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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re:

THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole,

Debtor.

Bankruptcy Case No.: 23-40523 WJL

Hon. William J. Lafferty

Chapter 11

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING SEVERALLY AND NOT JOINTLY TO SLIP NOS. CU 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'S OPPOSITION TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' MOTION TO ENFORCE THE RULE 2004 ORDER AND COMPEL COMPLIANCE WITH SANCTIONS

Date: April 26, 2024
Time: 10:30 a.m.
Place: United States Bankruptcy Court
1300 Clay Street
Courtroom 220
Oakland, CA 94612

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Certain Underwriters at Lloyd's, London, subscribing severally and not jointly to Slip Nos. CU 1001 and K 60034 issued to the Roman Catholic Bishop of San Francisco, and Nos. K 78318 and CU 3061 issued to the Roman Catholic Bishop of Oakland ("Underwriters"), hereby file this opposition to the Official Committee of Unsecured Creditors' ("Committee") Motion to Enforce the Rule 2004 Order and Compel Compliance with Subpoenas ("Motion to Compel"). In support of this opposition, Underwriters respectfully state as follows:

I. PRELIMINARY STATEMENT

The Motion to Compel filed by the Committee should be denied for the following reasons:

- The Committee seeks to compel information that is not in Underwriters' possession;
- The Committee seeks to compel information protected from disclosure by the Attorney-Client Privilege, the Work Product Doctrine, the Litigation Privilege, and Trade Secret Privilege; and
- The Committee failed to meet and confer in good faith regarding the Motion to Compel.

The Committee's request for costs and fees should also be denied because it failed to meet the stringent requirements of Civil L.R. 37-4 by failing to demonstrate the efforts made to secure compliance and itemize with particularity its fees and costs. Indeed, no such efforts were made. Accordingly, the Motion to Compel should be denied in full.

II. RELEVANT FACTS

A. Underwriters Policies

Underwriters subscribed, severally and not for the other, as their interests may appear, to certain insurance policies. On those policies (a) the Roman Catholic Archbishop of San Francisco is a Named Assured and certain Diocese-related entities were also Assureds, effective for periods from March 12, 1962, to October 25, 1963, and (b) the Roman Catholic Bishop of Oakland is a Named Assured and certain Diocesan-related entities were also Assureds, effective for periods from October 25, 1963, to October 25, 1966 (collectively, "Underwriters Policies"). The Underwriters Policies provide excess indemnity coverage above underlying insurance with limits of $500,000 any one person / any one occurrence.

B. The Bankruptcy and Adversary Proceeding

On May 8, 2023, The Roman Catholic Bishop of Oakland ("Debtor") filed a voluntary chapter 11 petition for relief under Title 11 of the Bankruptcy Code ("Bankruptcy Case").[1]

On June 22, 2023, the Debtor commenced an insurance coverage adversary proceeding against Underwriters, among other insurers ("Coverage Action").[2] On June 30, 2023, the Committee moved to intervene in the Coverage Action.[3] The Court approved the Committee's intervention, on September 7, 2023.[4] However, the Committee did not file a complaint in intervention, hence it is neither a plaintiff nor a defendant in the Coverage Action, and the Court did not allow the Committee to take discovery in the Coverage Action.[5] The Committee also did not seek derivative standing to pursue the Coverage Action on behalf of the Debtor. Thus, only the Debtor has standing to pursue its claims for insurance.

On June 26, 2023, the Debtor filed an amended complaint in the Coverage Action.[6] The amended complaint alleged that the Debtor was named in more than 300 complaints seeking recovery for alleged negligent supervision and hiring of certain clerical and ministerial personnel ("Suits")[7]. The Debtor alleged that it tendered the Suits through its broker to the various insurers, including Underwriters, and that those insurers improperly denied or failed to confirm coverage, and failed to provide defense or indemnity to the Debtor in the Suits.[8]

On August 10, 2023, Underwriters advised that they had not received any tenders and have

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[1] Bankruptcy Case, ECF No. 1.

[2] *See Roman Catholic Bishop of Oakland v. Pacific Indemnity et al.*, 23-40523, ECF No. 1 (Bankr. N.D. Cal. June 22, 2023).

[3] Coverage Action, ECF No. 15.

[4] Coverage Action, ECF No. 97.

