Docket #0141 Date Filed: 3/24/2021

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.	:	

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, hereby moves this Court (the "Motion") pursuant to Rules 26, 34 and 37 of the Federal Rules of Civil Procedure (the "Civil Rules"), made applicable by Rules 7026, 7034 and 7037 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and sections 105(a) and 1103 of title 11 of the United States Code (the "Bankruptcy Code"), for an order (I)

[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.

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compelling the Debtors and any producing non-debtor affiliates (collectively, the "Producing Parties") to propound testimony related to, *inter alia*, conversations held during the Debtors' Board of Managers meetings and conversations held during meetings concerning "Project Omega;"[2] (II) compelling the Producing Parties to produce an unredacted version of the May 2020 PowerPoint presentation identified by Bates Nos. Debtors_00050712-60 (the "PowerPoint");[3] and (III) granting related relief. In support of this Motion, the Committee respectfully states as follows:

INTRODUCTION[4]

As this Motion will demonstrate, the Debtors' assertion of the attorney-client privilege is overbroad and improper for several reasons.

First, factual information does not become privileged simply because it is funneled through a lawyer or because a lawyer was copied on a communication or participated in a discussion about those facts. It is plainly evident that the various attorneys which played a role in the subject meetings were acting primarily in a business role, as their foremost function was to educate and prime the Board members—some of whom were formerly retired and/or new employees of the Debtors—of the facts and business strategies pertinent to the Debtors' ultimate decision to seek bankruptcy relief 48 days after formation.

Second, even if legal advice was sought and rendered during the subject board meetings (as the Debtors will undoubtedly contend), the attorney client privilege does not apply to legal advice that can only be regarded as incidental to the primary business purpose of the meetings. *See United States v. Cohn*, 303 F. Supp. 2d 672, 683–84 (D. Md. 2003). The Debtors paint with

[2] 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.

[3] The redacted version of the produced PowerPoint is attached as Exhibit A.

[4] Capitalized terms not defined in the Introduction shall have the meaning ascribed to them elsewhere in this Motion.

an improperly broad brush, giving no regard to the narrow construction applied to the privilege. Thus, even where incidental legal advice may have been sought or rendered in the context of business strategy, the privilege protects primarily the client's communication *to the attorney*; testimony concerning statements made *by* attorneys may be discoverable provided they do not reveal the substance of the *client's* communications.

Third, the overbreadth and impropriety of the Producing Parties' assertions of privilege are even more evident from their withholding of portions of the PowerPoint, and related testimony, as well as testimony related to a certain a document referred to as an "asbestos tender agreement" (the "Asbestos Tender Agreement"). The PowerPoint was presented at the Debtors' joint board meeting on May 15, 2020, but the version produced to the Committee redacts the most relevant information contained therein—namely, an evaluation of the future liability payments and defense costs for the two entities which became the Debtors. (See Ex. A.) This is clearly not "legal" advice. Moreover, a board member considered this very information as critical to the board members' deliberations regarding bankruptcy. (See Ex. C, Zafari Dep. 94:21 – 95:16.) Nevertheless, the Producing Parties have redacted this document by relying on a dubious privilege assertion. The Producing Parties also obstructed testimony concerning the substantive terms of the Asbestos Tender Agreement, which was negotiated as part of the larger transaction of finalizing the Reverse Morris Trust between the Trane Entities[5] and then-Gardner Denver. Yet, it is unclear how the substance of an agreement between two distinct and unrelated entities in a business transaction which the Debtors purport was arms-length in nature could be privileged.

[5] The term "Trane Entities" refers to Trane Technologies, PLC, Trane Technologies Company LLC, and Trane U.S. Inc.

Fourth, the courts in this jurisdiction have held that the identity of documents presented to deponents for their review in preparation for a deposition are not protected by the attorney-client privilege or work product doctrine. *E.g.*, *Fort v. Leonard*, 2006 WL 8444690, at *3 (D.S.C. Oct. 11, 2006). Notwithstanding this settled aspect of law, counsel for the Producing Parties uniformly instructed witnesses not to respond to questions eliciting the identity of the documents (or even the *categories* of documents) they reviewed, even where the witness testified that their review refreshed their recollection. It is noteworthy that no claim was made that the documents in question were privileged.

