UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

Laurie Selber Silverstein
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February 23, 2021

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Re: *Imerys Talc America, Inc.*, Case No. 19-10289
(D.I. 2806, 2807, 2840, 2843, 2844, 2845, 2846)

Dear Counsel,

By this letter, I am addressing the invocation of the common interest doctrine by Debtors, the Tort Claimants Committee ("TCC") and the Future Claimants Representative

("FCR") in response to discovery propounded by Johnson & Johnson and Johnson & Johnson Consumer Inc. (together, "J&J") and Arnold & Itkin in connection with the Plan.[1]

At the January 15, 2021 hearing, I asked for letter submissions with respect to the assertion of the common interest doctrine. In their letter submissions,[2] Debtors (consistent with their presentation at the January 15 hearing), the TCC, and the FCR each provided me with a categorical privilege log. I have reviewed the submissions and come to the following determinations.[3]

**The Common Interest Doctrine**

The common interest doctrine is an exception to the general rule that disclosure of a communication to a third party destroys any attendant privilege. In other words, the doctrine permits attorneys representing different parties with similar legal interests to share information without having to share it with others.[4] "It expands the reach of the attorney-client privilege and work product doctrine by providing that, under certain circumstance[s], the sharing of privileged communications with third parties does not constitute a waiver of the privilege."[5]

To invoke the common interest doctrine, a party must establish: (1) the communication was made by separate parties in the course of a matter of substantially similar legal interest; (2) the communication was designed to further that effort; and (3) the privilege has not been waived.[6] The "substantially similar legal interest" must be as to the subject matter of the communication for which protection is sought and "not solely

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[1] The use of the term "Plan" in this letter refers to the Ninth Amended Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and its Debtor Affiliates under Chapter 11 of the Bankruptcy Code, D.I. 2864 and, where applicable, previous versions. Any terms used herein that are not defined have the meaning ascribed to them in current version of the Plan.

[2] TCC/FCR Letter to the Honorable Laurie Selber Silverstein, D.I. 2806; Debtors' Letter to the Honorable Laurie Selber Silverstein, D.I. 2807.

[3] The Ad Hoc Committee of Imerys Talc Litigation Plaintiffs (D.I. 2843) and the Cyprus Historical Excess Insurers (D.I. 2846) also submitted letters in which they generally joined in the objections raised by J&J (D.I. 2844, 2845) and Arnold & Itkin (D.I. 2840).

[4] *In re Teleglobe Communications Corp.*, 493 F.3d 345, 364 (3d Cir. 2007). *See also id.* at 365 ("For our purposes, it is sufficient to recognize that members of the community of interest must share at least a substantially similar legal interest.").

[5] *In re Leslie Controls, Inc.*, 437 B.R. 493, 496 (Bankr. D. Del. 2010). The common interest doctrine is sometimes referred to as the "common interest privilege." As others have recognized, this is a misnomer because the doctrine is not itself a privilege. Rather, as set forth in the text, it is a doctrine that only protects form disclosure communications that themselves are protected from disclosure by a privilege. I find this to be a subtle but worthwhile distinction to keep top of mind in performing a common interest doctrine analysis.

[6] *MobileMedia Ideas LLC v. Apple Inc.*, 890 F. Supp. 2d 508, 515 (D. Del. 2012); *Leslie Controls*, 437 B.R. at 496 (Bankr. D. Del. 2010).

commercial."[7] The common-interest doctrine does not require complete unity of interest, "but it is limited by the scope of the parties' common interest."[8] To the extent that the parties communicate about matters on which they hold opposing interests, those communications lose any privilege.[9] And, of course, the sharing of non-privileged information or documents gains no protection merely because the parties have a common legal interest.

Two cases in this jurisdiction discuss the common interest doctrine in the context of plan-related discovery. In *Leslie Controls*, Judge Sontchi examined whether a memorandum prepared by debtors' insurance coverage counsel providing advice with respect to the effect of its insurer's likely position on insurance coverage in various bankruptcy scenarios had to be produced because it was shared prepetition with counsel for an ad hoc committee of asbestos plaintiffs and a proposed future claimants representative. Judge Sontchi rejected a per se rule—that parties engaged in negotiations can never share a common interest—in favor of a case-by-case analysis. He concluded that notwithstanding ongoing plan negotiations, the prepetition debtors, the ad hoc committee of tort claimants and the proposed future claimants' representative had a common legal interest with respect to maximizing insurance coverage. On the other hand, he recognized that those parties had conflicting legal interests with respect to how to apportion any insurance coverage. In colloquial terms, Judge Sontchi drew a distinction between the "size of the pie" and the "pieces of the pie."