[5] Coverage Action, ECF No. 15.

[6] Coverage Action, ECF No. 2.

[7] *Id*. at ¶ 28.

[8] *Id*. at ¶¶ 32-34.

absolutely no information about tenders for the Suits and requested copies of any purported tenders.[9]

As of the date of this filing, the Debtor has not tendered any claims to Underwriters.

On January 12, 2024, the Debtor filed its third amended adversary complaint ("TAC").[10] The TAC does not identify any claim tenders received by Underwriters.[11]

C. The 2004 Application and Subpoena

On October 5, 2023, the Committee filed an *Ex Parte Application for Federal Rule of Civil Procedure 2004 Examination of Insurers* ("2004 Application"), seeking, among other things, the production of documents related to Underwriters' insurance reserves and underwriting information pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 2004.[12] On November 1, 2023, Underwriters, among others, objected to the 2004 Application, arguing that the discovery sought exceeded the limits of permissible discovery pursuant to FRBP 2004.[13]

Several insurers, including Underwriters, objected to the Committee's application for a FRBP 2004 subpoena.[14] The insurers argued, among other issues, that (1) the 37 document requests exceeded the scope of permissible discovery under FRBP 2004; (2) the subpoena was an improper attempt to evade the Court's order limiting the scope of the Committee's intervention in the adversary proceeding; and (3) any order granting the application should expressly preserve the right of any recipient of a subpoena to object to the subpoena, or move to quash it, under the appropriate provisions of the FRBP and the Federal Rules of Civil Procedure incorporated therein, including but not limited to the right to assert any privileges or confidentiality obligations.

On November 14, 2023, the Court held a lengthy hearing on the 2004 Application. After oral

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[9] *See* Exhibit 1 to Declaration of Bradley E. Puklin ("Puklin Dec.") filed concurrently herewith.

[10] Coverage Action, ECF No. 163. The Debtor filed a second amended adversary complaint on December 18, 2023. *Id*., ECF No. 161. Upon information and belief, the second amended adversary complaint was amended because it failed to name Underwriters as a defendant.

[11] *Id.*

[12] Bankruptcy Case, ECF No. 502.

[13] Bankruptcy Case, ECF No. 571.

[14] *Id.*

argument, the Court stated the following: "I am inclined to entertain the request with respect to the current claim files, the reserve working papers, and the underwriting information, if any, with respect to these cases."[15] The Court ordered the parties to

> "sit down…and just make sure everybody is agreeing on what the wording is because this is a moving target. …But I think *we need a little precision on what you mean by claims files, the reserve working files, and the underwriting information*. … give me some language…so that we're talking about the same thing."[16]

At the hearing's conclusion, the Court again asked the parties to

> "put your heads together about appropriate wording for the three categories I suggested with respect to this case, I think could be produced, I think I can – I'll be happy to see your handiwork. And I'll approve that, okay, subject to that being worked out."[17]

Counsel for the parties met and conferred on December 7, 2023, to settle the form of the order and subpoena.[18]

On December 15, 2023, Underwriters filed a 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 ("Motion to Reconsider").[19] The Motion to Reconsider sought clarification of the Court's oral bench ruling at the November 14, 2023 hearing, and in the alternative, reconsideration of the Court's ruling on the 2004 Application.[20] On January 17, 2024, the Committee filed its Objection to Underwriters' Motion to Reconsider the Court's Ruling on the Committee's Rule 2004 Application.[21] On January 18, 2024, the Court entered an Order Granting the Official Committee of Unsecured Creditors' Ex Parte

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[15] *See* Transcript of ECF No. 616, at 175:6-8. A true and correct copy of the transcript is attached as Exhibit A to the Motion to Reconsider, ECF No. 697.

[16] *Id.* at 175:14-25 (emphasis added).

[17] *Id.* at 177:10-14.

[18] Bankruptcy Case, ECF No. 697 at 10.

[19] Bankruptcy Case, ECF No. 697.

[20] *Id.*

[21] Bankruptcy Case, ECF No. 788.

