Docket #0287 Date Filed: 6/23/2021

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re	:	Chapter 11
ALDRICH PUMP LLC, *et al.*,[1]	:	Case No. 20-30608
Debtors.	:	
ALDRICH PUMP LLC, *et al.*,	:	
Plaintiffs,	:	
v.	:	Adv. Pro. No. 20-03041
THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT and JOHN AND JANE DOES 1-1000,	:	
Defendants.	:	

NOTICE OF FILING OF UNREDACTED REPLY IN FURTHER SUPPORT OF THE MOTION OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS TO COMPEL THE DEBTORS AND NON-DEBTOR AFFILIATES TO (I) PROVIDE TESTIMONY REGARDING CERTAIN MATTERS AND (II) PRODUCE CERTAIN WITHHELD DOCUMENTS, AND UNREDACTED EXHIBIT THERETO

The Official Committee of Asbestos Personal Injury Claimants (the "**Committee**" or "**ACC**") of Aldrich Pump LLC and Murray Boiler LLC (the "**Debtors**"), by and through its undersigned counsel, hereby files this Notice of Filing Unredacted Reply in Further Support of the Motion of the Official Committee of Asbestos Personal Injury Claimants to Compel the Debtors and Non-Debtor Affiliates To (I) Provide Testimony Regarding Certain Matters and (II) Produce

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Aldrich Pump LLC (2290) and Murray Boiler LLC (0679). The Debtors' address is 800-E Beaty Street, Davidson, North Carolina 28036.

Certain Withheld Documents, and Unredacted Exhibit Thereto (the "**Notice**"). In support of the Notice, the Committee respectfully states as follows:

1. On April 23, 2021, the Committee filed its *Reply in Further Support of the Motion of the Official Committee of Asbestos Personal Injury Claimants to Compel the Debtors and Non-Debtor Affiliates To (I) Provide Testimony Regarding Certain Matters and (II) Produce Certain Withheld Documents* (the "**Reply in Support**") [Adv. Dkt. 190], which included Exhibit L. Portions of the Reply in Support were redacted, and Exhibit L was filed under seal, pursuant to the Agreed Protective Order Governing Confidential Information (the "**Protective Order")** [Case No. 20-30608; ECF 345]. On April 27, 2021, the Committee filed a *Motion to File Confidential Documents under Seal* (the "**Motion to Seal**")[Adv. Dkt. 205] related to the redacted portions of the Reply in Support and sealed Exhibit L.

2. Since the filing of the Reply in Support, the Committee has received designations of confidential information for the deposition transcript from which excerpts were attached as Exhibit L. Based upon such designations, all redactions in the body of the Reply in Support can be removed, and Exhibits L can be unsealed. The Committee therefore filed a Withdrawal of the Motion to Seal on June 23, 2021 [Adv. Dkt. 286].

3. Accordingly, attached hereto is an unredacted copy of the Reply in Support and unsealed Exhibit L.

Dated: June 23, 2021

HAMILTON STEPHENS STEELE
+ MARTIN, PLLC

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REPLY IN FURTHER SUPPORT OF THE MOTION OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS TO COMPEL THE DEBTORS AND NON-DEBTOR AFFILIATES TO (I) PROVIDE TESTIMONY REGARDING CERTAIN MATTERS AND (II) PRODUCE CERTAIN WITHHELD DOCUMENTS

The Official Committee of Asbestos Personal Injury Claimants (the "Committee" or "ACC") of Aldrich Pump LLC and Murray Boiler LLC (the "Debtors"), by and through its undersigned counsel, submits this reply to address the Debtors' Objection [Adv. Dkt. No. 173] and the Non-Debtor Affiliates' Objection [Adv. Dkt. No. 176], and in further support of its Motion[2]

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Aldrich Pump LLC (2290) and Murray Boiler LLC (0679). The Debtors' address is 800-E Beaty Street, Davidson, North Carolina 28036.