In *Tribune*,[10] former Judge Carey addressed discovery in the context of competing plans. Specifically, certain noteholders (and proponents of a competing plan) sought discovery from the debtors, committee and lenders with respect to their negotiations of the settlements among them embodied in their own plan (the "DCL Plan"). After reciting the chronology of certain filings and mediation proceedings, the court concluded that a community of interest was established. Judge Carey then concluded that "[o]nce the DCL Plan Proponents agreed upon the **material terms** of a settlement, it is reasonable to conclude that the parties might share privileged information in furtherance of their common interest of obtaining approval of the settlement through confirmation of the plan."[11] But, in an Epilogue, former Judge Carey cautioned:

> Lest this decision be read too broadly, I add a cautionary note: A determination involving whether a community of interest privilege applies is an intensely fact-and-circumstance-driven exercise. The balancing of tensions which arise during the search for truth may, depending upon the particular

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[7] *Teleglobe*, 493 F.3d at 365; *MobileMedia*, 890 F. Supp. 2d at 515.
[8] *Leslie Controls*, 437 B.R. at 500.
[9] *Id.*
[10] *In re Tribune Co.*, No. 08-13141 KJC, 2011 WL 386827 (Bankr. D. Del. Feb. 3, 2011).
[11] *Id.* at *5.

> circumstances involved, fall either way. Guided by Circuit precedent, other persuasive decisional law, applicable local rule, and orders governing mediation, I have decided that the matter before me involves circumstances warranting a determination that a community of interest privilege may be invoked by co-proponents of a plan. This is not to say that parties who are co-proponents of a plan or parties who reach settlements arising from mediation are always entitled to assert this privilege. Neither should it be said that the privilege can never be invoked unless the circumstances involve the proposal of a joint plan or a settlement resulting from mediation.[12]

*Quigley*,[13] out of the Bankruptcy Court for the Southern District of New York, is also instructive (and relied upon by Debtors). In *Quigley*, an ad hoc committee sought to compel disclosure of documents shared between the debtor, Quigley Company Inc., and its parent, Pfizer Inc. in connection with Quigley's plan of reorganization, which included a section 524(g) injunction for Quigley's asbestos-related liability and Pfizer's derivative liability. In considering the common interest doctrine asserted by Quigley and Pfizer, Chief Judge Bernstein recognized that they were simultaneously aligned and adverse depending on which interest was considered. Ultimately, Chief Judge Bernstein concluded that Quigley and Pfizer shared a common legal interest in confirmation of Quigley's plan. In doing so, he highlighted the following factors: (i) prepetition, Quigley and Pfizer were co-defendants in numerous asbestos lawsuits (often sued jointly on the alleged wrong), (ii) for decades they had coordinated a joint defense against the asbestos claims and, one year prior to the bankruptcy filing, entered into a formal joint defense agreement, (iii) it was "undisputed" that Quigley and Pfizer had engaged in a joint strategy to file and prosecute the plan, and since the petition date, both engaged in joint prosecution of the bankruptcy case, and (iv) the plan resolved their joint liabilities through the injunction provided by 524(g). Taking these factors together, Chief Judge Bernstein concluded the parent and subsidiary shared a common legal interest in confirming Quigley's plan.

There are three take-a-ways from these cases relevant to the matter before me: (i) the common interest doctrine can be, but is not necessarily, applicable in the plan context; (ii) parties can simultaneously share a common legal interest with respect to some issues but not other issues; and (iii) to the extent that parties share a common legal interest, the common interest doctrine only protects the communications that are in furtherance of that common legal interest. Simply, put, context matters.

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[12] *Id.* at *9.

[13] *In re Quigley Co., Inc.*, No. 04-15739 SMB, 2009 WL 9034027 (Bankr. S.D.N.Y. Apr. 24, 2009).