Application for Federal Rule of Bankruptcy Procedure 2004 Examination of Insurers ("2004 Order").[22] The 2004 Order ordered the following:

> 2. The Insurers shall furnish all documents requested in subpoenas in a form substantially as those attached hereto as Exhibits 1 through 11 (the "Subpoenas"), and shall produce same to the Committee's counsel and the Debtor's counsel within forty-five (45) days of entry of this Order. ….
>
> 4. The Insurers' rights to object to the Subpoenas as permitted under Rule 45 of the Federal Rules of Civil Procedure, incorporated into this bankruptcy case by Rule 9016 of the Federal Rules of Bankruptcy Procedure, are fully preserved, including, without limitation (a) any and all applicable evidentiary privileges and (b) proper scope of discovery.[23]

On January 19, 2024, the Committee issued a subpoena ("Subpoena") to Underwriters.[24]

The Subpoena seeks production of the following eight categories of documents:

1. Copies of Underwriters' insurance policies issued to, or insuring, the Debtor ("Request #1");

2. Copies of secondary evidence of Underwriters insurance policies issued to, or insuring, the Debtor, but only with respect to Underwriters policies that are missing or incomplete ("Request #2");

3. All coverage position letters that Underwriters sent to the Debtor concerning coverage for any Abuse Claim tendered by or on behalf of the Debtor to Underwriters ("Request #3");

4. Documents sufficient to show exhaustion, erosion, or impairment of the limits of liability of each of Underwriters policies ("Request #4");

5. Underwriters Claim Files for any Abuse Claims tendered by or on behalf of the Debtor to Underwriters ("Request# 5);

6. All underwriting files for any Underwriters policies concerning any Abuse Claims tendered by or on behalf of the Debtor to Underwriters ("Request #6");

7. Documents sufficient to show Underwriters' reserves for each Abuse Claim tendered by or on behalf of the Debtor to Underwriters ("Request #7"); and

8. Documents and communications that relate to "setting, calculating, analysis, adjustment, investigation, evaluation of, and decision-making process with respect to [Underwriters']

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[22] Bankruptcy Case, ECF No. 796.

[23] *Id.*, at 2.

[24] *See* Exhibit 2 to Puklin Dec.

> reserves identified in response to Request No. 7 …" ("Request #8") (together with Requests #1-#7, "Overbroad Demands").[25]

On February 5, 2024, Underwriters served their Responses and Objections to the Subpoena ("Responses and Objections').[26] In the Responses and Objections, Underwriters reserved their objections to several requests pending the hearing on the Motion to Reconsider and any subsequent appeal.

On February 7, 2024, the Court held a hearing on the Motion to Reconsider.[27] After argument, the Court indicated it would take the matter under submission.[28]

On February 12, 2024, at a hearing to discuss pending Motions to Withdraw the Reference, the Court stated that it would deny the Motion to Reconsider.[29] It stated that there is a "difference between a 2004 exam, which is meant to get information about the debtor's assets, liabilities, financial condition, and the matters necessary to administer the case and do what you need to do in the course of a bankruptcy case, and litigation issues, which are going to be dealt with differently" in the Coverage Action.[30] The Court further stated that the insurance reserve and underwriting information was relevant, stating in relevant part:

> "they were in some ways the mirror image of the claim information. The claim information is one side of the ledger. What the insurance companies are doing about it is the other side of the ledger. So that was my thinking in making that ruling, and I thought it was quite clear".[31]
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> …

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[25] *Id.*

[26] See Exhibit 3 to Puklin Dec.

[27] Bankruptcy Case, ECF No. 846.

[28] *Id.*

[29] Bankruptcy Case, ECF No. 855.

[30] *See* Transcript of ECF No. 855 at 12:4-11. A true and correct copy of the transcript is attached as Exhibit A to the Declaration of Betty Luu filed in support of the *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*, ECF. No. 907.

[31] *Id.* at 13:1-7, 14:10-18, 14:23-15:4.

