IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
IMERYS TALC AMERICA, INC., *et al.*,	)	Case No. 19-10289 (LSS)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	
	)	
IMERYS TALC AMERICA, INC., IMERYS TALC VERMONT, INC. and IMERYS TALC CANADA INC.,	)	Adv. Pro. No. 19-50115 (LSS)
	)	
Plaintiffs,	)	Re: Dkt. Nos. 117, 118
	)	
THE OFFICIAL COMMITTEE OF TORT CLAIMANTS and JAMES L. PATTON, JR. AS FUTURE CLAIMS, REPRESENTATIVE,	)	
	)	
Plaintiff-Intervenors,	)	
	)	
v.	)	
	)	
CYPRUS AMAX MINERALS COMPANY and CYPRUS MINES CORPORATION,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM

Pursuant to paragraph 27 of the Adversary Proceeding Protective Order,[1] I have before me for *in camera* review eight (8) documents that Debtors/Plaintiffs ("Debtors" or "Imerys") seek to produce in this adversary proceeding and sixty-five (65) documents that

[1] Adv. No. 19-50115, Dkt. No. 115-1.

Defendants/Cyprus Amax Minerals Company and Cyprus Mines Corporation ("Cyprus") seek to produce in this adversary proceeding in response to discovery requests propounded by the other party.

By the adversary proceeding, Debtors seek a declaratory judgment that Imerys Talc America, Inc. owns all rights to the proceeds of certain insurance policies originally issued to certain Cyprus-related entities. Document production has concluded except for the documents before me. These remaining documents were, with only a few exceptions, authored by counsel for (x) Plaintiffs, (y) Defendants, or (z) certain insurance companies who have issued insurance policies that may provide coverage in certain of the underlying tort litigation brought by individuals alleging personal injuries from exposure to talc and/or asbestos against either Imerys, Cyprus or both.

The complicating factor in an otherwise routine production is that both the Official Committee of Tort Claimants ("Committee") and the Future Claims Representative ("FCR") are Plaintiff-Intervenors in this adversary proceeding and will also receive all documents produced in discovery absent further court order. The Committee consists of plaintiffs in the underlying tort litigation. The FCR acts on behalf of persons that might subsequently assert demands of such kind. Without the existence of the Plaintiff-Intervenors, these motions most likely would not have been filed. It appears that Plaintiffs and Defendants each already have in their possession the documents that are the subject of each motion. It is only because any document that either Plaintiffs or Defendants wish to use must be produced to all parties (*i.e.*, including the Plaintiff-Intervenors) that some relief from the court is required.

In recognition of this unusual posture, the Amended Scheduling Order[2] set up a multi-step process for production of non-privileged documents. The definition of non-privileged includes documents protected from disclosure under any common interest privilege to which Imerys and Cyprus were both parties so that such documents would retain their privilege as to other parties (which would include the individual tort claimants in the underlying tort litigation). Initially, Debtors and Cyprus engage in an informal

[2] Adv. No. 19-50115, Dkt. No. 55.

exchange and discussion of responsive non-privileged documents with an eye toward narrowing the scope of documents to be produced and providing Debtors and Cyprus an opportunity to determine how to handle documents protected by any privilege to avoid waiver risks. Further, if documents are requested from third-parties and any responsive documents produced are subject to the common interest privilege among Debtors, Cyprus and those third-parties, then the parties to the common interest privilege are to meet and confer to attempt to work out an acceptable resolution. It is only after agreed-to resolutions that formal production to all parties in the adversary proceeding of non-privileged documents is made. Any disputes are to be resolved by the court. As stated in the Amended Scheduling Order, the purpose of these procedures is to ensure that privileges are not waived.[3]

The Adversary Proceeding Protective Order supplements the Amended Scheduling Order and provides for similar protections for documents that Cyprus or Imerys seeks to produce. Paragraph 27 specifically provides that:

> Nothing contained in this Adversary Proceeding Protective Order authorizes a Producing Party to disclose to the Committee, Future Claimants Representative or any other party or entity, or their respective professionals, another party's or entity's privileged information generated in connection with the defense of talc related and/or asbestos related claims that is subject to a shared Privilege or Protection as between the Producing Party and such party or entity. In the event that the Producing Party intends to produce any such information that is subject to a claim by another party or entity of a shared Privilege or Protection (which may include information that was prepared by, or delivered by the Producing Party to, counsel retained to represent the Producing Party in filed or threatened talc-related litigation), the Producing Party will provide advance notice by email or other writing to the counterparty under the shared Privilege or Protection prior to production by the Producing Party of such information under this Protective Order. The notice shall attach the documents or information sought to be produced. Such counterparty will have three (3) business days after receipt of the Producing Party's notice to object by email or other writing to the Producing Party's proposed production and, if such objection is delivered to the Producing Party within the three (3) day period, then the Producing Party and the counterparty will confer in good faith regarding the objection and proposed production. In the event that an agreement cannot be reached between the Producing Party and the objecting

[3] Delaware Bankruptcy Local Rule 9018-1 also provides that until a protective order is entered, all documents produced are for attorneys' eyes only. Del. Bankr. L.R. 9018-1(f).