JURISDICTION

1. This Court has subject matter jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). For purposes of a hearing on this Motion, venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory authorities for the relief requested are sections 105(a) and 1103 of the Bankruptcy Code, Bankruptcy Rules 7026, 7034 and 7037, and Civil Rules 26, 34 and 37.

PERTINENT FACTUAL BACKGROUND

2. In addition to written discovery, the Committee has deposed several current employees, board members of Debtors and former officers, directors, board members, and employees of the Trane Entities with respect to the 2020 Corporate Restructuring[6]. At the instruction of counsel, the witnesses consistently and repeatedly refused to answer questions regarding the following subjects: (i) inquiries made to counsel at board meetings in connection with Project Omega and planning for the 2020 Corporate Restructuring and information and advice

[6] "2020 Corporate Restructuring" refers to the twin divisive mergers effectuated under Texas law by Trane Technologies, PLC which allowed it to isolate the asbestos claims of its subsidiaries, Trane Technologies Company LLC and Trane U.S. Inc., into Aldrich and Murray, respectively, while segregating and protecting valuable operating assets within the "new", post-merger subsidiary entities.

relayed to deponents by counsel regarding the same; (ii) inquiries made to counsel at board meetings in connection with deliberations regarding the Debtors' bankruptcy filing, and information and advice relayed to deponents by counsel regarding the same; (iii) the substantive terms and conditions of the Asbestos Tender Agreement; and (iv) the redacted portions of the PowerPoint (collectively, the "At Issue Discovery").

[redacted]It is clear from the witnesses' testimony that many of the attorneys in question engaged in business roles. For example, deponents Mr. Valdes and Mr. Zafari [redacted] (Ex. C, Zafari Dep. 24:10-17; Ex. D, Valdes Dep. 133:17-21.) Mr. Zafari also testified that [redacted] (Ex. C, Zafari Dep. 24:18-24). Mr. Zafari was retired at the time and was not an employee of the Debtors. (*Id.* at 29:13-18.) Yet, counsel instructed Mr. Zafari not to reveal [redacted]

[redacted]

(Ex. C, Zafari Dep. 29:19 – 30:19.)

4. Moreover, it is clear that the board meetings primarily concerned high-level business information, not legal advice. Mr. Valdes testified that [redacted] (Ex. D, Valdes Dep. 154:21-24.) The board meetings did not concern updates [redacted]. (*Id.* at 155:3 – 156:8.) Rather, the board members were in [redacted] (*Id.* at 157:11 – 158:17; 211:22-212:9.) A board member testified that the [redacted] (*Id.* at 251:13-20.) Yet, counsel instructed the witnesses not to answer questions regarding [redacted]. (*Id.* at 102:9 – 103:10.)[7]

[redacted]For example, counsel instructed Mr. Valdes [redacted]

[redacted]

[7] Other deponents similarly observed an instruction given by the Debtors' counsel at the depositions not to answer questions concerning Project Omega and the decision to file bankruptcy, citing the attorney-client privilege. *See, e.g.* Dufour Dep. 114:20–115:12, 134:16-135:24, 150:16-151:6; 155:4-15 (attached as Exhibit B); Pittard Dep. 208:2-16, 245:18-246:14 (attached as Exhibit E); Majocha Dep. 30(b)(6) Dep. 198:20–199:14 (attached as Exhibit F); Bowen Dep. 227:2-9 (attached as Exhibit I); Kuehn Dep. 120:13-121:15 (attached as Exhibit J); Sands Dep. 113:24-115:5 (attached as Exhibit K).

(Ex. D, Valdes Dep. 212:14 – 213:12.)