**The Contentions**

*A. Debtors' Assertion of the Common Interest Doctrine*

Debtors assert that the common interest doctrine protects from discovery documents and communications protected by the attorney client privilege or that are work product, in relevant part, as follows: [14]

> Category 1: among Plan Proponents regarding the proposed plan of reorganization and related documents and issues from March 5, 2020 – ongoing.
>
> Category 2: between Debtors and the FCR regarding preserving and/or maximizing assets available or potentially available for recovery to creditors, including related to insurance and/or estate claims, including claims for indemnification from at least as of September 25, 2018 - February 13, 2019.
>
> Category 3: among Plan Proponents regarding preserving and maximizing assets available for recovery to creditors, including as related to Johnson & Johnson's indemnity obligations and insurance assets from at least February 13, 2019 – ongoing.
>
> Category 4: between Debtors and Imerys, S.A. regarding the bankruptcy action and related proceedings at least as of February 13, 2019 - ongoing.
>
> Category 7: among Plan Proponents, Rio Tinto and Zurich regarding the proposed plan of reorganization and related documents and issues from at least as of June 29, 2020 – ongoing.
>
> Category 9: among Debtors, the TCC, the FCR and Cyprus regarding the proposed plan of reorganization and related documents and issues from at least as of December 14, 2020 – ongoing.

*B. The TCC's Assertion of the Common Interest Doctrine*

The TCC asserts that the common interest doctrine protects from discovery documents and communications protected by the attorney client privilege or that are work product, in relevant part, as follows:[15]

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[14] Debtors' Categorical Privilege Log in connection with Plan-Related Discovery, D.I. 2807-1.

[15] Official Committee of Tort Claimants' Privilege Log, D.I.2806-3. In response to the document requests received from J&J and Arnold & Itkin, the TCC and the FCR each took the position that they would not search for communications between themselves and Debtors as it would simply be duplicative of Debtors' production responses. I assume that this explains why the TCC's and the

Category 1: between the TCC and FCR regarding the proposed plan of reorganization and related documents and issues from March 20, 2020–ongoing.

Category 3: between the TCC and FCR regarding preserving and/or maximizing assets available or potentially available for recovery to creditors, including as related to insurance and/or estate claims, including claims for indemnification from June 17, 2019–ongoing.

Category 5: among the TCC, FCR, Rio Tinto and Zurich regarding proposed plan of reorganization and related documents and issues from May 30, 2020-July 9, 2020.

*C. The FCR's Assertion of the Common Interest Doctrine*

The FCR asserts that the common interest doctrine protects from discovery documents and communications protected by the attorney client privilege or that are work product, in relevant part, as follows:[16]

Category 1: between the FCR and TCC regarding the proposed plan of reorganization and related documents and issues from 3/20/20-10/19/20.

Category 3: between the FCR and TCC regarding preserving and/or maximizing assets available or potentially available for recovery to creditors, including as related to insurance and/or estate claims, including claims for indemnification from 6/17/19-10/19/20.

Category 5: Among the FCR, TCC, Rio Tinto and Zurich regarding the proposed plan of reorganization and related documents and issues from 5/30/20-7/9/20.

**Discussion**

The above-stated categories can be grouped together as follows:

- Debtors category 1, TCC category 1 and FCR category 1 broadly seek to protect plan-related communications among the Plan Proponents. On the facts of this case, the category of "plan-related" communications is too broad because it sweeps up the

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FCR's respective assertions of the common interest doctrine relative to these production requests do not include Debtors and why certain start dates differ. On the other hand, I cannot discern a reason for the end dates in the FCR's invocation of the doctrine other than to conclude that they have no communications or documents beyond the stated end date and do not anticipate any further protected communications.

[16] Future Claimants' Representative's Privilege Log, D.I. 2806-5.

TDPs. As discussed below, the TDPs largely fall within the *Leslie Controls* "piece of the pie" rubric and would, therefore, not warrant protection from disclosure among parties that are adverse with respect to that particular interest.

- Debtors categories 2, 3, TCC category 3 and FCR category 3 address communications and documents regarding maximizing assets and creditor recoveries. These categories fall within the *Leslie Controls* "size of the pie" rubric and would warrant protection from disclosure between and/or among proper parties and within a proper timeframe.

- Debtors categories 7 and 9, TCC category 5, and FCR category 5 seek to protect communications regarding the plan among settlement parties once a settlement is reached. These communications might fall within the *Tribune* rubric and, if so, warrant protection from disclosure between and/or among proper parties and within a proper timeframe.