> counterparty, then the Producing Party will not produce the subject documents or information and the issue will be determined by the Bankruptcy Court.

While this process contemplated a procedure for agreed-to redactions, it did not override relevant rules and caselaw on documents protected by attorney-client privilege or work product immunity.

The seventy-three documents ("Contested Documents") were submitted *in camera* pursuant to these procedures.[4] Non-parties Cyprus Historical Excess Insurers ("Excess Insurers") object to the production of the Contested Documents.[5] I have reviewed the public filings of the parties,[6] filings which I permitted to be made *in camera*[7] by the Excess Insurers, Debtors and Cyprus as well as the Contested Documents and entertained argument. The matter is ripe for decision.[8]

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[4] Debtors' Motion to Facilitate Production of Non-Privileged Documents [Adv. No. 19-50115, Dkt. No. 118] ("Debtors' Motion"); Defendants' Motion to Produce Documents Pursuant to Protective Order [Adv. No. 19-50115, Dkt. No. 117] ("Defendants' Motion").

[5] Cyprus Historical Excess Insurers' Objection to Cyprus' and Debtors' Motion to Facilitate Production of Privileged Documents Pursuant to Protective Orders [Dkt. Nos. 117 and 118] [Adv. No. 19-50115, Dkt. No. 123] ("Excess Insurers' Objection"). The Excess Insurers are: Columbia Casualty Company, Continental Casualty Company, the Continental Insurance Company, as successor to CNA Casualty of California and as successor in interest to certain insurance policies issued by Harbor Insurance Company, Lamorak Insurance Company (formerly known as OneBeacon America Insurance Company), as successor to Employers' Surplus Lines Insurance Company, Stonewall Insurance Company (now known as Berkshire Hathaway Specialty Insurance Company), National Union Fire Insurance Company of Pittsburgh PA, and Lexington Insurance Company to the extent that they issued policies to Cyprus Mines Corporation prior to 1981. Debtors and Cyprus represent that the documents, in their redacted form, have been supplied to all other insurance companies and there are no other objections to production in their submitted form. Defendants' Mot. ¶ 8; Debtors' Mot. ¶ 8.

[6] Excess Insurers' Objection; Declaration of Janine Panchok-Berry in Support of Cyprus Historical Excess Insurers' Objection to Cyprus' and Debtors' Motion to Facilitate Production of Privileged Documents Pursuant to Protective Orders [Dkt. Nos. 117 and 118] [Adv. No. 19-50115, Dkt. No. 124] ("Panchok-Berry Declaration"); Reply in Support of Debtors' Motion to Facilitate Production of Non-Privileged Documents [Adv. No. 19-50115, D.I. 125]; Reply in Support of Defendants' Motion to Produce Documents Pursuant to Protective Order [Adv. No. 19-50115, D.I. 126]; Declaration of Rani Gupta in Support of Defendants' Motion to Produce Documents Pursuant to Protective Order [Adv. No. 19-50115, D.I. 127].

[7] I have been careful to avoid reference to anything not reflected in the public record and believe that this Memorandum does not contain any privileged information.

[8] In the Excess Insurers' Objection, the Excess Insurers did not provide a document by document assertion of privilege. Rather, they "[sought] leave to submit a log for *in camera* review of their objections to the individual documents but respectfully ask that the Court consider first dismissing this motion for the reasons stated above." [Adv. No. 19-50115, Dkt. No. 123, at 7]. I have

Discussion

The Excess Insurers assert that the Contested Documents are either privileged communications or work product and that they can object to the production of the Contested Documents because they were created and/or exchanged in the context of a common interest with respect to the underlying tort litigation.

With the few exceptions noted below, neither Imerys nor Cyprus contests that the Excess Insurers can object to the production of the Contested Documents. Rather, they argue that the Contested Documents as submitted *in camera* do not contain attorney-client communications and are not protected by the work product doctrine.

Before turning to the specific arguments and documents, then, I will briefly discuss the relevant legal standards.

A. Legal Standards

A document must fall within a recognized exception to discovery. Just because it is confidential or damaging does not make it privileged.

I. Work Product Doctrine/Immunity

1. The work product doctrine is an exception to the general rule that all relevant documents are discoverable.[9] This doctrine functions to "'promote[ ] the adversary system' by guarding the confidentiality of documents prepared in anticipation of litigation, allowing a party to prepare for litigation without fear

considered the non-privilege objections raised by the Excess Insurers and decline to dismiss the motions on relevancy or other grounds.