[2] Capitalized terms used herein but not defined have the same definition assigned to them in the Committee's opening Motion.

for an order (I) compelling the Debtors and any producing non-debtor affiliates (collectively, the "Producing Parties") to provide testimony related to, *inter alia*, conversations held during the Debtors' Board of Managers meetings and conversations held during meetings concerning "Project Omega;"[3] (II) compelling the Producing Parties to produce an unredacted version of the PowerPoint; and (III) related relief. In support of this Reply, the Committee respectfully states as follows:

INTRODUCTION

The Debtors have failed to meet their burden of demonstrating the applicability of the attorney client and attorney work product privileges to the At Issue Discovery.

First, the thrust of the Motion is that the Debtors impeded the testimony of eight (8) deponents[4] (as identified in Exhibits B to K to the Motion[5]) regarding the factors that the boards considered in ultimately deciding to file for bankruptcy, including the factual information and analysis concerning forecasts of future asbestos liabilities, insurance recoveries and other company reorganizations that informed their deliberations. The Debtors improperly seek to extend the attorney-client privilege to cover the mental impressions of the *board members*, simply because much of the factual information and analysis the board members considered were sourced from counsel or from consultants who relied on some "inputs" from counsel. Yet, the Debtors do not dispute that the attorneys in question played a heavily business role, including but not limited to, putting together the boards and educating board members regarding the factors that ultimately led

[3] The exhibits submitted herewith identify the excerpts from the deposition of each witness which includes the question posed, counsel's instruction not to answer, the witness's decision not to answer, and any pertinent dialogue on the record.

[4] The Debtors mischaracterize the relief requested by the Committee as being primarily focused on the PowerPoint and the testimony of Mr. Valdes and Mr. Zafari.

[5] Exhibits referred to in the *Motion of the Official Committee of Asbestos Personal Injury Claimants to Compel the Debtors and Non-Debtor Affiliates to (I) Provide Testimony Regarding Certain Matters and (II) Produce Certain Withheld Documents* are referenced here as "Motion Ex. __".

to their decision to file bankruptcy. These tasks do not involve legal acumen or advice and could easily have been done by business personnel. To shield the *board members'* mental impressions and understanding from disclosure would be an improper extension and misuse of the attorney-client privilege, which must be narrowly construed.

Second, contrary to Debtors' assertions, in the Fourth Circuit, the downward flow of legal advice is privileged only if it would reveal confidential client communications or reveal the motive of the client in seeking the legal advice. *E.g.*, *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999); *United States v. (Under Seal)*, 748 F.2d 871, 874-77 (4th Cir. 1984); *Digital Vending Servs. Intern., Inc. v. Univ. of Phoenix, Inc.*, 2013 WL 1560212, at *5 (E.D. Va. Apr. 12, 2013). Here, it is hard to imagine how the disclosure of any purported legal advice would reveal the board's communications or motives, since it is clear that *counsel* were driving the conversations and educating the board about the factual information and analysis they needed to know (which the Debtors do not dispute). Moreover, Debtors fail to explain why the information their counsel provided would even constitute legal advice, only referring generally to the topics identified in the board meeting minutes. Yet, these meeting minutes identify a broad scope of topics, which are, at least facially, non-legal in nature. *See* Debtors' Ex. B, at DEBTORS_00050798; Debtors' Ex. C, at DEBTORS_00050793.[6]

Third, as Debtors note, the Asbestos Tender Agreement, previously withheld as privileged, has now been produced to the Committee. Yet, the Committee's questions regarding the Asbestos Tender Agreement to the witnesses were obstructed based on the purported privileged nature of

[6] The exhibits attached to the *Debtors' Objection to the Motion of the Official Committee of Asbestos Personal Injury Claimants to Compel the Debtors and Non-Debtor Affiliates to (I) Provide Testimony Regarding Certain Matters And (II) Produce Certain Withheld Documents* [Adv. Dkt. No. 173] are referred to as "Debtors' Ex. __".

that document. Accordingly, the Committee is now entitled to elicit testimony concerning the Asbestos Tender Agreement.