> "So I think we need to be sensitive to possibly doing things a little bit differently. And it was my theory that having the insurance companies provide this information was going to help that process and was going to get everybody into the mediation with the optimum amount of information. On the debtor to committee side, that's the claim information produced to the insurers. From the insurers, that is a snapshot of where they are with their evaluations. And in my view, those are simply mirror images of each other."
>
> …
>
> "So that was my ruling. I stand by it. I continue to think for those reasons that there was relevancy established, at least for the limited purposes of a 2004 exam, which again, I'm contrasting with litigation theories. Okay. Litigation is a whole other story, and you're going to get into that in the AP. That is different. So for all those reasons, I'm going to deny the motion for clarification and/or for reconsideration."[32]

On February 14, 2024, the Court issued *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* ("Reconsideration Order.")[33] That same date, the Committee demanded Underwriters revise their Responses and Objections as a result of the Reconsideration Order.[34] In response, on February 20, 2024, Underwriters advised the Committee that they would move to quash, or, in the alternative, for a protective order as to the Overbroad Demands, and would be seeking leave to appeal the Reconsideration Order, and a stay pending the appeal.[35] Underwriters requested an opportunity to meet and confer.[36]

On February 21, 2024, the Committee indicated that it was unavailable to meet and confer and believed a meet and confer to be unnecessary, but nevertheless would provide dates the following week.[37] As of the filing of this Opposition, the Committee has not responded with any proposed dates to meet and confer.

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[32] *Id.* at 13:1-7.

[33] Bankruptcy Case, ECF No. 875.

[34] *See* Exhibit 4 to Puklin Dec.

[35] *See* Exhibit 5 to Puklin Dec.

[36] *Id.*

[37] *See* Exhibit 6 to Puklin Dec.

On February 28, 2024, Underwriters filed a Notice of Appeal and Motion for Leave to Appeal (collectively, "Appeal") with the United States District Court, Northern District of California.[38] On the same day, Underwriters moved for a stay pending the Appeal in this Court.[39]

On March 4, 2024, Underwriters filed a Motion for Protective Order.[40] Further, because the Subpoena compelled production of documents in New Jersey, Underwriters also filed a Motion to Quash in the District of New Jersey on March 4, 2024.[41] Afterwards, Underwriters and the Committee stipulated to transfer the Motion to Quash to this Court.[42]

On March 4, 2024, Underwriters also produced certain documents to the Committee.[43] Underwriters stated that they had no documents responsive to Requests #2 and #4[44] and objected to Requests #5, #6, #7, and #8, because, among other reasons, the requests called for information protected by attorney-client and work product privileges.[45] On March 20, 2024, the Committee filed the Motion to Compel, alleging that Underwriters did not produce documents to Requests #2, #4, #5, #6, #7, and #8.[46] The Committee also asserted that Underwriters did not produce a privilege log detailing any redacted or withheld information or documents.[47]

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[38] Bankruptcy Case, ECF Nos. 905, 906.

[39] Bankruptcy Case, ECF No. 907.

[40] Bankruptcy Case, ECF No. 918.

[41] *See In re The Roman Catholic Bishop of Oakland,* 2:24-cv-01467-CCC-JSA, ECF No. 1 (D.N.J.).

[42] Bankruptcy Case, ECF No. 994.

[43] *See* Exhibit 7 to Puklin Dec.

[44] *Id.*

[45] *See* Exhibit 3 to Puklin Dec.

[46] Request #5 is referred to as Claim Files, Request #6 is referred to as Underwriting Files, and Requests #7 and #8 are collectively referred to as Reserve Information.

[47] Bankruptcy Case, ECF No. 996, ¶ 35.

III. ARGUMENT

A. The Court Cannot Compel Production of Information Not in Underwriters' Possession

The Committee erroneously contends that Underwriters failed to produce documents responsive to Requests #2 and #4.[48] Contrary to the Committee's contention, on March 4, 2024, Underwriters informed the Committee that they were not in possession of any documents in response to Requests #2 and #4.[49] Therefore, Underwriters cannot produce documents not in their possession.[50]

"A court cannot order a party to produce documents that are not within its possession, custody, or control."[51] The District Court in *Perez* denied the plaintiff's motion to compel responses to document requests where the defendant insurer unequivocally stated in its opposition that it has no documents responsive to the requests.[52] Similarly the district court in *Blake*, denied the motion to compel requests for production for which the defendants asserted that they had no responsive documents.[53]

B. The Motion to Compel Improperly Seeks to Compel Disclosure of Privileged or Other Protected Matter

Those persons seeking to examine witnesses or records pursuant to FRBP 2004 are subject to several evidentiary protections.[54] As explained below, the requests in the Subpoena seek

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[48] Bankruptcy Case, ECF No. 996, ¶ 35.