6. Counsel also broadly instructed the witnesses not to reveal any questions they asked to counsel concerning [redacted] discussed at the board meeting, *whether or not* those options called for or encompassed legal advice. (Ex. D, Valdes Dep. 249:8-251:20.) Counsel interrupted a witness mid-sentence as he provided an answer that did not concern attorney-client communications. (*Id.* at 251:21 – 253:13.) Counsel declined to provide the witness guidance on distinguishing between questions for legal and non-legal advice:

(Ex. D, Valdes Dep. 249:15-251:3.)

7. Counsel also uniformly instructed witnesses not to identify the documents which counsel presented to them for their review in preparation of their depositions, even where the witnesses testified that the only reason they reviewed the documents presented by counsel was to refresh their memories. (Ex. C, Zafari Dep. 13:22-14:7.)[8] Indeed, counsel even refused to allow witnesses to testify about the *categories* of documents they had reviewed (emails, memoranda, etc.), even where the questioner was clear that they were not looking for any substantive information about what was contained in those documents. (Ex. G, Regnery Dep. 21:12-25.)

8. With respect to the Asbestos Tender Agreement, counsel instructed the witness not to testify regarding its substance.[9] The Asbestos Tender Agreement was negotiated as part of the larger transaction of finalizing the Reverse Morris Trust between the Trane Entities and then-Gardner Denver, an unrelated entity. (Ex. F, Majocha Dep. 82:18–83:10; 84:4–84:21.) After an opportunity to review[10] the Asbestos Tender Agreement, the Producing Parties were unable to explain how the document itself could be covered by the attorney client privilege and attorney

[8] Other deponents similarly observed instructions given by the Debtors' counsel not to identify the documents counsel presented for their review in preparation of the deposition. *See, e.g.*, Majocha 30(b)(6) Dep. 139:5 – 140:9 (attached as Exhibit F); Valdes Dep. 24:17 – 25:24 (attached as Exhibit D); Regnery Dep. 19:11 – 22:7 (attached as Exhibit G); Howlett Dep. 18:19 -19:7 (attached as Exhibit H); Bowen Dep. 17:15-25 (attached as Exhibit I).

[9] Counsel instructed the witness not to answer the following questions: (1) (Ex. F, Majocha 30(b)(6) Dep. 93:7-15); (2) (*Id.* at 97:13-20.)

[10] Counsel took a 30-minute break during which time Debtors' counsel reviewed the document in order to articulate their purported reasons for withholding the document and obstructing related testimony.

work product—when it was part of a purportedly arms-length business transaction between two then-unrelated entities (and an exhibit in the closing binder)—other than to make a conclusory statement that the it was covered by a common interest agreement (which has never been produced[11] or tested). (*Id.* at 86:2-96:11).

RELIEF REQUESTED

9. The Committee requests that the Court compel the production of the unredacted PowerPoint and second depositions of the witnesses in question concerning the At Issue Discovery, which depositions will occur remotely over video teleconferencing and will be limited to the At Issue Discovery and questioning arising therefrom. Courts in this jurisdiction have frequently compelled additional hours of deposition to address questions previously blocked by an invalid assertion of privilege. *E.g.*, *Prowess, Inc. v. RaySearch Labs. AB*, 2013 WL 1856348, at *5 (D. Md. Apr. 30, 2013); *Neuberger Berman Real Estate Income Fund v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 423 (D. Md. 2005).

10. It is noteworthy that the Producing Parties, at no time during or after the twelve (12) depositions (and counting), made a motion for a protective order based on the applicability of the purported privilege, as is their obligation.[12] Instead, they have continuously asserted privilege objections and interrupted depositions with improper witness coaching and instructions not to respond to questions concerning highly relevant topics. Moreover, the Producing Parties have withheld information and documents based on facially invalid assertions of privilege, which they failed to correct or withdraw upon the Committee's request.