Fourth, Debtors argue that the PowerPoint redactions concerning the projections of future liability payments, defense costs and insurance recoveries for the two entities which became the Debtors are privileged work product because the projections were prepared by consultants utilizing some unidentified "inputs" and "assumptions" which they allege constitute counsel's mental impressions. Debtors also argue that because these projections generally concerned how to address asbestos lawsuits, the same were prepared in "anticipation of litigation." The assertions made by Debtor, however, are not only wholly unsupported by any evidentiary showing, but, in fact, are in clear conflict with the subsequent deposition of Evan Turtz, the General Counsel of the Trane entities and the Rule 30(b)(6) testifying representative of Trane Technologies and Trane U.S. Turtz, who led the Project Omega initiative before the Texas divisive merger, and who attended all of the Aldrich and Murray board meetings, testified that the redacted projections in the PowerPoint came from NERA, whose work was performed for the exclusive purpose of providing estimates for the Trane entities for the purpose of enabling the Trane entities to make the disclosures that are required by the federal securities laws and regulations. Furthermore, according to the Debtors' own witnesses, the entire purported reason for the PowerPoint was to provide the members of the boards with facts that would enable them to make final decisions about filing for bankruptcy.[7] In any event, it is clear that the content of the PowerPoint was not created to guide litigation strategy.

[7] Based on the evidence, the Debtors' assertion appears to be false, as the decision to file for bankruptcy was made before, not after, the Texas divisional merger. *See, e.g.*, *Notice of Filing of Exhibits in Support of Opposition of the Official Committee of Asbestos Personal Injury Claimants to the Debtors' Motion for Preliminary Injunction or Declaratory Relief* [Dkt. No. 153], Ex. O (Valdez Dep. Ex. 18) (December 4, 2019 email from Project Omega member to future Aldrich and Murray President and board member Valdes telling Valdes that the entities which would later become 200 Park and ClimateLabs "will NOT be *bankrupt* entities, they will be operating entities (op-co), under new *bankrupt* entities (holding entities only);" *see also id.*, Ex. J (Tannanbaum Dep. Ex. 190) (May 5, 2020 notes of Project

Fifth, with respect to the identity of documents presented to deponents for their review in preparation for a deposition, Debtors cite only one Fourth Circuit case which does not concern the compilation of documents in this context. *See In re Allen*, 106 F.3d 582, 608 (4th Cir. 1997). Moreover, the record is clear that the Committee laid an appropriate foundation for the application of Federal Rule of Evidence 612, or in the alternative, were obstructed from doing so by improper privilege objections.

ARGUMENT

1. Debtors make offhand references to the Committee's "burden" to prevail on their Motion. (*See* Debtors' Objections at p. 10.) However, this is an inaccurate and misleading reference to the standard for establishing an exception to the attorney-client privilege, which is irrelevant here. The Committee does not seek to "pierce" the privilege vis-à-vis an exception. Rather, the Committee argues that the privilege does not apply in the first instance because the communications in question do not pertain to the giving or receiving of legal advice. It is the *Debtors'* burden to establish the applicability of the attorney client privilege, which they have failed to do. *See United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("The party asserting an attorney-client privilege must prove its applicability as well as its non-waiver.").