[49] *See* Exhibit 7 to Puklin Dec. Requests #5, #7 and #8 seek information related to Abuse Claims tendered by the Debtor. There were no claim tenders to Underwriters at the time the 2004 Application was filed and any information would be protected by privilege as discussed in Section B.

[50] *See* Exhibit 7 to Puklin Dec.

[51] *Blake v. Godfrey*, 2023 WL 8168828 (C.D. Cal. Nov. 13, 2023) (quoting *Perez v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 1362086 (N.D. Cal. Apr. 11, 2011).

[52] *Perez*, 2011 WL 1362086, at * 4.

[53] *Blake*, 2023 WL 8168828, at *1.

[54] *In re Gi Yeong Nam*, 245 B.R. 216, 230 (Bankr. E.D. Pa. 2000); *In re Fin. Corp. of America*, 119 B.R. 728, 733 (Bankr. C.D. Cal. 1990) (citing FRBP 9017, which incorporates Fed. R. Evid. 501).

confidential information that Underwriters cannot be compelled to produce.

1. The Attorney-Client Privilege

Rule 26(b), incorporated by FRBP 7026, protects confidential communications between attorneys and their clients. "[C]ommunications made in confidence by clients to their lawyers for the purpose of obtaining legal advice" are protected by the attorney-client privilege.[55] The purpose of the privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[56] As a general matter, "[a] party is not entitled to discovery of information protected by the Attorney-Client Privilege."[57] The party opposing the privilege must show that "the information was not confidential or that it falls within an exception."[58]

2. The Work Product Doctrine

Federal Rule of Civil Procedure 26(b)(3) protects attorney work product by prohibiting a party from "discover[ing] documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."

While the Work Product Doctrine originated in the context of an adversary proceeding, it does not necessarily require the existence of an adversarial action.[59] The attorney Work Product Doctrine is "distinct from and broader than the attorney-client privilege."[60] Unlike the Attorney-Client

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[55] *Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 745 (Fed.Cir. 1987).

[56] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[57] *Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003) (citation omitted).

[58] *In re 3dfx Interactive, Inc.*, 347 B.R. 394, 402 (Bankr. N.D. Cal. 2006); *see also Siddall v. Allstate Ins. Co.*, 15 F. App'x 522, 523 (9th Cir. 2001) ("a substantial need does not, as a matter of law, provide a legal basis for piercing the attorney-client privilege…").

[59] *Fin. Corp. of America*, 119 B.R. at 738.

[60] *U.S. v. Nobles*, 422 U.S. 225, 238 (1975).

Privilege, the Work Product Doctrine protects documentation prepared by the attorney in anticipation of litigation.[61]

A party may not obtain information subject to the Work Product Doctrine unless it can show "it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[62] Even if the party seeking disclosure of information protected by the Work Product Doctrine makes such a showing, the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[63] Opinion work product that reflects opinions, mental impressions, or legal theories of an attorney are nondiscoverable absent extraordinary circumstances.[64]

In *Barge v. State Farm Mut. Ins. Co.*, 2016 WL 6601643 (W.D. Wash. Nov. 8, 2016), an insured sought discovery of its insurer's unredacted claim files, including reserves and evaluation amounts.[65] The court found that the claim files and related reserve information was "based on opinions and evaluation of [the insurer] personnel after [the insurer] reasonably contemplated litigation in this case" and the insured failed to demonstrate a compelling need for the information.[66]

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[61] *Am. C.L. Union of N. California v. United States Dep't of Just.*, 880 F.3d 473, 485–486 (9th Cir. 2018); *In re Residential Capital, LLC*, 575 B.R. 29, 42 (Bankr. S.D.N.Y. 2017).

[62] Fed. R. Civ. P. 26(b)(3)(A).

[63] Fed. R. Civ. P. 26(b)(3)(B).

[64] *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977); *In re Lake Lotawana Community Improvement District*, 563 B.R. 909, 917 (Bankr. W.D. Mo. 2016) ("discovered only in rare and extraordinary circumstances"); *Barge v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 6601643, at *5 (W.D. Wash. Nov. 8, 2016).

[65] *Barge,* 2016 WL 6601643, at *4.