[9] *United States v. Veolia Environnement North America Operations, Inc.*, 2014 WL 5511398, at *3 (D. Del. Oct. 31, 2014) (LPS); *see Hercules Incorporated v. Exxon Corporation*, 434 F. Supp. 136, 150 (D. Del. 1977) ("The work product rule is the result of a balancing between the policy of full disclosure behind the federal discovery rules and 'the desire to promote the effectiveness of the adversary system by safeguarding the vigorous representation of a client's cause from the possible debilitative effects of susceptibility to discovery.'") (citation omitted).

that its work product will be used against it."[10] It permits an attorney to be comfortable putting his or her thoughts in writing.[11]

2. The work product exception is set forth in Federal Rule of Civil Procedure 26(b)(3) and provides that, ordinarily a party may not discover documents that are prepared in anticipation of litigation unless the party shows a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.[12] The protected materials include documents prepared in anticipation of litigation by or for a party or the party's representative, including its attorney, insurer or agent. The party asserting that a document is work product has the burden of proving that it is.[13]
3. The work product immunity "protects an attorney's statements, memoranda, correspondence, briefs, and mental impressions, obtained or prepared by an attorney in anticipation of identifiable litigation."[14] However, documents prepared in the ordinary course of business are not protected by work product

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[10] *Veolia Environnement*, 2014 WL 5511398, at * 3 (citing *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1428 (3d Cir.1991)); *see Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947); *see also Hercules*, 434 F. Supp. at 150–51 (stating that the work product doctrine "is not to protect all recorded opinions, observations and impressions of an attorney made in connection with any legal problem, but to protect the integrity of the adversary process").

[11] *Hickman*, 329 U.S. at 511 ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.").

[12] *United Coal Companies v. Powell Const. Co.*, 839 F.2d 958, 966 (3d Cir. 1988). Rule 26(b)(3) provides, in relevant part:

> (A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (***including the other party's attorney, consultant, surety, indemnitor, insurer, or agent***). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> > (i) they are otherwise discoverable under Rule 26(b)(1); and
> > (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

[13] *Veolia Environnement*, 2014 WL 5511398, at * 3.

[14] *Novartis Pharm. Corp. v. Abbott Labs.*, 203 F.R.D. 159, 163 (D. Del. 2001) (citing *Hickman*, 329 U.S. at 511).

immunity.[15] The test is whether "in light of the nature of the document and the factual situation of the case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."[16] If the primary purpose of creating a document is to assist in future litigation, the document is granted work product protection.[17]

4. There are two categories of work product: opinion work product and fact work product.[18] The Third Circuit has recognized that documents that contain "pure legal opinion" are "opinion work product" which "is the most sacrosanct of all forms of work product."[19] It encompasses an attorney's mental impressions, conclusions, opinions or legal theories. Fact work product contains "raw factual information;"[20] it includes "relevant and non-privileged factual information."[21] A document may contain both fact work product and opinion work product, and if such statements are so intertwined it may be impossible to sort between the two.[22]
5. As reflected in Rule 26(b)(3), if a document contains work product (either type), it may be withheld from production. But, as the work product immunity is qualified, if a party is able to make the requisite showing of substantial need for a document containing fact work product, the court may order production of the document, but should protect against disclosure of opinion work product.

II. Attorney-Client Privilege

1. The attorney-client privilege is another shield against the broad discovery rule, which protects communications between counsel and client made for the purpose

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[15] *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000); *Immersion Corp. v. HTC Corp.*, 2014 WL 3948021 at *2 (D. Del. Aug. 7, 2014).
[16] *Immersion Corp.*, 2014 WL 3948021, at *2 (citing U.S. v. Rockwell Int'l, 897 F.2d 1255, 1265–66 (3d Cir. 1990)); *see In re Grand Jury Proceedings*, 604 F.2d 798 (3d Cir. 1979) (in the grand jury context) (quoting 8 Charles Wright & Arthur Miller, *Federal Practice and Procedure* § 2024 (1970)).
[17] *Immersion Corp.*, 2014 WL 3948021, at *2.
[18] *In re Grand Jury Investigation*, 599 F.2d 1224, 1230 (3d Cir. 1979); *RCA Corp. v. Data General Corp.*, 1986 WL 15693, at *10 (D. Del. July 2, 1986).
[19] *Grand Jury Investigation*, 599 F.2d at 1231.
[20] *In re Intel Corp. Microprocessor Antitrust Litigation*, 258 F.R.D. 280, 293 (D. Del. 2008).
[21] *RCA*, 2014 WL 3948021, at * 10.
[22] *Intel Corp.*, 258 F.R.D. at 294.

of providing or obtaining legal advice.[23] This privilege intends "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[24] It enables counsel to be fully informed by his or her client and to provide sound legal advice or advocacy because the client "will be encouraged to disclose fully all relevant information to his [or her] attorney" only if assured that the information relayed in confidence will be immune from discovery.[25]