2. The Debtors assert throughout their Objection that counsel provided "legal advice" to the board members, yet do not explain how their communications were made "for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding." *Hawkins v. Stables,* 148 F.3d 379, 383 (4th Cir. 1998). The Debtors only identify the broad topics of the advice, noting that counsel advised regarding "current asbestos-related lawsuits," "the experience of the Companies in the tort system" and "strategic options for

Omega team member Heather Howlett stating that "We will isolate the asbestos liabilities into stand-alone entities and take the entities bankrupt.")

addressing current or future asbestos claims." *See* Debtors' Objections, at p. 5. Yet, the record indicates that these topics were explored for the purpose of providing primarily business advice. The meetings did not concern specific cases and also did not concern litigation strategy across a broad swath of cases. Debtors have not disputed that counsel played a heavily business role or that the purpose of the meetings was to educate the board members—whom counsel had handpicked and recruited to serve on the boards—with the facts and the history of Trane's experience with asbestos claims and litigation as well as projections that had been prepared by a third party vendor for the purpose of enabling Trane to make the disclosures under the federal securities laws and regulations. While it is conceivable that board members were provided "advice," the Debtors have not established that the advice was primarily *legal* in nature. To the contrary, the record indicates that the purpose of the meetings was primarily[8] to bring the Aldrich and Murray board members up to speed and to explain why bankruptcy was the preferred course of action that Trane management had agreed upon and that the two boards needed to approve. Accordingly, and for the reasons set forth below, the Debtors have not established the applicability of the attorney client and attorney work product privileges to the At Issue Discovery.

A. The Privilege Does Not Shield a Client's Mental Impressions Simply Because the Same are Derived from Information Communicated by Counsel

3. The Debtors' privilege instructions during the depositions primarily involved questions which sought to elicit (1) the deponent's "understanding" of certain factors relevant to their decision to support the filing of bankruptcy, which understanding was largely or even entirely based on information relayed by counsel, or (2) statements made by counsel which relayed such

[8] Likely the only topic identified by the Debtors that conceivably involved the provision of legal advice was counsel's review of "chapter 11 bankruptcy process". Yet, even that topic is questionable. Purely informational summaries regarding bankruptcy processes are not necessarily privileged. *See Digital Vending Servs. Intern., Inc. v. Univ. of Phoenix, Inc.*, 2013 WL 1560212, at *5 (E.D. Va. Apr. 12, 2013) (requiring disclosure of emails from counsel that were pertinent to litigation but did not reveal strategy, client motives or confidential client communications).

information. Thus, the privilege has been asserted against the downward flow of information (from counsel to client), not the upward flow of information (from client to counsel).

4. The Fourth Circuit has held that the attorney-client privilege "can apply to the downward flow of legal advice from counsel to client in limited circumstances." *Digital Vending Servs.*, 2013 WL 1560212, at *5 (citing *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999) and *United States v. (Under Seal)*, 748 F.2d 871, 874-77 (4th Cir. 1984)); *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 415 (N.D. Ill. 2006) ("Although the privilege is deemed generally to apply only to communications by the client, statements made by the lawyer to the client will be protected where those communications rest on confidential information obtained from the client…"). The attorney-client privilege may be "extended" to apply to communications made by counsel to the client, which either "reveal confidential client communications," *U.S. v. (Under Seal),* 748 F.2d at 874, or "reveal the motive of the client in seeking representation, litigation strategy or the specific nature of the services provided." *Chaudhry,* 174 F.3d at 402.

5. Applying these principles, the *Digital Vending* court held that emails from counsel during a pending litigation that alerted the client to other cases decided on similar issues and emails about setting a moot court for their oral argument were not privileged because they did not reveal legal strategy, the client's motives or confidential client communications. *Compare Digital Vending Servs. Intern.*, 2013 WL 1560212, at *6 *with Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (report of counsel and relevant portions of corporate board minutes were privileged because disclosure would reveal "directly or inferentially" the contents of counsel's interviews with client's employees).

6. Here, the Debtors seek a topsy-turvy application of the attorney client privilege. They seek to protect primarily the attorneys' communications to the board members (without

meeting the applicable standard) and the board member's understanding to the extent it is based on information relayed by counsel.[9]

7. For example, one deponent testified that he learned information during the board meetings which were important factors that he took into consideration in ultimately deciding to support the decision to file bankruptcy, but counsel instructed him not to reveal the information/factors. *See* Motion Ex. D, at 212:23-213:6. Indeed, a common instruction provided by counsel to the deponents was that the deponent could only answer the question posed "to the extent you have independent knowledge beyond what your attorneys told you." *See* Motion Ex. B, at. 113:25-114:6. However, this instruction is simply not supported by the case law cited herein (or in the case law cited by the Debtors).