[66] *Id.* at 6; *see also Rhone-Poulenc Rorrer Inc. v. Home Indem. Co.*, 139 F.R.D. 609, 614 ("Where the reserves have been established based on legal input, the results and supporting papers most likely will be work-product and may also reflect attorney-client privilege communications" magistrate judge refused ***all*** discovery into the reserves because "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."); *Certain Underwriters at Lloyd's London v. Fidelity and Casualty Ins. Co. of New York*, 1998 WL 142409 (N.D. Ill. 1998) (refusing to order production of reserve recommendations based on attorney work product and attorney-client privileges finding that "[w]e conclude that reserve

3. Litigation Privilege

The Attorney-Client Privilege and the Work Product Doctrine incept before the initiation of litigation. Once litigation is commenced, the Litigation Privilege bars discovery of all attorney client communications and attorney work product.[67]

4. Trade Secret Privilege

Federal Rule of Civil Procedure 26(c)(1)(G) permits the Court to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:...requiring that a trade secret or other confidential research, development, or commercial information not be revealed…" Further, FRBP 9018 "the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information..."

Federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information.[68] Rule 26(c) provides a qualified protection for trade secrets and confidential commercial information in the civil discovery context.[69] Moreover, the Trade Secret Privilege, which protects confidential commercial information, also applies to FRBP 2004 examinations.[70]

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recommendations, in this case, do reveal attorney mental impressions, thoughts, and conclusions since the reserve figures were calculated only after an attorney acting in his legal capacity carefully determined the merits and value of the underlying case.").

[67] *Mon Cheri Bridals, LLC v. Cloudfare, Inc.*, 2021 WL 1222492 (N.D. Cal. Apr. 1, 2021) ("[C]ounsel's communications with the client and work product developed once the litigation commences are presumptively privileged and need not be included on any privilege log.") (quoting *Ryan Inv. Corp. V. Pedregal de Cabo San Lucas*, 2009 WL 5114077 (N.D. Cal. Dec. 18, 2009); *Kumar v. Nationwide Mutual Ins. Co.*, 2023 WL 3598478 (N.D. Cal. May 23, 2023) ("Nationwide need not include any communications with counsel, Dentons, or otherwise related to the present litigation, although the Court notes the privilege logs do contain entries dated after the filing of the Complaint that Nationwide claims are privileged in communications 'regarding this matter.'").

[68] *See, e.g., E. I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917); 8 J. Wigmore, Evidence § 2212, pp. 156–157 (McNaughton rev. 1961).

[69] *Fed. Open Mkt. Comm. of Fed. Rsrv. Sys. v. Merrill*, 443 U.S. 340, 356–57 (1979).

[70] *In re Jewelers Shipping Ass'n,* 97 B.R. 149, 150 (Bankr. D.R.I. 1989) (denying examination that sought confidential commercial information).

Confidential, proprietary information about how Underwriters set reserves, classify and underwrite risks, evaluate claims, calculate premiums, compensate brokers/agents, make litigation decisions, determine settlements, and the processes and strategies related to the foregoing, is protected by the Trade Secret Privilege. Any disclosure of such information would cause Underwriters irreparable harm.

5. Reserve Information Is Privileged

The above protections prohibit any disclosure of non-public documents related to the Underwriters Reserve Information.

Courts have rejected the production of Reserve Information because of its invasion of traditional privileges.[71] The insured in *Shreib* sought discovery of reserve information to gain insight into how the insurer valued her claim.[72] In denying the insured's request, the court found that that the "loss reserve information exchanged between American Family and its attorney regarding impending litigation is protected by the attorney-client privilege."[73]

The Committee has not established a compelling need to force Underwriters to disclose any privileged information. The Committee's special insurance counsel wrongly asserted that reserve information looks "back at the history of their settlement" and "goes to the reasonable value of these claims."[74] Counsel for the Committee did not provide any evidence in support of this erroneous statement, which misled the Court as to the nature of reserve information. To the contrary, Reserve Information is only a determination of the aggregate amounts that Underwriters estimate to be

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[71] *Shreib v. Am. Fam. Mut. Ins. Co.*, 304 F.R.D. 282 (W.D. Wash. 2014); *Barge,* 2016 WL 6601643 (precluding discovery of reserve documents where documents at issue "can be fairly said to have been prepared or obtained because of the prospect of litigation."); *Zurich Am. Ins. Co. v. Keating Bldg. Corp.*, No. CV 04-1490 (JBS), 2006 WL 8457156, at *6 (D.N.J. Dec. 29, 2006) ("'[w]here the reserves have been established based on legal input, the results and supporting papers most likely will be work-product and may also reflect attorney-client privilege communications.'") (quoting *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, 139 F.R.D. 609, 614 (E.D. Pa. 1991).