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[11] "In the Fourth Circuit, the proponent of the common interest privilege must produce evidence of an agreement between the individuals with the common legal interest." *Hempel v. Cydan Development, Inc.*, 2020 WL 4933634, at *8 (Aug. 24, 2020) (*citing In re Sanctuary Belize Litig.*, 2019 WL 6717771, at *3 (D. Md. Dec. 10, 2019)).

[12] "It is improper to assert a privilege and then sit back and require the opposing side to file a motion to compel; when a party instructs a witness not to answer on the grounds of privilege, it is that party's obligation to file a motion for protective order." *Moloney v. United States*, 204 F.R.D. 16, 21 (D. Mass. 2001).

ARGUMENT

11. Bankruptcy Rule 7037 provides that "Rule 37 Fed.R.Civ.P. applies in adversary proceedings." Pursuant to Civil Rule 37(a)(3)(B)(i), a party in interest may seek to compel discovery if "a deponent fails to answer a question asked under Rule 30" (governing depositions upon oral examination). Pursuant to Civil Rule 37(a)(3)(B)(iv), a party in interest may seek to compel production if "a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34." Further, Civil Rule 37(a)(4) provides that an evasive or incomplete response must be treated as a failure to respond.

12. The attorney-client privilege "affords confidential communications between lawyer and client complete protection from disclosure." *Hawkins v. Stables,* 148 F.3d 379, 383 (4th Cir.1998). The attorney-client privilege applies only if "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.*

13. Where the privilege is asserted as to factual communications by the attorney to the client, the application of the privilege is narrower in scope, and applies only to facts which state or imply facts communicated to the attorney in confidence." *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 516 (D. Conn. 1976) (citing *United States v. Silverman*, 430 F.2d 106, 122 (2d Cir. 1970)). Moreover, where the deponent is asked to reveal the rationale underlying a given decision, only those reasons which are "*limited* to reliance on protected legal advice" are privileged. *Id.* at 516-

17 (emphasis in original). The business rationale behind the decision, even one informed by legal counsel, should be disclosed. *Id.*

14. The attorney-client privilege is to be narrowly construed and recognized "only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (internal quotation marks omitted); *see also Hawkins v. Stables*, 148 F.3d 379, 382–83 (4th Cir. 1998); *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1993) (noting narrow construction of privilege); *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990) (same); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984) (same).

15. "The party asserting an attorney-client privilege must prove its applicability as well as its non-waiver." *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982); *see also U.S. v. Cohn*, 303 F.Supp.2d 672, 679 (D. Md. 2003). "It is improper to assert a privilege and then sit back and require the opposing side to file a motion to compel; when a party instructs a witness not to answer on the grounds of privilege, it is that party's obligation to file a motion for protective order." *Moloney v. United States*, 204 F.R.D. 16, 21 (D. Mass. 2001) (citing *American Hangar, Inc. v. Basic Line, Inc.*, 105 F.R.D. 173, 175 (D. Mass. 1985) and Lauriat, Massachusetts Deposition Practice Manual (MCLE, 1992 & Supp.1996, 1998 & 2000) at Ch. 18, pp. 14–15).

16. "When a party withholds information otherwise discoverable by claiming that the information is privileged . . ., 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." Fed. R. Civ. P. 26(b)(5)(A).

A. Factual Information and Advice which is Predominantly Business-Related Are Not Protected by the Attorney-Client Privilege

17. The attorney-client privilege attaches in those instances where an attorney is acting to provide primarily legal services, assistance or opinions. *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). It is well settled that communications are not privileged merely because one of the parties is an attorney or because an attorney was present when the communications were made. *U.S. v. Cohn*, 303 F.Supp.2d 672, 683 (D. Md. Oct. 7, 2003); *Neuder v. Battelle Pacific Northwest National Laboratory*, 194 F.R.D. 298, 293 (D.D.C. 2000). "When the legal advice is merely incidental to business advice, the privilege does not apply." *Cohn*, 303 F. Supp. 2d at 683 (internal citation omitted). The privilege also does not apply to communications "as to which a business purpose would have served as a sufficient cause, i.e., any communication that would have been made because of a business purpose even if there had been no perceived additional interest in securing legal advice." *Id.* at 684 (*citing McCaugherty v. Sifferman*, 132 F.R.D. 234, 238 (N.D. Cal. 1990)).