8. Moreover, it cannot be overlooked that Debtors do not dispute that the counsel in question played a large business role, which the Committee expounded in detail in their opening brief. *See* Motion at ¶¶ 3-4. Debtors simply assert, in a conclusory manner, that the privilege instructions in question "decidedly" concerned legal advice, without further explanation. *See* Debtors' Objections, at pp. 11-12.

[9] For example, privilege objections and instructions not to answer were interposed in connection with the following questions: deponent's "current understanding of why Murray Boiler LLC was converted from a Texas company to a North Carolina company" *See* Motion Ex. B, at 90:14-91:5; *see also id.* at 113:10-114:8, 115:20-24 (whether the deponent expected asbestos liabilities and legal fees and expenses "to go up or down" in the future absent bankruptcy); *id.* at 134:16-24 (the deponent's understanding of why the corporate restructuring would make it easier to pursue insurance coverage for asbestos liabilities); Motion Ex. D.at 197:11-25 (deponent's understanding of what would occur if an injunction were not issued post-filing); *id.* at 212:14-22 (what deponent learned about the restructuring and its effects during a board meeting); Motion Ex. H at 73:24-74:6 (what kind of update the legal team provided during the Project Omega meetings); Motion Ex. I, at 227:2-9 (whether the deponent recalled any discussion of environmental liabilities at the Project Omega meeting); Motion Ex. J. at 120:24-121:15 (statements by counsel regarding what the business purpose of Project Omega was); Motion Ex. K. at 113:24-114:7 (whether in-house counsel for the Debtors was aware of whether a plan of reorganization is being drafted); Motion Ex. C at 119:8-22 (deponent's recollection of the discussions at the board meeting to "review of activities of the board since May 1, 2020 including discussion of strategic options towards addressing current and future asbestos claims").

9. Debtors attempt, in a footnote, to distinguish the supporting case law cited by the Committee by asserting that the cases have "nothing to do with corporate restructurings or bankruptcy filings". *See* Debtors' Objections, p. 12 n. 9. However, that is not a valid basis to distinguish the cases cited. For example, in *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 517 (D. Conn. 1976), which the Committee cited, the focus of the analysis was whether "the decisions were the type in which business personnel defer to the recommendation of legal staff." The court reasoned that the licensing decisions at issue in that case "may contain a legal component but are not inherently dependent on legal advice." *Id.* Debtors do not (and cannot) argue that the decision to file bankruptcy to address mounting liabilities is "inherently dependent on legal advice."

10. The cases cited by Debtors are inapposite or distinguishable from the case at hand:

a. *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995) is distinguishable for two reasons. First, the document in question was a memorandum on proposed guidelines for implementing involuntary terminations of staff in connection with a corporate restructuring. Second, the attorney who prepared the subject document specifically affirmed that he served in the capacity of a legal advisor and the subject document did not contain business advice. Here, it is not disputed that counsel served in the capacity of business advisor and provided business advice. Moreover, unlike in *Motley*, the information presented by counsel by and large did not concern legal guidelines or considerations; they concerned the factual information and business analysis necessary for the boards to decide whether to file for bankruptcy.

b. *Great Plains Mut. Ins. Co., Inc. v. Mutual Reinsurance Bureau*, 150 F.R.D. 193, 197 (D. Kan. 1993) is distinguishable because the court specifically found that the purpose of the board meeting in question was to review and consider legal issues regarding

a specific pending litigation and that the lawyer was acting as a legal advisor and rendered legal advice and that the "advice rendered…required the skill and expertise of an attorney." Here, the review and analysis of the companies' experiences in the tort system and financial projections for asbestos liabilities and insurance recoveries do not require legal expertise. In fact, as Debtors themselves assert, these projections were done by business consultants. *See* Debtors' Ex. A, at ¶¶ 6-7.