- Debtors category 4, communications between Debtors and Imerys S.A. with respect to the entire case, is also overly broad. As set forth below, Debtors have not met their burden to show that they shared a common *legal* interest prior to the settlement with Imerys S.A.

*A. Communications and Documents regarding the Trust Distribution Procedures*

Much of the discovery disputes center around the TDPs. The Plan Proponents consider the TDPs a part of the Plan and thus included within each categorical log as category 1. On the facts of this case, inclusion in the plan-related category is not justified.

I agree with Arnold and Itkin's assessment that the TDPs are one of the most important documents in the case. "In general, the TDPs will dictate the rights (and the limitations on those rights) of each tort claimant by, among other things, (a) establishing the claims resolution process, (b) classifying different types of tort claims; (c) providing for the treatment of each claim and each class of claim; and (d) determining the assets that will be available to satisfy each unique class of tort claims."[17] Arnold & Itkin seeks communications regarding the TDPs, including information concerning Scheduled Values, Average Values and Maximum Values, the 40-40-20 split, the Initial Payment Percentages and certain general mechanics of how the TDPs will be implemented. J&J also seeks documents with respect to claimant recoveries, claim values and eligibility criteria.

Debtors assert the common interest doctrine for any such communications among all Plan Proponents as of March 5, 2020. The TCC and the FCR both assert the common interest doctrine for any such communications since the beginning of the bankruptcy case.

[17] D.I. 2840, at 1.

The TCC and the FCR also specifically contend that their respective searches (using J&J's parameters) did not result in the identification of any "substantive discussions" regarding the TDPs payment percentages.

I conclude that the Plan Proponents have not met their burden of proving that all communications among them regarding the TDPs are protected by the common interest doctrine.[18] The TDPs address how the Trust's assets will be distributed among claimants. In that regard, Plan Proponents are more adverse than aligned. A debtor, in general, would seek to keep claim amounts (e.g. Scheduled Values, Average Values and Maximum Values) as well as payouts low, while claimants (whether current or future) would seek higher values. As between the TCC and FCR, it is clear that their interests diverge with respect to the initial payment percentages. Further, based on the colloquy at the Disclosure Statement hearing, it is also clear that the TCC and FCR had significant negotiations over other aspects of the TDPs, such as the proper allocation of assets among the three trusts established in the TDPs.[19] These terms go to the "pieces of the pie" rather than the size of the pie.

Moreover, as Judge Carey noted in *Tribune*, the invocation of the common interest doctrine could, in particular circumstances, be in tension with the search for the truth. Given the singular importance of the TDPs to recoveries by claimants and the reliance by the TCC and FCR in the instance on their negotiations to formulate the TDPs, discovery of the requested material terms of the TDPs is warranted.

*B. Communications and Documents Regarding the Plan, Generally*

Debtors represent that the Plan Proponents reached an agreement in principle on the material terms of the Plan on March 5, 2020. Neither J&J nor Arnold & Itkin seriously contest this contention. I conclude, therefore (with the exception of the settlements discussed below, and, of course, with respect to the TDPs), that on March 5, 2020, the Plan Proponents had a common legal interest in confirming the Plan.[20]

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[18] My conclusion assumes that any communications would be protected from production by either the attorney-client privilege or the work product doctrine in the first instance.

[19] For example, at the time of the approval of the Disclosure Statement, the FCR had not yet signed off on the TCC's proposal for the allocation of the Cyprus Contribution. I also note that the first version of the TDPs was not filed on the docket until September 10, 2020—a full six months after the Plan was originally filed.

[20] As Arnold & Itkin points out, the FCR asserts that a common legal interest arose between it and the TCC with respect to the Plan on March 20, 2020. I ascribe the difference in start date to the specific documents each party is seeking to protect rather than a difference in the date of an actual meeting of the minds. *See supra* n. 15. If my assumption is incorrect, the matter can be brought to my attention and I will re-visit it.

*C. Communications and Documents between Debtors and Imerys S.A. regarding the bankruptcy action*

Debtors variously assert a common legal interest solely between themselves and Imerys S.A. "over communications [that] discuss or address legal issues related to a proposed plan" prior to March 5, 2020[21] or, as stated in Debtors category 4 over communications "regarding the bankruptcy action from at least February 13, 2019 ("Petition Date"). For this proposition, Debtors primarily rely on *Quigley*.