2. Under Federal Rule of Evidence 501, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."[26] Therefore, New York law governs the privilege inquiry in the current adversary proceeding.[27]
3. Under New York law, the party asserting attorney-client privilege carries the burden to establish "[(1)] that the information was a communication between client and counsel, [(2)] that it was intended to be and was kept confidential, and [(3) that] it was made in order to assist in obtaining or providing legal advice or services to the client."[28]
4. To be privileged, the attorney-client communication must be "primarily or predominantly of a legal character."[29] The test is "whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client" rather than business advice.[30] The

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[23] *Westinghouse*, 951 F.2d at 1423; *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 70 (S.D.N.Y. 2009).
[24] *HSH Nordbank*, 259 F.R.D. at 70 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).
[25] *Hercules*, 434 F. Supp. at 144.
[26] Fed. R. Evid. 501; *see Interfaith Hous. Delaware, Inc. v. Town of Georgetown*, 841 F. Supp. 1393, 1396 (D. Del. 1994).
[27] Neither party briefed the choice of law issue. The determination that New York law applies was reached after a review of the Stock Purchase Agreement and the Agreement of Transfer and Assumption, both of which are governed by the law of the State of New York without reference to choice of law principles. These agreements are attached to the Complaint in this action.
[28] *HSH Nordbank*, 259 F.R.D. at 70 (quoting *Charter One Bank, F.S.B. v. Midtown Rochester, LLC*, 738 N.Y.S.2d 179, 190 (N.Y. Sup. Ct. 2002)); *see* N.Y.C.P.L.R. § 4503 (a)(1).
[29] *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 428 (S.D.N.Y. 2013) (quoting *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 594 (N.Y. 1989)).
[30] *Id.*

distinction between legal advice and business advice is not a bright line.[31] Generally, communications are "not cloaked with privilege when the lawyer is hired for business" or to do nonlawyer work.[32] Nonetheless, "[s]o long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters."[33]

5. Under New York law, communications protected by attorney-client privilege are generally "absolutely immune from discovery."[34]

III. Community of Interest/Common Interest "Privilege"[35]

1. The common interest privilege is an exception to the general rule that disclosure to a third party destroys privilege. The use of the term "privilege" is somewhat of a misnomer, because the common interest privilege is not a separate privilege itself.[36] Rather, communications and/or documents shared between parties must themselves be privileged in order to be shielded from disclosure.[37] Sharing of non-privileged information or documents gains no protection merely because the parties have a common legal interest.
2. Under New York law, the common interest rule permits "communications passing from one party to the attorney for another party" without waiving the underlying privilege "where two or more clients *separately* retain counsel to advise

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[31] *In re Cty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007).
[32] *In re Residential Capital, LLC*, 575 B.R. 29, 36 (Bankr. S.D.N.Y. 2017) (quoting *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 379 (N.Y. 1991)).
[33] *Id.* at 35 (quoting *Rossi*, 73 N.Y.2d at 594).
[34] *Id.*
[35] At the hearing on December 11, 2019, counsel for both Excess Insurers and Cyprus argued about the "tripartite privilege," seemingly implicating the joint defense privilege. *See, e.g.*, Hr'g Tr. 24, 54–55, Dec. 11, 2019 [Adv. No. 19-50115, Dkt. No. 154]. However, all of the documents under review refer to the common interest privilege. Therefore, I will only use common interest privilege in my determination. Indeed, though they are different, the common interest privilege is an extension of the joint defense privilege. *See In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 363–64 (3d Cir. 2007); *Egiazaryan*, 290 F.R.D. at 434.
[36] *Egiazaryan*, 290 F.R.D. at 433 ("The common interest rule is not a separate privilege but an extension of the attorney client privilege.") (internal quotation marks and citation omitted).
[37] *Id.*; *see In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) ("[A]s an exception to waiver, the joint defense or common interest rule presupposes the existence of an otherwise valid privilege.").

them on matters of common legal interest."[38] This "privilege" has two elements: (1) the party asserting privilege must share a common legal interest with the party with whom information was shared; and (2) the communication was designed to *further* that common legal interest.[39] Thus, the shared interest must be legal, rather than a "personal or business oriented" interest.[40] Also, the shared communications must "be in furtherance of a common legal interest in pending or reasonably anticipated litigation in order to remain privileged."[41]

3. In this district, the common interest "privilege" allows *attorneys* "representing different clients with similar legal interests to share information without having to disclose it to others."[42] To invoke this "privilege," 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.[43] Thus, the "substantially similar legal interest" must be as to the subject matter of the communication for which protection is sought and "not solely commercial."[44] And the privilege is available when counsel, not clients, share information.[45]
4. Significantly, the common interest privilege cannot be waived without the consent of all parties sharing the privilege.[46] Namely, one party cannot unilaterally waive the common interest privilege. Indeed, this privilege is

