld document is or is not [in] fact privileged." (alteration in original and internal citations and quotations omitted)).

61. Federal Rule 26(b)(5)(A), made applicable in bankruptcy discovery through Bankruptcy Rule 7026, provides:

> *Information Withheld*. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party 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.

62. Rather than attempting to meet its burden, Westport takes the position that information responsive to the Disputed Requests is *per se* privileged. Further, Westport ignores this Court's prior statements that there was not "anything necessarily categorically confidential or privileged about that information." Luu Decl. Ex. A, at 14:18–20. As such, a categorical ruling that the information is privileged, without the opportunity to challenge the applicability of privilege on a document-by-document basis, is inappropriate.

63. Although Westport belatedly produced a privilege log, it did not provide sufficient information to allow the Committee to make a determination as to the merits of the privilege assertions. For example, Westport's privilege log contains indecipherable assertions of privilege including "Communication regarding privileged information." *See* Kaplan Decl., Ex. A. Presumably, at least certain of these entries in the privilege log relate to the Disputed Requests,

however, it is unclear how many (or if all) the information withheld on this basis relates to the Disputed Requests.[6] Regardless, such descriptions are insufficient and do not enable the Committee to evaluate the privilege assertion.

64. Westport's claim of categorical privilege also ignores the California statute and regulations that require reserves to be *computed and maintained, and reported*, as set forth in the applicable state laws and regulations. *See* Cal. Ins. Code § 923.5 (West 2011); Cal. Code Regs. tit. 10, § 2319.2; Cal. Code Regs. tit. 10, § 2319.4. It is unclear how a reserve amount, *which must be reported in the manner and form prescribed by the Commissioner*, can be privileged, or in any event how that privilege is not waived pursuant to the mandatory disclosure and reporting provided for in the statute. Cal. Ins. Code § 923.5 (West 2011).

65. Westport's argument further disregards the line of case law where reserves information *was required to be produced*. *See, e.g.*, *Bernstein v. Travelers Ins. Co.*, 447 F. Supp. 2d 1100, 1115–16 (N.D. Cal. 2006) (concluding that insurers' reserves and communication about reserves were discoverable in a bad faith case alleging that insurers delayed payment and made excessive demands for proof of loss in attempt to secure low-ball settlement); *see also Everest Nat'l Ins. Co. v. Santa Cruz Cnty. Bank*, No. 15-cv-02085-BLF (HRL), 2016 U.S. Dist. LEXIS 149975, at *2 (N.D. Cal. Oct. 28, 2016) (finding reserve information relevant to whether insurer acted in good faith); *Lipton v. Superior Ct.*, 48 Cal. App. 4th 1599, 1616 (Cal. Ct. App. 1996) ("Lipton is entitled to discovery of the requested loss reserve information unless the trial court can, as a matter of law, conclude (as to each separate item of information) that it is not relevant to the subject matter or is not calculated to lead to the discovery of admissible evidence in Lipton's bad faith action."). Indeed, if reserve information was *per se* privileged, it would never be ordered to be produced in other instances.

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[6] Westport's April 9th Letter confirms that "nearly half" of the entries on Westport's Privilege Log relate to reserve information. *See* Kaplan Decl., Ex. C. The Court's ruling on this Motion and the Motion to Enforce should guide the parties to a resolution of any outstanding privilege disputes unrelated to the Disputed Requests (if such privilege assertions and associated disputes exist). The Committee reserves the right to raise further disputes relating to Westport's Privilege Log if a resolution cannot be reached.

66. For the foregoing reasons, the Committee requests that this Court deny Westport's request in the Motion for *carte blanche* authority to withhold documents responsive to the Disputed Requests on the basis of privilege.

C. Any Confidentiality Concerns Are Addressed Through the Confidentiality Order Entered by the Court.

67. At the Insurers' insistence, and after litigating the issue at length, the Court entered the Confidentiality Order, which governs the production and handling of information designated as confidential or highly confidential. As such, confidentiality does not provide a basis for withholding information, but rather documents must be produced subject to and in compliance with the Confidentiality Order.