c. *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prods. Liab. Litig.*, 2019 WL 2330863, at *3 (D. Md. May 31, 2019) is distinguishable because the purpose of the document in question was found to be primarily for the provision of legal advice concerning pending and anticipated claims arising out of a hip replacement product. Importantly, the court noted that the document set forth the company's legal position and litigation strategy and the factual information therein (of which the opposing party sought disclosure) was "interwoven with counsel's legal advice." In contrast, it is not disputed that the board meetings, Project Omega and the PowerPoint did not address litigation strategy or legal positions with respect to asbestos claims.

d. *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 425-26 (N.D. Ill. 2006) held that while redactions in a document prepared by counsel pertaining to "legal ramifications" of a proposal were properly redacted, the commercial concerns could not be redacted, despite attorney participation.[10]

[10] Debtors appear to cite this case with respect to that portion which upholds privilege as to a slide of a PowerPoint presentation. However, the court's decision does not explain why the privilege was upheld and it is not clear how that holding supports Debtors' argument. *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 426-27 (N.D. Ill. 2006).

B. The Redacted Portions of the PowerPoint and Related Testimony Do Not Constitute Attorney Work Product

11. Debtors concede that the Slides 32-35 which contain future liability and insurance recovery projections do not contain legal advice but argue that the figures were prepared by consultants using models that contained inputs and assumptions "based on legal advice and attorney work product." *See* Debtors' Objection, at p. 13. Debtors also argue that these slides were prepared in anticipation of the asbestos lawsuits against the companies.

12. Debtors' argument is inaccurate and is clearly disproven by the deposition testimony of Evan Turtz, the General Counsel and 30(b)(6) deponent of Trane Technologies and Trane U.S. Turtz testified that he is not aware of any other potential source of the projections in the redacted sections of the PowerPoint other than NERA and/or Ankura,[11] both of whom performed projections for Trane for the sole purpose of enabling Trane to make the disclosures required by the federal securities laws and regulations.[12]

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[11] *See* 30(b)(6) Dep. Tr. 232:6-12 (Evan Turtz) (attached hereto as **Ex. L**):

> **Q: To your knowledge prior to May 15 of 2020, had any forecast been done for future asbestos liabilities other than those done by NERA and Ankura?**
> A. I don't recall.
> **Q: Are you aware of any?**
> A. I am not.

See also id. at 234: 8-11 ("**Q: So is there any other source of this type of information that was available as of May 1 – excuse me – as of May 15, 2020?** A. Not that I am aware of.").

[12] *See* Ex. L at 180:11—181:19:

> **Q: Okay. And was --- the NERA evaluations of both past and future asbestos liabilities, was that utilized in Trane's SEC disclosures?**
> A. NERA and the prior actuary prior to NERA.
> **Q. That would be Ankura?**
> A. I believe so.
> …
> **Q. Okay. And for what purpose was NERA engaged?**
> A. I mean, as I recall, this was for financial reporting. So exactly what you said, the financial disclosures that the company makes….
> **Q. All right. And NERA was retained for the purpose of assisting you in making those disclosures accurately; is that correct?**
> A. Yes.
> **Q. Were they retained for any other purpose that you're aware of?**
> A. Not that I'm aware of.