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[38] *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 35 (N.Y. 2016) (emphasis in original).
[39] *Allied Irish Banks, P.L.C. v. Bank of Am., N.A.*, 252 F.R.D. 163, 171 (S.D.N.Y. 2008).
[40] *Egiazaryan*, 290 F.R.D. at 434.
[41] *Ambac Assur. Corp.*, 57 N.E.3d at 37–40.
[42] *Teleglobe*, 493 F.3d at 364; *see 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.").
[43] *MobileMedia Ideas LLC v. Apple Inc.*, 890 F. Supp. 2d 508, 515 (D. Del. 2012); *In re Leslie Controls, Inc.*, 437 B.R. 493, 496 (Bankr. D. Del. 2010).
[44] *Teleglobe*, 493 F.3d at 365; *MobileMedia*, 890 F. Supp. 2d at 515.
[45] *Teleglobe*, 493 F.3d at 364–65.
[46] *Id.* at 379 (holding that one party to a joint representation may not unilaterally waive the attorney-client privilege); *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, AFL-CIO*, 913 F.2d 544, 556 (8th Cir. 1990) (holding that one party cannot waive common interest privilege of a document shared by another party, noting that"[i]t is fundamental that the joint defense privilege cannot be waived without the consent of all parties to the defense") (internal quotation marks and citation omitted); *Grand Jury Subpoenas*, 902 F.2d at 248, 250 (holding that one party to a joint defense may not unilaterally waive the attorney-client or work-product privilege).

necessary "to assure [that] joint defense efforts are not inhibited or even precluded by the fear that a party to joint defense communications may subsequently unilaterally waive the privileges of all participants, either purposefully in an effort to exonerate himself [or herself] or inadvertently."[47]

B. Analysis

The Contested Documents are mainly of three types: so-called tender letters and responses, cost sharing agreements and reservations of rights letters. Notwithstanding that these documents can be placed into categories, certain documents may serve dual purposes or contain information that serves both a business and a legal function. This is evident from not only a review of each Contested Document, but from the very fact that Contested Documents in each category were redacted prior to their submission for *in camera* review.[48]

Applying the legal standards to this matter has not been an easy task. As Judge Lane notes in *ResCap*, in the insurance context, determining whether a given document is protected by a privilege is often challenging because insurance companies are in the business of investigating and adjusting claims.[49] A claims adjuster's tasks include "process[ing] the initial intake of a claim and information concerning the claim, review[ing] the policy, and mak[ing] decisions regarding coverage such as declination or claim payments."[50] Communications that reflect claims handling are not protected by the attorney-client

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[47] *Interfaith Hous. Delaware*, 841 F. Supp. at 1400 (quoting *Western Fuels Ass'n Inc. v. Burlington Northern R.R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984)).

[48] It was represented that those redactions were made to eliminate attorney judgment or attorney work-up in the underlying tort cases. Hr'g Tr. 27–30, Dec. 11, 2019.

[49] *ResCap*, 575 B.R. at 42–43; *cf. Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, No. CV 7841-VCP, 2015 WL 778846, at *8 (Del. Ch. Feb. 24, 2015) ("In the litigation funding context, this [work product] analysis becomes blurry because the litigation itself arguably is part of the business. Potentially every document a third-party litigation-funding company creates is created 'because of litigation' in that the company is in the business of funding litigation.").

[50] *ResCap*, 575 B.R. at 37.

privilege even if performed by an attorney.[51] So, if the communication primarily serves a claims processing/adjusting function it is a business communication. And, as a separate analysis, documents prepared in the ordinary course of an insurer's business are not protected by work product immunity.[52] In the insurance context, to decide when a document crosses the often indistinct line between being business-centered (*i.e.*, unprotected) and litigation-centered (*i.e.*, protected), a court must analyze the facts and circumstances regarding the creation of the document.[53]

Counsel for the Excess Insurers did not make my task any easier. Their document by document privilege log contains entries for each document that are overly broad, difficult to follow and do not clearly separate the asserted privilege and the basis for it. Often, I could not find in the referenced Contested Document any semblance to the description of the document in the privilege log. As for Cyprus and Imerys, they started from an incorrect premise. As Cyprus framed the issue—the question is whether the Contested Documents, as redacted, contain privileged information. But, this framing of the question may not permit the court to make a proper analysis because a privilege analysis may require the court to examine the document in its original form. It also ignores the distinction between work product immunity and attorney client privilege as it relates to whether a privileged document may be redacted or must be withheld in its entirety. Further, for the most part, Cyprus and Imerys merely distinguished the Excess Insurers' cases rather than supplying affirmative authority for their own legal positions.

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[51] *Id.* at 35–36.
[52] *Id.* at 43.
[53] *Id.* at 43–44.