As of the Petition Date, Debtors realized the need to resolve disputes with Imerys S.A. In the first day declaration, Ms. Picard declared: "During the Chapter 11 Cases, the Debtors intend to negotiate the terms of a consensual plan of reorganization with the future claimants' representative appointed by the Court, representatives of the holders of current alleged Talc Claims *and the non-debtor Parent on behalf of the rest of the Imerys Group* in order to resolve the Talc Claims and develop a go forward strategy for the affected talc businesses."[22] This is reinforced by the recently approved Disclosure Statement in which Debtors represent that "The Plan incorporates a global settlement that is the product of extensive negotiations and discussion among the Plan Proponents providing for the treatment of Talc Personal Injury Claims in a manner consistent with the Bankruptcy Code. The Plan Proponents submit that the Imerys Settlement is the product of months of intensive, arms' length negotiations and is the lynchpin of the Plan, paving the way for a consensual resolution of these Chapter 11 Cases."[23]

Debtors have not met their burden to show that their common legal interest (as opposed to a common commercial interest) predates the agreement on the Imerys Settlement. While *Quigley* does hold that it is possible for a parent and subsidiary to share a common legal interest in confirming a plan of reorganization, it does not mandate that result. Unlike *Quigley*, there is no evidence before me that Imerys S.A. was a co-defendant in the Imerys prepetition litigation or that Imerys S.A. shares derivative liability with Debtors, factors the *Quigley* court heavily relies on in its decision. There is also no evidence of a joint defense agreement between the Debtors and Imerys SA, much less any evidence before me of decades-long coordinated defense efforts, factors the *Quigley* court thought were relevant in establishing the common legal interest.[24]

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[21] D.I. 2807, n. 9 (referencing Category No. 4, which gives a date range for the common interest privilege of the petition date going forward.)

[22] Declaration of Alexandra Picard, Chief Financial Officer of the Debtors in Support of Chapter 11 Petitions and First Day Pleadings, D. I. 10, ¶ 50.

[23] Disclosure Statement for Ninth Amended Joint Chapter 11 Plan of Reorganization of Imerys Talc America, Inc. and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code, D.I. 2866, at 71.

[24] Debtors also cite *In re Cherokee Simeon Venture I, LLC,* in support of the proposition that communication between a parent and subsidiary are protected by the common interest doctrine. 2012 WL 12940975, at *3 (Bankr. D. Del. May 31, 2012). *Cherokee Simeon* is wholly distinguishable. In that case, Judge Gross concluded that the parent (Zeneca) and subsidiary (debtor, Cherokee

Accordingly, I conclude that Debtors have not met their burden of establishing a common legal interest between themselves and Imerys S.A. regarding the bankruptcy action as of February 13, 2019.

Furthermore (and consistent with part B, immediately above), I conclude that a common legal interest between Debtors and Imerys, S.A. with respect to the Plan did not exist until March 5, 2020.

*D. Communications and Documents Regarding Settlements within the Plan*

Parties may have a legal interest in a particular settlements within a plan distinct from a legal interest in confirmation of the Plan itself. While the two legal interests are similar, the difference is both nuanced and important. As exemplified by this Plan, which contains settlements between the Plan Proponents and multiple counter-parties arrived at independently and at different points in time,[25] the legal interests parties have in obtaining approval of the respective settlements is through confirmation of the Plan. Accordingly, the *Tribune* material terms/meeting of the minds analysis provides the best rubric for this category.

Debtors assert a common interest among Plan Proponents, Rio Tinto and Zurich American as of June 29, 2020 "after Debtors and Rio Tinto and Zurich entered a term sheet governing Rio Tinto and Zurich's participation in the proposed plan." The TCC and FCR assert a common legal interest among the TCC, FCR, Rio Tinto and Zurich beginning May 30, 2020 through July 9, 2020. Similarly, Debtors assert a common interest among Debtors, the TCC, the FCR and Cyprus as of December 14, 2020 "after Debtors and Cyprus entered into a final term sheet governing Cyprus' participation in Plan." No party questions these dates.