[72] *Shreib*, 304 F.R.D. at 283.

[73] *Id.* at 287.

[74] Transcript of ECF No. 616, at 135:11-14. A true and correct copy of the transcript is attached as Exhibit A to the Motion to Reconsider, ECF No. 697.

sufficient to provide for the payment of all losses and claims for which Underwriters may be liable, including the expense of litigation, adjustment or settlement of such losses and claims. The costs of litigation – attorneys' fees for discovery, motions, mediation, trial, appeal, and so on; expert witnesses and consultants; mediation costs; to name only some of the components of reserves – are not the "mirror image" of the claims made against the Debtor. Consequently, reserves are not determinative of, or in any way relevant to, the value of any claim.

Here, no claims had been tendered to Underwriters at the time the 2004 Application was filed, in fact, none have been tendered to Underwriters as of now; and there have been no settlement negotiations. Any Reserve Information would be based on advice from the Underwriters attorneys and in anticipation[75] of litigation as the Debtor's Coverage Action predated any claim tenders by it to Underwriters and would not require a privilege log.[76] The Litigation Privilege is clearly applicable here.

Moreover, Underwriters Reserve Information would only be a preliminary estimate of adjustment expenses and possibly for potential settlement or loss exposure for claims. That is particularly true here, where (i) the Underwriters Policies are excess of $500,000 per occurrence per triggered policy period; (ii) Underwriters do not have a duty to defend; and (iii) Underwriters lack information about the claims and any underlying insurance.

Thus, the Court should deny the Motion to Compel discovery of Reserve Information.

[75] Underwriters must also keep information by an insured confidential under a "tripartite" relationship that defense counsel has with Underwriters and an insured. *See Bank of Am. V. Superior Court*, 212 Cal. App. 4th 1076, 1084 (2023). Under that tripartite relationship, "confidential communications between either the insurer or the insured and counsel are protected by the attorney-client privilege, and both the insurer and insured are holders of the privilege." *Id*. at 1083. Similarly, work product "does not lose its protection when it is transmitted to the insurer." *Id*.

[76] Coverage Action, ECF No. 163.

6. Claims Files Are Privileged

The Committee seeks Claim Files related to Abuse Claims tendered by the Debtor.[77] As discussed above, the Debtor has not tendered any claims to Underwriters.[78] Thus, there are no responsive documents containing Claims Files now.

In the future, subpoenaed Claims Files may include confidential communications between Underwriters and their counsel and thus would be protected by the Attorney-Client Privilege. Further, the contents may include drafted documents or information necessarily developed in anticipation of litigation and would thereby be protected under the Work Product Doctrine. Moreover, any responsive documents in the future would not require a privilege log, because they will necessarily have been generated after the Debtor filed the Coverage Action against Underwriters, and would therefore be protected under the Litigation Privilege.

The Committee's vague statement that "…insurers are required to keep claims file. …[a]nd in the claims file, there will be information on how they value the case and what their coverage defenses are and things like that" is a rather honest recognition by the Committee that such files are privileged and non-discoverable.[79]

Thus, in the future, the Court should protect Underwriters from the disclosure of information subject to the Attorney-Client Privilege, the Work Product Doctrine, the Litigation Privilege, and the Trade Secret Privilege.

C. The Motion to Compel Should be Denied Because the Committee Failed to Meet and Confer in Good Faith

Civil L.R. 37-1(a), incorporated by B.L.R. 1001-2, states as follows:

> The Court will not entertain a request or a motion to resolve a disclosure or discovery dispute unless, pursuant to Fed. R. Civ. P. 37, counsel have previously conferred for the purpose of attempting to resolve all disputed issues. If counsel for the moving party

[77] *See* Exhibit 2 to Puklin Dec.