18. "To determine whether communications were made primarily for the purpose of providing legal services, the court must consider the context in which they were made." *Id.* at 684. For example, in *Cohn*, *supra*, the Court analyzed an in-house attorney's role and purpose in reviewing telemarketing scripts for Four Star and held that Four Star, which sought to assert the attorney-client privilege over the attorney's emails, had failed to establish that the attorney's services were primarily for legal rather than business purposes. *Id.* at 684.

19. Similarly, in *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 516 (D. Conn. 1976), the Court recognized that although business interests "might ultimately be influenced by the strictures of law, basic business effects, considerations and policy should be disclosed". *Id.* at 518. In that case, the deponent testified that the legal and business reasons involved in a licensing matter "were

so interwoven that he could not answer without disclosing privileged conversations". *Id.* at 517. In its analysis, the Court noted that while licensing decision "may contain a legal component, they are essentially business decisions." *Id.* The Court reasoned that when the "ultimate decision"

> requires the exercise of business judgment and when what were relevant nonlegal considerations incidental to the formulation of legal advice emerge as the business reasons for and against a course of action, those business reasons considered among executives are not privileged. They are like any other business evaluations and motivations and do not enjoy any protection because they were alluded to by conscientious counsel. To protect the business components in the decisional process would be a distortion of the privilege.

Id.

20. Communications which aid a committee, such as a Board of Directors or management team, in making a business decision are outside the scope of the attorney client privilege. *Johnson v. Bd. of Pensions of the Evangelical Lutheran Church in America*, 2012 WL 5985600, at *4 (D. Minn. Sept. 5, 2012) (board sought counsel's advice with "corporate-wide business interests in mind"; allegedly privileged documents related to possible changes to retirement plan and business ramifications, not to the "legality of the various options for restoring the plan's fund"); *In re FiberMark, Inc.*, 330 B.R. 480, 499-500 (Bankr. D. Vt. 2005) (communications not privileged where they concerned a corporate governance issue which was a business decision, not a legal issue); *Neuder v. Battelle Pacific Northwest Nat. Laboratory*, 194 F.R.D. 289, 295 (D.D.C. 2000) (communications were statements of fact provided to committee to assist them in making a personnel decision); *see Alomari v. Ohio Dep't of Pub. Safety,* C/A No. 2:11-cv-00613, 2013 WL 4499478, at *4 (S.D. Ohio Aug. 21, 2013) ("Rather, the attorney-client privilege "applies only to communications made to an attorney in his capacity as legal advisor. Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected.")

21. Here, the context in which the various board meetings occurred, and which the At Issue Discovery concerns, clearly indicate the predominantly business purpose of those meetings and communications. First, there are clear indications that counsel took on a heavily business role that went far beyond that of a legal advisor. Counsel was involved in staffing the Debtors' boards, including personally making calls to the prospective directors concerning the positions that they were being asked to take and the circumstances surrounding the formation and composition of those boards. Counsel was also chiefly in charge of educating the new board members concerning the Debtors' finances, corporate structure and governance, asbestos liabilities and the various business options and strategies available to address them. One of those board members had been previously retired and admitted that he needed to be educated as to the Debtors' operations; another new member, who was a current employee of the Producing Parties, testified that the board was in [redacted] There is no indication that communications with counsel at these meetings were made or received for the purpose of receiving legal advice, and indeed, the deponents testified that they did not receive updates or information concerning specific litigations during the board meetings.