Accordingly, I conclude that a common legal interest to approve the Rio Tinto/Zurich Settlement and to therefore confirm the Plan arose among the Plan

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Simeon) shared a common interest in defending against a motion to dismiss debtor's bankruptcy case as a bad faith filing, filed at Zeneca's direction and for Zeneca's benefit. Judge Gross noted the necessity of exploring the relationship between the two entities and found that: (i) debtor owned one asset, a parcel of real estate that had been deeded to it by Zeneca, (ii) Zeneca originally owned the parcel and was still liable as a responsible party for remediation expenses; (iii) Zeneca was the debtor's manager; and (iv) Zeneca had funded the bankruptcy case when debtor's primary secured creditor would not permit use of cash collateral. The communications at issue involved the legal strategies to defend against the allegations of a bad faith filing. Under these circumstances, Judge Gross ruled that the communications were protected and found a common legal interest in both prosecution of the bankruptcy case and defending against the bad faith dismissal.

[25] For example, the first iteration of the Plan was centered around the Imerys Settlement. It did not contain the Rio Tinto/Zurich Settlement or the Cyprus Settlement.

Proponents, Rio Tinto and Zurich as of June 29, 2020.[26] I further conclude that a common legal interest to approve the Cyprus Settlement, and therefore to confirm the Plan arose among Debtors, the TCC, the FCR and Cyprus as of December 14, 2020.

*E. Communications and Documents Regarding Maximization of Assets*

As exemplified by *Leslie Controls*, courts have recognized a common legal interest between and among a debtor, a future claims representative and a tort claimants committee with respect to maximizing assets coming into a debtor's estate, at least in the context of plan negotiations.[27] Those courts seem to recognize a natural affinity inherent in a tort claimants committee (the fiduciary representing current tort claimants) and a future claimants' representative (appointed to represent future demand holders, i.e. those who would assert tort liability against the debtor) in ensuring as large a pot of funds for recoveries, generally. A debtor can also share that same natural affinity.

In their categorical privilege logs, each of the TCC, the FCR and Debtors assert they share that common legal interest in maximizing assets. This assertion covers three different periods among certain parties. First, Debtors assert they share a common legal interest with the FCR in maximizing recoveries to creditors from "at least September 25, 2018 to February 13, 2019."[28] Second, Debtors assert they share a common legal interest in maximizing assets among all Plan Proponents from at least February 13, 2019 – ongoing. Third, the TCC and FCR assert such a common legal interest between themselves from June 17, 2019 through October 19, 2020. Somewhat in tension with the categorical privilege logs, the TCC/FCR letter asserts that this common legal interest arose at the beginning of the bankruptcy case.

I conclude that:

(i) Debtors and the FCR share a common legal interest in maximizing assets for recoveries to creditors from September 25, 2018 to the Petition Date.

(ii) The TCC and the FCR had a common legal interest in maximizing assets for recoveries to creditors during the asserted dates, i.e. from June 17, 2019 through October 19, 2020.

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[26] I choose the June 29, 2020 date over the May 30, 2020 date because June 29 is the date on which the Rio Tinto/Zurich term sheet was executed.

[27] No party objecting to the assertion of the common interest privilege took direct aim at this category.

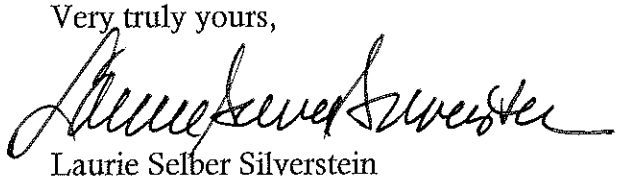
[28] While not stated, this timeframe begins on the date of Mr. Patton's prepetition engagement as the legal representative for future personal injury claimants in conjunction with discussions and a negotiation regarding a potential plan of reorganization under chapter 11 of Title 11 of the United States Code (D.I. 100-4) and ends on the Petition Date.

(iii) Debtors generally share that common legal interest in maximizing assets for recoveries to creditors with the TCC and FCR from the Petition Date forward. But, Imerys S.A. does not share in that common legal interest, certainly as it pertains to itself.

**Conclusion**

The above provides guidance to the parties with respect to the common interest doctrine that must be applied to specific documents and communications responsive to discovery requests. To be shielded from discovery a document must be the subject of a common legal interest as determined above and be protected by the attorney-client privilege or be work product.

Very truly yours,



Laurie Selber Silverstein

LSS/cmb