Finally, as noted above, with the presence of the Plaintiff-Intervenors, this case presents an uncommon posture. Absent further order of the court, any documents produced (which may or may not be actually used) in this litigation will come into the hands of an adversary in the underlying tort litigation. This has been the concern expressed by the Excess Insurers from the commencement of this adversary proceeding. The Committee exacerbated this concern in previous filings in which it took the position that any document produced in this litigation would lose its privileged status entirely, including as to the underlying tort litigation. Counsel for the Committee re-emphasized this position during the December 11, 2019 hearing.[54]

Permitting a Committee to intervene in an adversary proceeding is not intended to create an unfair advantage for Committee members. Accordingly, I have taken this into consideration, to the extent possible and within my discretion, in my conclusions which are set forth in the Appendix below. Further, any Contested Documents produced are to be designated as Highly Confidential subject to further order of the court. The alternative is to preclude the participation of the Committee and the FCR in discovery that implicates the Contested Documents, relief that has not been sought.

Conclusion

For the reasons set forth above and in the Appendix below, the Motions are each granted in part and denied in part.

Dated: December 16, 2019

Laurie Selber Silverstein
United States Bankruptcy Judge

[54] Hr'g Tr. 95–96, Dec. 11, 2019.

Appendix

I. Contested Documents Submitted by Cyprus

Tabs 1–4, 11, 62, 63, 65

MAY PRODUCE[55]

Parties have agreed upon redactions.

Tab 7

MAY PRODUCE[56]

This is a cost sharing agreement. As discussed with respect to Tab 57 below, a review of this document shows that it was prepared in anticipation of the underlying tort litigation.

However, Cyprus is correct that none of the Excess Insurers is party to this agreement. The Excess Insurers have not provided a factual basis or legal authority for the proposition that they can assert the work product protection over documents that do not constitute their work product or to which they are not a party.

The Confidentiality Provision in this Contested Document does not (and could not) prevent a court from ordering production of the agreement.

The Confidentiality and Common Interest Agreement made and entered August 4, 2015 by and between Imerys, Rio Tinto and the various insurers set forth therein ("Insurers") provided a mechanism by which Imerys (and perhaps Rio Tinto) could provide confidential and/or privileged communications to the Insurers while maintaining the protections and confidentiality of the documents. While Sections 2.1 and 3.1 speak to documents exchanged between the parties, the definition of Shared Material refers to documents requested by the Insurers or otherwise provided to the Insurers. This suggests a one-way

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[55] My conclusion is either that a Contested Document is Privileged (in which event it cannot be produced) or that the Contested Document *may* be produced. I am not ordering production in this proceeding where the parties have agreed to production or where, as in Tab 7, I have determined that the document is protected by a privilege or immunity, but the Excess Insurers have not shown they are able to object to the Motions.

[56] The Excess Insurers raise concerns regarding subject matter waiver. Subject matter waiver determinations are made in the context of a specific disclosure considering the fairness to the adversary party. *See Westinghouse*, 951 F.2d at 1426 n.12 ("When a party discloses a portion of otherwise privileged materials while withholding the rest, the privilege is waived only as to those communications actually disclosed, ***unless*** a partial waiver would be unfair to the party's adversary."); *see also In re Hechinger Inv. Co. of Delaware*, 303 B.R. 18, 24 (D. Del. 2003) ("[The *Westinghouse*] 'fairness doctrine' was held to apply equally in the context of the attorney-client privilege and work product protection."). Movants should consider subject matter waiver concerns in producing any documents.

flow of documents. Further, Cyprus is not a party to this agreement. Thus, for purposes of this dispute, I conclude that the Confidentiality and Common Interest Agreement does not bear on the Contested Documents, including the document at Tab 7.

The Excess Insurers state that this document was produced in the California Coverage Action and argue that it is, therefore, subject to the Stipulated Confidentiality Order filed December 28, 2017 in the Superior Court of the State of California, San Francisco County in the case styled *Columbia Casualty Co. v. Cyprus Mines Corp.*, Case No. CGC-17-560919. The Excess Insurers do not state who it was produced by or to. In paragraph 13 of the Gupta Declaration, Mr. Gupta states under penalty of perjury that "none of the documents that are the subject of the [Cyprus] Motion were obtained by Cyprus or the Debtors through discovery in the California Coverage Action, nor are any subject to the protective order in that case."[57] Thus, I conclude that production of any Contested Documents, including the document at Tab 7, is not prevented by the Stipulated Confidentiality Order.

Tab 8

PRIVILEGED

Review shows the communication reflects attorney-client privileged communications and work product. Redaction not possible.

Tabs 9, 10, 12, 13, 14, 15, 16, 17, 58, 59
Reservation of Rights/Coverage Letters and communications regarding same[58]

PRIVILEGED

These communications contain Mr. Ward's analysis[59] of the coverage available under the insurance policies relative to various tendered claims in the underlying tort litigation. The analysis clearly contains fact work product and Mr. Ward's mental impressions and opinions regarding coverage and it explicitly refers to the underlying tort litigation. It is, therefore, work product as it was created in anticipation of the underlying tort litigation.