22. Just like the boards in the cases cited above, which were involved in making personnel decisions, licensing decisions and decisions concerning retirement plans, the boards here were involved in business deliberations regarding the Debtors' (and their ultimate parent companies') business strategy for addressing the enterprise's aggregate asbestos liabilities. It is clear from the context of these meetings that counsel were charged with equipping the board members with the *factual* information concerning Debtors' asbestos liabilities and potential strategies so that those board members could engage in such strategic deliberations. Although it is conceivable that the lawyers present at these meetings may have referenced certain legal

considerations, such as the interpretation or impact of certain Bankruptcy Code sections, this does not render all communications to or from counsel during those meetings privileged. Yet this is precisely the position the Debtors have taken, repeatedly coaching witnesses not to divulge anything which may have been discussed during a meeting at which a lawyer was merely present, or, in certain instances, simply instructing them not to answer questions. As the Fourth Circuit noted in *Cohn*, the business purpose of deliberating whether to file bankruptcy "would have served as a sufficient cause" for the communications in question to have been made, without any secondary interest in securing heretofore unidentified legal advice.

23. Moreover, there is no indication that the deponents' responses to the At Issue Discovery would reveal communications relating to legal advice. On the record, counsel failed to identify the topics on which the Board purportedly sought legal advice, let alone any connection between those topics and the questions posed to the deponents. (*See* Ex. D, Valdes 249:15 -251:3, excerpted above); *Nix v. Holbrook*, No. CIV.A. 5:13-02173-JM, 2015 WL 631155, at *6 (D.S.C. Feb. 13, 2015) (holding that deposition questions related to business decisions were not protected because they did "not suggest a response containing extensive legal advice"). Counsel objected and instructed the witnesses not to answer questions regarding the factors that the board considered during their deliberations, factual information concerning forecasts of future asbestos liabilities, and factual information concerning the Georgia-Pacific, DBMP and Paddock Enterprises reorganizations. [redacted]. None of these topics reveal any apparent connection to the seeking or rendering of legal advice.

B. The PowerPoint and Testimony Related to the Asbestos Tender Agreement are Not Protected by Attorney Client Privilege or Attorney Work Product

24. The PowerPoint redactions are neither protected by the attorney client privilege nor constitute attorney work product. The redactions pertain to evaluations of the future liability payments and defense costs for the two entities which became the Debtors. (*See* Ex. A.) This information constitutes factual information provided to the Debtors to assist them in their business decision-making, not constitute legal advice. The PowerPoint redactions are not protected as attorney work product because there is no basis to assert that the redacted information was prepared in anticipation of litigation. *E.g., In re Grand Jury Proceedings*, 102 F.3d 748, 750 (4th Cir. 1996).

25. Similarly, witnesses should be compelled to testify concerning their understanding of the terms and conditions of the Asbestos Tender Agreement. (*See* Ex. F, Majocha 30(b)(6) Dep. 93:7-15, 97:13-20). The Asbestos Tender Agreement was negotiated between Gardner Denver and the unrelated Trane Entities as part of the Reverse Morris Trust transaction and allocated asbestos liabilities between the preexisting and newly created entities. Clearly, the terms of an agreement do not constitute attorney-client communications. Moreover, testimony concerning the Asbestos Trust Agreement is not protected by the work-product privilege; an agreement entered into by two unrelated parties as part of a purportedly arms-length business transaction is not an attorney's "work product" in anticipation of litigation.

C. Documents Presented to Deponents for their Review in Preparation for Depositions are not Protected by the Attorney-Client Privilege or Work Product Doctrine

26. The identity of documents presented to a deponent by their counsel for review in preparation of a deposition is not protected by the attorney client privilege or as attorney work product. *Fort v. Leonard*, 2006 WL 8444690, at *3 (D.S.C. Oct. 11, 2006). In *Fort*, the Court rejected the asserting party's arguments that by inquiring into the identity and contents of the

documents presented to the deponent, opposing counsel "could gain insight into the documents and other aspects of the case defense counsel believe are more important." *Id.*