68. Even the cases Westport cites do not support its position that reserves should be protected from discovery in this Chapter 11 Case. *See Dobson v. Twin City Ins. Co.*, No. SACV 11-0192-DOC (MLGx), 2011 U.S. Dist. LEXIS 144394, at *9–11 (C.D. Cal. Dec. 14, 2011) (determining under the narrower federal rules—*not* under Rule 2004—and without reference to any confidentiality orders in the case, that discovery of reserves was not permitted where, unlike here, there has been no explanation as to why the information is necessary); *Aspen Specialty Ins. Co. v. Nucor Corp.*, 19 CVS 19887, 2022 NBC LEXIS 32, at *7, *10–12 (N.C. Super. Apr. 22, 2022) (analyzing under the North Carolina Rules of Civil Procedure (which are inapplicable here) whether reserve information was *relevant*, and making no determination based on propriety). In fact, in *Estate of Mali v. Federal Insurance Co.*, No. 3:06-CV-01475 (EBB), 2011 U.S. Dist. LEXIS 64319, *3–5 (D. Conn. June 17, 2011) (cited by Westport), the court's decision was whether reserve information was admissible *after it had already been produced in discovery*, and is therefore irrelevant to Bankruptcy Rule 2004 discovery in this Chapter 11 Case.

69. Further, Westport has not described any irreparable harm that would befall it if such information were shared with the Debtor and the Committee (neither of whom are competitors of Westport).

70. Just as the Debtor and Committee are required to share sensitive information—indeed there is arguably no information more sensitive than the excruciating details of claims of sexual abuse—Westport must be required to produce information, even if it deems that information sensitive or confidential. That is precisely the reason the Confidentiality Order was entered: to provide a structure and process for designating information produced as confidential and for parties to object to such designations where appropriate.

71. As such, even if the Confidentiality Order were somehow insufficient to govern the sharing of information by the Insurers (in which case, it is unclear what the purpose of the Confidentiality Order is), the undescribed potential harm to Westport in sharing the information would be outweighed by the importance to a resolution of this Chapter 11 Case of sharing the requested information, particularly in light of the protections offered by the Confidentiality Order.

72. Because the Confidentiality Order is controlling, a protective order as sought by the Motion is unnecessary, and the Motion should therefore be denied.

D. Public Policy Does Not Support Reconsideration of the Court's Rule 2004 Order.

73. Westport's public policy argument should similarly be disregarded.

74. Despite fulsome briefing and argument before this Court, Westport's public policy argument was not previously raised by Westport in connection with the Rule 2004 Motion or subsequent orders and rulings. Such arguments were therefore waived and cannot be raised at this stage.

75. This argument further amounts to an untimely motion for reconsideration, on new grounds, which should not be entertained by this Court.

76. Regardless of Westport's timing, however, this argument still fails for several independent reasons.

77. First, Westport's argument does not demonstrate, as required when seeking a protective order, *any* harm that might befall it if it is required to produce documents responsive to the Disputed Requests. For this reason alone, a protective order should not be granted.

78. Second, Westport's argument rests on the implication that insurers might not honestly abide by their statutory duties to accurately calculate reserves if they know such information might be discoverable. While the Committee hopes that such an argument is not reflective of the views or practices of any Insurer in this Chapter 11 Case, it underscores the need for the information sought in Request #8 (documents and communications relating to the settling, calculating, analysis, adjustment, investigation, evaluation of, and decision-making process with respect to reserves).

79. In addition to the ethical concerns with Westport's reasoning, this argument is belied by the plethora of case law—which has been cited by both the Committee and other Insurers—where courts have ordered the production of reserve information. *See, e.g.*, *Bernstein*, 447 F. Supp. 2d at 1115–16; *Everest Nat'l Ins. Co.*, 2016 U.S. Dist. LEXIS 149975, at *2; *Lipton*, 48 Cal. App. 4th at 1616.

80. For Westport's argument to be given any credence (and for any insurance company to alter its behavior with respect to calculating and establishing reserves), reserve information would need to be held under lock and key *under all circumstances*. Because there is *always* the possibility that reserve information may need to be produced in litigation, this Court's ruling will not impact the behavior of insurance companies broadly.

For the foregoing reasons, the Committee requests that this Court (i) strike the Declarations and portions of the brief highlighted in the attached **Exhibit A** and prohibit counsel from relying on such statements at the hearing, or alternatively permit the Committee to depose and cross-examine Mr. Battis and Mr. Harrington, (ii) deny the Motion and Joinder and require Westport and LMI to produce documents responsive to the Disputed Requests pursuant to the 2004 Order, and (iii) order Westport to reimburse the Debtor's estate the costs associated with objecting to the Motion.

Dated: April 11, 2024

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Exhibit A

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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

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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

[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)

[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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