13. Second, in order for the attorney work product to attach to the financial projections, the same "must have been prepared *because* of the prospect of litigation." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992) (emphasis in original). Recognizing that a single document can be prepared for both litigation and non-litigation purposes, the Fourth Circuit held that "[d]etermining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question." *Id.* Here, there is no basis at all to conclude that the driving force behind the financial projections were the asbestos litigations. To the contrary, the projections were prepared for the purpose of enabling Trane to make its corporate disclosures and were provided to the board members as factual background they would need to carry out their obligations. Debtors do not (and cannot) argue that the financial projections would somehow inform the litigation strategy in defending asbestos lawsuits.[13]

14. Moreover, even if the Debtors could somehow establish—which they cannot—that the financial projections were protected as attorney work product, the protection is not absolute because the financial projections do not constitute "legal opinion or theory." *Nat'l Union*, 967 F.2d at 984. Thus, the financial projections must be disclosed because the Committee has demonstrated a "substantial need." *See id.* The validity and motives driving the Debtors' filing of bankruptcy are one of the integral questions at issue in this matter. The Debtors' deliberations and decision to file bankruptcy cannot be assessed without knowing the financial facts and analysis upon which they purportedly relied. The Committee cannot obtain this information from any other source.

[13] Debtors do not argue so, but it is also clear that the bankruptcy is not anticipated "litigation" within the meaning of this rule. Bankruptcy itself involves the filing of legal proceeding but the financial projections were not prepared in order to assist in litigating adversary proceedings.

15. With respect to Slides 4-5, 21-24 and 26-28 of the PowerPoint, Debtors argue that the redacted information reveals counsel's mental impressions and legal strategies. This claim is clearly inconsistent with the Turtz deposition testimony. If this Court is, for any reason, inclined to give these unsupported claims of the Debtors any credence, the Committee respectfully requests that the Court undertake an *in camera* review of these slides.

C. The Committee is Entitled to Elicit Testimony About the Asbestos Tender Agreement

16. Previously, the Debtors obstructed testimony regarding the Asbestos Tender Agreement based on a claim that the same had been withheld as privileged. As the Debtors have now produced the Asbestos Tender Agreement, it cannot be disputed that the Committee is now entitled to elicit testimony regarding this document.

D. The Identity of Documents or Categories of Documents Presented to Deponents for Pre-Deposition Review Should be Disclosed

17. Debtors make two arguments on this point. First, they cite to case law from other jurisdictions applying the work product doctrine to an attorney's compilation of documents in preparation of a deposition. The only Fourth Circuit case they cite does not concern the compilation of documents for review by a deponent in preparation for a deposition. *In re Allen*, 106 F.3d 582, 608 (4th Cir. 1997). Rather, *Allen* concerned the disclosure of a document which contained pages of selected employment records which the attorney had requested the client provide to the attorney for the *attorney's* investigative review. *Id.* Moreover, Debtors do not (and cannot) distinguish the only other cited Fourth Circuit case, which held that identity of documents presented to a deponent by their counsel for review in preparation of a deposition is not protected as attorney work product. *Fort v. Leonard*, 2006 WL 8444690, at *3 (D.S.C. Oct. 11, 2006) (cited in the Motion, at pp. 16-17).

18. Second, as to Rule 612 of the Evidence Rules, the Debtors argue that the Committee did not show "any instance" in which the foundation for its application was laid. This is simply untrue. For example, in the case of deponent Mr. Zafari, counsel laid the foundation by eliciting testimony from the witness which confirmed that he reviewed the documents in order to refresh his recollection and that upon review, the documents confirmed his recollection. *See* Motion Ex. C at. 14:2-4; 15:8-15. Yet, Debtors' counsel still obstructed testimony, arguing that the witness did not testify that the documents successfully refreshed his recollection. *See id.* at 14:10-21; 15:22-23. This argument has no basis in Rule 612, which simply requires that a witness "*uses* a writing to refresh memory." *See* Fed. R. Evid. 612(a) (emphasis added). Rule 612 does not require that the document bring to surface a new recollection.

19. Moreover, Debtors should be deemed to have waived arguments regarding lack of foundation for the application of Rule 612 because they obstructed questioning meant to lay a foundation under Rule 612:

> Q: **Mr. Regnery, did any of the emails that you review during your deposition prep session refresh you recollection; yes or no?**
> Mr. Mascitti: Objection; privilege. Direct the witness not to answer.
>
> Motion Ex. G at 25:4-8.