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[57] Gupta Decl. ¶ 13, at 5 [Adv. No. 19-50115, Dkt. No. 127].

[58] The respective positions of the Excess Insurers and Cyprus regarding the privileged nature of communications concerning reservation of rights letters refer to their respective positions on the nature of the coverage letters, themselves. Accordingly, given the complicating factors in this case and the concern over subject matter waiver, I will treat them in the same fashion.

[59] Tab 58 is from Rachel H. Krayer, another Account Manager at Resolute Management, Inc.

The only two reported cases cited by either party hold that reservation of rights letters are work product.[60] Cyprus attempts to distinguish *Madrid* and *Midwest Feeders* arguing that neither addresses production of insurer-insured communication redacted to remove privileged information.[61] Whether in the first instance a party may redact privileged information subject to a common interest privilege depends on whether the information is protected by the attorney-client privilege or work product immunity. Here, I have concluded that the documents are work product. As such, in order for the documents to be produced over objection, the requesting party must make a showing of substantial need and undue hardship. There has been no such showing. Because the Excess Insurers have objected, any redactions are not voluntary. Therefore, whether or not parties may voluntarily produce work product in redacted form is not an issue before me.

Tab 58 is also a coverage/reservation of rights letter and Tab 59 is email communications between counsel for Cyprus in the underlying tort litigation and Mr. Ward discussing coverage. Both of these Contested Documents have been heavily redacted. These redactions belie Cyprus' position that coverage/reservation of rights letters do not contain any privileged information and cannot be work product.

Tabs 5, 6, 18–40, 42–56
Tender Communications

MAY PRODUCE with redactions as per below

The objection raised by the Excess Insurers to the tender communications is that they are protected by the attorney-client privilege.

These documents reflect the tender and acceptance of insurance claims. These communications are not made in order to assist in obtaining or providing legal advice or services. Rather, these documents were prepared for a business purpose and were made as part of the claims handling process.[62] But, certain of these communications also contain information that may reflect the mental impressions of counsel and, as such, must be

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[60] *Midwest Feeders, Inc. v. Bank of Franklin*, No. 5:14CV78-DCB-MTP, 2016 WL 7422561, at *5 (S.D. Miss. June 28, 2016); *In re Madrid*, 242 S.W.3d 563, 569 (Tex. App. 2007) (applying Texas law governing work product immunity that is substantially similar to federal law); *cf. Carlyle Inv. Mgmt.*, 2015 WL 778846, at *9. It may also be these claims have a dual-litigation purpose in that, at some point in the future, the Excess Insurers may have anticipated coverage litigation. In these circumstances, the *Madrid* court held that such documents are protected by work product immunity because "the reservation of rights letter relates directly to the insurer providing [the insured] a defense in the instant [tort] case." *Madrid*, 242 S.W.3d at 569.

[61] Cyprus Reply in Support of Mot. to Produce Documents ¶ 9 [Adv. No. 19-50115, Dkt. No. 126].

[62] *ResCap*, 575 B.R. at 35–37, 42–43.

redacted—or further redacted—as the case may be.[63] In this regard, it is necessary to note that communication among counsel in the underlying tort litigation exists in the context of a series of underlying lawsuits that, together, constitute mass tort litigation. These underlying cases have national defense counsel and are governed by joint defense or common interest agreements, cost sharing agreements and case management orders. There is no doubt that the communications among counsel reflect their common knowledge, understanding and application of these documents as well as the circumstances of the underlying tort litigation. Having reviewed only the Contested Documents, I conclude that the following redactions must be made.

- **Redact to exclude any categorization of the claim(s) referenced in the document whether the categorization occurs in the subject line or text.**
- **Redact any reference to a document that is protected by work product immunity or attorney-client privilege, which includes reference to a Withheld Document.**[64]

Tab 41

MAY PRODUCE with redactions as per below

Tab 41 is described in the Excess Insurers' privilege log as a tender communication although it is not similar to the communications described above. Nonetheless, the unredacted portion of this document reflects claims handling.

The sole objection is on the basis of attorney-client communications. Accordingly, the analysis set forth with respect to **Tabs 5, 6, 18–40, 42–56** applies and the document must be redacted accordingly.

- **Redact to exclude any categorization of the claim(s) referenced in the document whether the categorization occurs in the subject line or text.**
- **Redact any reference to a document that is protected by work product immunity or attorney-client privilege, which includes reference to a Withheld Document.**

Tab 57

PRIVILEGED

This is a cost sharing agreement. Review of this document shows that it was prepared in anticipation of the underlying tort litigation. It discusses choice of counsel, responsibilities

[63] The current redactions in over half of the tender communications confirm that they contain information that is protected by the attorney-client privilege. Here, the parties that co-share the privilege disagree about what must be redacted to ensure that no privileged information is produced.
[64] During argument, it was represented by counsel that either Cyprus or Imerys or both withheld responsive documents on the basis of privilege (each, a "Withheld Document").

of counsel, and the plan for how cases will be handled. Cyprus has not made a showing of substantial need or undue hardship. Accordingly, this document may not be produced.[65]

Tab 60

MAY PRODUCE with redactions as per below

Review shows this document falls within the claims handling function, but the document contains certain information subject to the attorney-client privilege.

