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Re: *Imerys Talc America, Inc.*, Case No. 19-10289

Dear Counsel:

This letter addresses the first of multiple discovery disputes that are the subject of letter submissions (D.I. 2394; 2444; 2445; 2446; 2450; 2583) and argument of counsel on December 10, 2020 and, to some extent, January 19, 2021. Further disputes will be addressed separately.

I dispense with background as all parties are familiar with the posture of the case as we head into a scheduled June confirmation hearing.

Excel Spreadsheets

Eight excel spreadsheets (“Spreadsheets”) were submitted *in camera* jointly by Debtors, the Tort Claimants Committee (“TCC”) and the Future Claims Representative (“FCR” and, collectively, “Plan Proponents”).¹ From a review of the letter submissions and the arguments of counsel, the salient facts/representations surrounding the Spreadsheets are:

- Debtors identified eleven spreadsheets responsive to certain of Johnson & Johnson and Johnson & Johnson Consumer Inc.’s (collectively, “J&J”) requests for production.²
- Debtors describe the Spreadsheets as containing “varying levels of detail regarding confidential settlements in the underlying tort actions, including amounts of individual settlements in anonymized form and collective settlement amounts by law firm or case type, as well as detail regarding review and/or assessment of lawsuits.” D.I. 2444, at 4.
- It is represented that the settlement agreements in the underlying tort actions contain confidentiality provisions.
- The Spreadsheets are among documents Debtors produced informally to the TCC and the FCR during their respective due diligence over the course of these bankruptcy cases. D.I. 2444, at 2.
- Debtors withheld the Spreadsheets from production to J&J “because claimants holding an interest in such information have declined to consent to their production to co-defendants such as J&J.” D.I. 2444, n.4.
- The TCC has shared the Spreadsheets with one of its experts who will offer an opinion at confirmation that the Spreadsheets are not sufficient to base decisions on with respect to values established in the Trust Distribution Procedures (“TDPs”). Jan. 19 Hr’g Tr. 130-131.

Debtors’ counsel represented at the December 10 hearing that documents containing claims information have been produced in response to the J&J document requests. What has not been shared are documents, such as the Spreadsheets, that contain both claim information and settlement information. There is no contention that the Spreadsheets contain information regarding strategies of defending claims or the merits of the underlying tort claims and my review of the Spreadsheets confirms this. Debtors’ concern with producing the Spreadsheets is running afoul of confidentiality provisions in the settlement

¹ Any term not defined herein shall have the meaning set forth in the Plan or TDPs, as applicable.

² Two spreadsheets have already been produced to J&J and there is no opposition to the production of a third spreadsheet. D.I. 2450, at 2.

agreements that presumably preclude Debtors from discussing the settlement absent consent or order of a court.³

The TCC and FCR object to producing the Spreadsheets to J&J on the grounds that providing J&J with this information will give J&J a competitive advantage in that the information in the Spreadsheets will provide significant insight into what plaintiffs are willing to accept to settle their claims against Imerys. The TCC and FCR argue that some of the plaintiffs who have settled litigation with Imerys are still litigating with J&J, that J&J would not be entitled to the information contained in the Spreadsheets in the underlying tort litigation (at least not at this time) and that Weil is representing J&J in the underlying lawsuits as well as this bankruptcy proceeding.⁴ The TCC and FCR also argue that the confidentiality of the settlement agreements is an important bargained for provision. To the extent that the Spreadsheets are to be produced, the Plan Proponents also submitted *in camera* redacted forms of the Spreadsheets.

Decision

The Spreadsheets, in their unredacted form, must be produced to J&J. There are multiple reasons for this conclusion. First, no party has argued that the Spreadsheets are privileged or work product. While confidentiality concerns can factor into determinations of permissible discovery, confidential documents do not receive the same protections as documents that are privileged or work product.

Second, the parties opposing production did not cite to any case for the proposition that this type of claim and settlement information is not generally producible or relevant in mass tort cases. Indeed, under questioning, counsel for the FCR affirmatively stated that the appropriateness of the matrix values is relevant to claimants who will receive distributions from the Trust under the TDPs (*see e.g.*, Dec. 12 Hr'g Tr. 31).⁵ Under the current Plan,⁶ and all recent previous iterations, holders of Indirect Talc Personal Injury Claims are channeled to the Trust and governed by the TDPs, including the Scheduled Values. Such holders are also limited in their recoveries by the amount the underlying claimant, holding a Direct Talc Personal Injury Claim, would receive from the Trust. Pursuant to the bar date order entered in this case, J&J has filed a proof of claim. While Debtors filed an objection to the proof of claim, the hearing on the objection has been

³ No party has suggested that the settlements are protected from disclosure by an order of any court.

⁴ I was not presented with any specific factual information about ongoing litigation with J&J or that Weil is representing J&J in the specific lawsuits that are reflected in the Spreadsheets.

⁵ Counsel also stated that he is not aware that matrix values have been the subject of dispute in other mass tort cases.