27. Decisions from other jurisdictions are consistent with *Fort. See Am. Automobile Ins. Co. v. First Mercury Ins. Co.*, 2016 WL 7395219, at *3 (D.N.M. Oct. 22, 2016) (witness required to identify and produce the documents provided to her for review in anticipation of deposition); *Christison v. Biogen Idec*, 2014 WL 3749191, *2 (D. Utah July 29, 2014) ("[T]his Court could not locate Tenth Circuit case law recognizing a work-product privilege for an attorney's compilation of select documents. In fact, cases from district courts within the Tenth Circuit question such a privilege."); *Williams v. Sprint/United Mgmt. Co.*, 2007 WL 634873, at *4 (D. Kan. Feb. 27, 2007) (concluding "that mere selection and grouping of information does not transform discoverable documents into work product"); *Resolution Trust Corp. v. Heiserman*, 151 F.R.D. 367, 374 (D. Colo. 1993) (cautioning that "[t]aken to its logical conclusion," the claim that "selecting documents represents counsel's mental impressions and legal opinions" would "render[] virtually all document requests ... opinion work-product ..."); *Audiotext Commc'ns Network, Inc.*, 164 F.R.D. at 253 ("Collecting and organizing discoverable documents in a notebook does not make the notebook protected work product.").

28. Moreover, Rule 612 of the Federal Rules of Evidence ("Evidence Rules") permits discovery of documents reviewed or relied upon by a witness to refresh their recollection in advance of a deposition, even where those documents are privileged (which has not been alleged here). *Brown v. Tethys Bioscience, Inc.,* No. CIV.A. 3:11MC11, 2011 WL 4829340, at *1–2 (E.D. Va. Oct. 11, 2011). Certainly, if privileged documents reviewed by a witness in preparation can be discoverable under such circumstances, the Committee should be entitled to inquire as to *nonprivileged* documents. Yet, here, even after deponents confirmed the only reason for reviewing

the documents was to refresh their recollection, counsel still instructed the deponent not to identify the documents reviewed. (*See* Ex. C, Zafari Dep 14:2-21.)[13] In one instance, counsel obstructed questioning meant to lay a foundation under Rule 612:

[redacted]

(Ex. G, Regnery Dep. 25:4-8.)

29. Here, counsel made blanket objections instructing witnesses not to identify the documents they reviewed in preparation of their depositions. No claim was made that those unidentified documents are privileged. Even if they were, however, the witnesses testified that the only reason they reviewed the documents presented by counsel was to refresh their memories. Accordingly, even if the identity of these documents constitutes attorney work product, they are nonetheless discoverable under Rule 612.

FED. R. CIV. P. 37(a)(1) CERTIFICATION

30. Pursuant to Civil Rule 37(a)(1), the undersigned hereby certifies that the Committee has, in good faith, conferred with the Producing Parties concerning the At Issue Discovery and the issues raised in this Motion on March 15, 2021, March 18, 2021 and March 24, 2021. The Producing Parties' assertion the Asbestos Tender Agreement[14] is privileged was also addressed during the deposition of Mark Majocha on March 18, 2021. (Ex. F, Majocha Dep. 97:13-106:19).

[13] [redacted]

[14] During the parties' March 24, 2021 meet and confer, the Producing Parties stated they would reconsider their earlier withholding of the Asbestos Tender Agreement (which appears as No. 3317 on the Producing Parties' Privilege Log) (the "Agreement"). Thus, while the Committee does not seek to compel production of the Agreement in this Motion, it does reserve its right to seek the Agreement's production in the event the Producing Parties continue to withhold the Agreement or produce it with overbroad or unwarranted redactions.