- **Redact to exclude any categorization of the claim(s) referenced in the document whether the categorization occurs in the subject line or text.**
- **Redact any reference to a document that is protected by work product immunity or attorney-client privilege, which includes reference to a Withheld Document.**

Tab 61

PRIVILGED

While part of this document could be claims handling, review shows that this document is responsive to a request from Excess Insurers for fact gathering purposes, including the mental impressions regarding the interpretation of the policies relative to the underlying tort litigation and so constitutes work product.

Tab 64

MAY PRODUCE

Review shows this document falls within the claims handling process.

[65] *Cf. AMEC Civil, LLC v. DMJM Harris, Inc.*, No. CIV.A. 06-064 FLW, 2008 WL 8171059, at *4 (D.N.J. July 11, 2008) ("Generally, joint defense agreements are protected by work product privilege, and are therefore not discoverable without showing substantial need.") (citing *R.F.M.A.S. Inc. v. So*, 2008 U.S. Dist. LEXIS 14969, at *2 (S.D.N.Y. 2008)).

II. Contested Documents Submitted by Imerys

Tab 1

MAY PRODUCE with redactions suggested by the Excess Insurers

This document is a communication arranging a meeting. Except for the redactions as suggested by the Excess Insurers, it does not reflect any attorney-client privileged communications.

Tab 2

MAY PRODUCE

The above analysis with respect to "**Reservation of Rights/Coverage Letters and communications regarding same**" concerning Contested Documents submitted by Cyprus applies here (including that this document is redacted). Further, I have determined that categorization of the underlying tort claims reflect the mental impressions of counsel and that the third paragraph of this document (beginning, "Finally") contains the mental impressions of an attorney.

However, Imerys is correct that the Excess Insurers are not a recipient of this communication. The Excess Insurers have not provided a factual basis or legal authority for the proposition that they can assert the work product protection over documents that do not constitute their work product or to which they are not a party.

Tab 3

MAY PRODUCE

These documents are a transmittal email, and a response from Imerys to a tender letter from Freeport-McMoRan and, as such were prepared for a business purpose and were made as part of the claims handling process.

Further, the Excess Insurers are neither a party to nor copied on these documents. The Excess Insurers have not provided a factual basis or legal authority for the proposition that they can assert the work product protection over documents that do not constitute their work product or to which they are not a party.

Tabs 4 and 5

PRIVILEGED

These Reservation of Rights/Coverage letters contain Mr. Ward's or Ms. Krayer's analysis of the coverage available under the insurance policies relative to various tendered claims in the underlying tort litigation. The above analysis with respect to "**Reservation of Rights/Coverage Letters and communications regarding same**"concerning Contested Documents submitted by Cyprus applies here (including that Tab 5 is redacted). These letters, therefore, are work product as they are created in anticipation of the underlying tort litigation.[66] In their responsive filing, Imerys states the redactions protect against the disclosure of any information reflecting legal analysis and advice.

Tab 6

MAY PRODUCE

The above analysis with respect to "**Reservation of Rights/Coverage Letters and communications regarding same**" concerning Contested Documents submitted by Cyprus applies here. It is, therefore, work product as it was created in anticipation of the underlying tort litigation.[67] Imerys has not made a showing of substantial need or undue hardship.

Notwithstanding, the document has been filed on the docket in this proceeding, so the document may be produced.

Tab 7

PRIVILEGED

The above analysis with respect to "**Reservation of Rights/Coverage Letters and communications regarding same**" concerning Contested Documents submitted by Cyprus applies here (including that the document is heavily redacted). Imerys has not made a showing of substantial need or undue hardship.

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[66] *Midwest Feeders*, 2016 WL 7422561, at *5; *Madrid*, 242 S.W.3d at 569; *see ResCap*, 575 B.R. at 42–43; *cf. Carlyle Inv. Mgmt.*, 2015 WL 778846, at *9.

[67] *Midwest Feeders*, 2016 WL 7422561, at *5; *Madrid*, 242 S.W.3d at 569; *see ResCap*, 575 B.R. at 42–43; *cf. Carlyle Inv. Mgmt.*, 2015 WL 778846, at *9.

Tab 8

PRIVILEGED

This email chain begins with the forwarding of a cost-share term sheet and the following emails discuss potential defense of the underlying tort litigation. The email chain also references and applies the conclusion of a reservation of rights letter which I have already determined to be work product. Further, this document is redacted and thus Imerys admits that the document contains information either protected by work product immunity or attorney-client privilege. Imerys has not made a showing of substantial need or undue hardship.