⁶ Ninth Amended Joint Plan of Reorganization of Imerys Talc America Inc. and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code.

continued several times. No evidence has been presented, no argument has been made and no decision has been rendered on the objection to the proof of claim. On the present record, therefore, the Spreadsheets are not only generally relevant, but J&J, as the holder of an Indirect Personal Injury Talc Claim, is entitled to discovery on the values in the matrices contained in the TDPs.⁷

Third, the Spreadsheets have been provided to the TCC and FCR and shared with experts who will testify at confirmation. There is no question, therefore, that the Spreadsheets must be produced. It would be unfair to permit Debtors to provide the Spreadsheets to counsel to the TCC and FCR, for counsel to then consider and share the same with their respective experts, but not to permit review by counsel to J&J and its experts. Further, to the extent the settlement agreements contain confidentiality provisions, it would be unfair in the context of a mass tort case to permit plaintiffs to consent to sharing information with only a tort claimants committee and a future claims representative, but yet oppose production to other parties. Strategic, or merely selective, waiver of confidentiality under circumstances such as these is not appropriate.⁸

Finally, there is no question that the TCC and FCR believe the information found in the Spreadsheets is relevant to evaluating claim information.⁹ Section 5.2(b)(6) of the TDPs, titled, “Valuation Factors to be Considered in the Individual Review Process,” provides in pertinent part:

The Trust shall liquidate the value of each Talc Personal Injury Claim that undergoes the Individual Review Process based on the historic liquidated values of other similarly situated claims in the tort system as it exists on the Effective Date for similar claims or an analogous disease, or upon such criteria as the Trust may develop in consultation with the TAC and the FCR based upon its claims administrative experience and information available on values through continued litigation in the tort system. Accordingly, the Trust shall take into consideration all of the factors that affect the amount of damages and values in the tort system, including, but not limited to, credible evidence of (i) the degree to which the characteristics of a claim differ from the Medical/Exposure Criteria for the disease in question; (ii) factors such as

⁷ Plan Proponents also question J&J’s standing (and thus ability to obtain discovery) arguing that the Plan is “neutral” as to J&J. J&J disagrees as to both standing and neutrality. That issue has not been squarely placed in front of me and I offer no opinion. But, even if the Plan preserves all of J&J’s rights and defenses relative to any indemnification obligations, J&J is still the holder of an Indirect Talc Personal Injury Claim.

⁸ Query whether plaintiffs are insisting on confidentiality or their lawyers are.

⁹ I offer no opinion on whether these factors are appropriate as that matter is not before me and may never be.

the claimant's age, disability, employment status, disruption of household, family or recreational activities, dependencies, special damages, and pain and suffering; (iii) whether the claimant's damages were (or were not) caused by Debtor Exposure (for example, possible alternative causes and the strength of documentation of injuries); (iv) settlement and verdict histories in the Claimant's Jurisdiction for similarly situated or analogous claims; (v) the greater of (a) settlement and verdict histories for the claimant's law firm in the Claimant's Jurisdiction for similarly situated or analogous claims, and (b) settlement and verdict histories for the claimant's law firm, including all cases where the claimant's law firm satisfies the Trust on the basis of clear and convincing evidence provided to the Trust that the claimant's law firm played a substantial role in the prosecution and resolution of the cases, such as actively participating in court appearances, discovery and/or trial of the cases, irrespective of whether a second law firm was also involved and would also be entitled to include the cases in its "settlement and verdict histories." For the avoidance of doubt, mere referral of a case, without further direct involvement, will not be viewed as having played a substantial role in the prosecution and resolution of a case.

Much of the proposed redacted information falls within the above factors.

In permitting discovery of the Spreadsheets, I recognize that J&J is (or may be) a co-defendant in much of the underlying tort litigation and that Debtors assert claims against J&J. As I stated at argument, J&J's proof of claim may be the proverbial "tail wagging the dog." Nonetheless, the Spreadsheets are relevant to Plan confirmation and have been shared with the TCC and FCR. J&J has been seeking this information for at least a year. I have not permitted discovery before because I agreed with Plan Proponents that the proper context for such discovery was confirmation. That time is now here. And, based upon the discussion above, there is no basis upon which to withhold the Spreadsheets.

The Spreadsheets must also be produced to Arnold & Itkin. They also propounded discovery regarding the TDPs, including the basis for the Scheduled Values, Average Values and Maximum Values contained therein. Arnold & Itkin represents holders of Talc Personal Injury Claims who are also directly affected by the values set forth in the TDPs.

Imerys Talc America, Inc.– Adversary No. 19-50115
February 4, 2021
Page 6

The Spreadsheets shall be subject to the Protective Order entered in the bankruptcy cases and shall be labeled Attorneys Eyes Only. To the extent the parties deem an Order necessary, they shall submit one under certification of counsel.

Very truly yours,



Laurie Selber Silverstein

LSS/cmb