CONCLUSION

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

Dated: March 24, 2021

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EXHIBIT A

May 2020 PowerPoint Presentation

Exhibit Redacted Per Agreed Protective Order Governing Confidential Information

EXHIBIT B

Excerpted Transcript of the Deposition of Marc DuFour

Exhibit Redacted Per Agreed Protective Order Governing Confidential Information

EXHIBIT C

Excerpted Transcript of the Deposition of Robert Zafari

Exhibit Redacted Per Agreed Protective Order Governing Confidential Information

EXHIBIT D

Excerpted Transcript of the Deposition of Manilo Valdes

Exhibit Redacted Per Agreed Protective Order Governing Confidential Information

EXHIBIT E

Excerpted Transcript of the Deposition of Ray Pittard

Exhibit Redacted Per Agreed Protective Order Governing Confidential Information

EXHIBIT F

Excerpted Transcript of the Deposition of Mark Majocha

Exhibit Redacted Per Agreed Protective Order Governing Confidential Information

EXHIBIT G

Excerpted Transcript of the Deposition of David Regnery

Exhibit Redacted Per Agreed Protective Order Governing Confidential Information

EXHIBIT H

Excerpted Transcript of the Deposition of Heather Howlett

Exhibit Redacted Per Agreed Protective Order Governing Confidential Information

EXHIBIT I

Excerpted Transcript of the Deposition of Cathleen Bowen

Exhibit Redacted Per Agreed Protective Order Governing Confidential Information

EXHIBIT J

Excerpted Transcript of the Deposition of Chris Kuehn

Exhibit Redacted Per Agreed Protective Order Governing Confidential Information

EXHIBIT K

Excerpted Transcript of the Deposition of Robert Sands

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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re: ALDRICH PUMP LLC, *et al.*,[1] Debtors.	Chapter 11 Case No. 20-30608 (JCW) (Jointly Administered)
ALDRICH PUMP LLC and MURRAY BOILER LLC, Plaintiffs, v. THOSE PARTIES TO ACTIONS LISTED ON APPENDIX A TO COMPLAINT and JOHN AND JANE DOES 1-1000, Defendants.	Adversary Proceeding No. 20-03041 (JCW)

NOTICE OF HEARING

PLEASE TAKE NOTICE that The Official Committee of Asbestos Personal Injury Claimants (the "Committee") filed a *Motion to Compel the Debtors and Non-Debtor Affiliates to (I) Provide Testimony Regarding Certain Matters and (II) Produce Certain Withheld Documents* (the "Motion").

PLEASE TAKE FURTHER NOTICE that your rights may be affected by this Motion. You should read the Motion carefully and discuss it with your attorney. If you do not have an attorney, you may wish to consult with one.

PLEASE TAKE FURTHER NOTICE that if you do not want the Court to grant the relief requested in the Motion, or if you oppose it in any way, then on or before **April 7, 2021** you MUST:

[1] The Debtors are the following entities (the last four digits of the Debtors' 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.

1. File a formal, written response with the Bankruptcy Court at:

   Clerk, United States Bankruptcy Court
   Charles Jonas Federal Building
   401 West Trade Street
   Charlotte, North Carolina 28202

2. Serve a copy of your response on all parties in interest, including:

   a) U.S. Bankruptcy Administrator
   402 West Trade Street
   Charlotte, NC 28202

   b) HAMILTON STEPHENS STEELE + MARTIN, PLLC
   Glenn C. Thompson
   525 North Tryon Street, Suite 1400
   Charlotte, North Carolina 28202

   c) ROBINSON & COLE LLP
   Natalie D. Ramsey
   Davis Lee Wright
   1000 N. West Street, Suite 1200
   Wilmington, Delaware 19801

   d) CAPLIN & DRYSDALE, CHARTERED
   Kevin C. Maclay
   Todd E. Phillips
   One Thomas Circle NW, Suite 1100
   Washington, DC 20005

If you do not want the Court to grant the relief requested in the Motion or if you want the Court to consider your views on the Motion, then you or your attorney should attend the hearing on **April 29, 2021 at 9:30 a.m.** before the Honorable J. Craig Whitley at the United States Bankruptcy Court, Charles Jonas Federal Building, Courtroom 1-4, 401 West Trade Street, Charlotte, North Carolina 28202.

PLEASE TAKE FURTHER NOTICE that the Court may grant the relief requested in the Motion. No further notice of the hearing on the Motion will be given.

[Signatures appear on the following page]

Dated: March 24, 2021
Charlotte, North Carolina

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