CONCLUSION

For the reasons set forth above and in the Motion, the Committee requests that this Court enter an order granting the relief requested in the Motion and providing such other and further relief as this Court deems just and proper.

Dated: April 23, 2021

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Exhibit L

FILED UNDER SEAL

Turtz Deposition Transcript
April 5, 2021
(Relevant pages only)

EVAN TURTZ

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: Chapter 11
No. 20-30608
(Jointly Administered)

ALDRICH PUMP LLC, et al.,

Debtors.

ALDRICH PUMP LLC and

MURRAY BOILER LLC,

Plaintiffs,

v. Adversary Proceeding
No. 20-03041 (JCW)

THOSE PARTIES TO ACTIONS

LISTED ON APPENDIX A

TO COMPLAINT and

JOHN and JANE DOES 1-1000,

Defendants.

REMOTE VIDEOTAPED DEPOSITION OF

EVAN TURTZ

APRIL 5, 2021

Reported by:
Sara S. Clark, RPR/RMR/CRR/CRC
JOB No. 192005

Q. Okay. And is there any reason why there was a new actuarial firm being interviewed?

A. No reason comes to mind. I know Bates White has -- Bates White has an excellent reputation.

Q. Does NERA have an excellent reputation?

A. I believe so.

Q. Okay. And was -- the NERA evaluations of both past and future asbestos liabilities, was that utilized in Trane's SEC disclosures?

A. NERA and the prior actuary prior to NERA.

Q. That would be Ankura?

A. I believe so.

Q. And so I gather you would not use a firm that you didn't have a high level of confidence in to advise you on your SEC disclosures; is that a correct statement?

A. That's a very correct statement.

Q. Okay. And for what purpose was NERA engaged?

A. I mean, as I recall, this was for

financial reporting. So exactly what you said, the financial disclosures that the company makes.

Q. So in other words, because Trane, and before it, Ingersoll Rand, was publicly traded, you needed to make certain disclosures about current and potential future liabilities; is that right?

A. I'm not sure I got -- the gist of your question is do we have to make disclosures? We do, yes.

Q. All right. And NERA was retained for the purpose of assisting you in making those disclosures accurately; is that correct?

A. Yes.

Q. Were they retained for any other purpose that you're aware of?

A. Not that I'm aware of.

Q. This invite in this exhibit we were just -- Exhibit 180 is from Drew Evans at Bates White.

Do you know how he got to the point of sending this invite?

A. I don't.

company. Ankura, I believe the name was. And they also did projections.

Q. Okay. So to your -- let me revise my question a little bit.

To your knowledge, prior to May 15 of 2020, had any forecast been done for future asbestos liabilities other than those done by NERA and Ankura?

A. I don't recall.

Q. Are you aware of any?

A. I'm not.

Q. I'm sorry. Is that a no?

A. I'm not aware of any. Excuse me.

Q. If we could go to Page 34 in the PowerPoint, which is Bates Number 50745, which is titled "Future Insurance Reimbursement Forecasts."

Do you know where these numbers came from?

A. Sitting here right now, I don't. They could be from our financial disclosures that the company provides, but I'd have to go back and look and compare.

Q. And the financial disclosures were

MR. HIRST: My objection is on foundation.

A. I don't recall. At some point, there was discussion with Bates White, but I don't think that they were involved in this at this point.

Q. So is there any other source of this type of information that was available as of May 1 -- excuse me -- as of May 15, 2020?

A. Not that I'm aware of.

Q. Okay. I think that's it.

MR. GOLDMAN: If we could look at -- we can close out of that one now, and if we could put up Exhibit 32 in the chat.

MR. DEPEAU: Exhibit 32 is up in the chat.

THE WITNESS: 32?

MR. GOLDMAN: 32, right.

THE WITNESS: Okay.

BY MR. GOLDMAN:

Q. These appear to be the minutes of the joint meeting on May 22nd; is that correct?

A. I agree that that's what it appears to be, yes.