[78] The Debtor circulated an email on October 20, 2023 to Underwriters and other insurers with a link to over 300 Complaints filed against the Diocese and other entities. Although Underwriters expressly advised that the provision of Complaints sent by link were not tenders, out of an abundance of caution, Underwriters sent preliminary coverage positions for the Complaints.

[79] Transcript of ECF No. 616, at 135:5-8. A true and correct copy of the transcript is attached as Exhibit A to the Motion to Reconsider, ECF No. 697.

> seeks to arrange such a conference and opposing counsel refuses or fails to confer, the Judge may impose an appropriate sanction, which may include an order requiring payment of all reasonable expenses, including attorney's fees, caused by the refusal or failure to confer.

Civil L.R. 1-5(n) defines "meet and confer" or "confer" as:

> to communicate directly and to discuss in good faith the issue(s) required under the particular Rule or order. Unless these Local Rules otherwise provide or a Judge otherwise orders, such communication may take place by telephone. The mere sending of a written, electronic, or voice-mail communication, however, does not satisfy a requirement to "meet and confer" or to "confer." Rather, this requirement can be satisfied only through direct dialogue and discussion – either in a face to face meeting or in a telephone conversation.

"Merely 'sending a letter to the opposing party demanding compliance with a discovery request is not what [the] Court regards as an earnest attempt to 'meet and confer' on the issues.'"[80] The meet and confer requirement under Civ. L.R. 1-5(n) "is not a meaningless formality, nor is it optional; instead, the purpose of a meet and confer requirement is for the parties to engage in a meaningful dialogue about their respective positions on disputed issues to see whether they can resolve (or at least refine) the disputes without court intervention, saving time and money for the litigants as well as the court system."[81]

On February 14, 2024, the Committee threatened to move to compel Underwriters to comply with the Subpoena.[82] On February 20, 2024, Underwriters responded requesting to meet and confer.[83] On February 21, 2024, the Committee responded stating, "we do not need to meet and confer…" but would "circle back with available times next week, to the extent a meeting is still necessary."[84] The Committee never responded with dates for a meet and confer. Here, a good faith meet and confer

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[80] *Clark v. Anna's Linen's Company, et al.*, 2006 WL 8442882 (N.D. Cal. Aug. 1, 2006) (citation omitted) (denying motion to compel production of payroll database because sending letter demanding response to discovery request did not satisfy meet and confer requirements."

[81] *Miranda Dairy v. Harry Shelton Livestock, LLC*, 2020 WL 6269541 (N.D. Cal. Oct. 22, 2020) (citations omitted).

[82] *See* Exhibit 4 to Puklin Dec.

[83] *See* Exhibit 5 to Puklin Dec.

[84] *See* Exhibit 6 to Puklin Dec.

could have resolved many of the disputes raised in the Motion to Compel because, as discussed above, Underwriters presently have no documents responsive to several of the requests identified in the Motion to Compel.

Hence, the Motion to Compel should be denied.

D. The Committee's Request for Costs and Fees Must Be Denied.

Civil L.R. 37-4, incorporated by B.L.R. 1001-2, requires that motions for sanctions, including a request for an award of attorney fees, must be accompanied by a declaration which, among other things, "describe in detail the efforts made by the moving party to secure compliance without intervention by the Court; and [i]f attorneys fees or other costs or expenses are requested, itemize with particularity the otherwise unnecessary expenses, including attorney fees, directly caused by the alleged violation or breach, and set forth an appropriate justification for any hourly rate claimed." The Committee's Motion to Compel fails to comply with both requirements. As discussed in Section III(C), the Committee made no effort to meet and confer in good faith with Underwriters as required by Civil L.R. 1-5(n) and 37-1.[85] Further, the Committee failed to provide an itemization of its costs and fees.

IV. CONCLUSION

Based on the foregoing, Underwriters respectfully the Court deny the Motion to Compel and the Committee's request for fees and costs.

Dated: April 12, 2024

By /s/ *Catalina J. Sugayan*

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[85] *See Dish Network L.L.C. v. Jadoo TV, Inc.*, 2022 WL 16856349 (N.D. Cal. Nov. 10, 2022) (declining to issue sanctions where movant failed to meet and confer under Civ. L.R. 37-4 and movant ignored respondent's meet and confer letter).

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Attorneys *Certain Underwriters at Lloyd's, London, subscribing severally and not jointly to Slip Nos. CU 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*