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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 Western Surety Company, a South Dakota
11 corporation,

12 Plaintiff,

13 v.

14 The United States of America,

15 Defendant.

Case No.: 4:16-CV-00761-TUC-CKJ

**WESTERN SURETY COMPANY'S
MEMORANDUM REGARDING
DISCOVERABILITY OF RESERVE
INFORMATION**

16 Pima County, a subdivision of the State of
17 Arizona,

18 Intervenor/Plaintiff,

19 v.

20 Western Surety Company, a South Dakota
21 corporation; The United States of
22 America; Blue Diamond Contracting,
23 L.L.C., an Arizona limited liability
24 company; Employers Mutual Casualty
25 Company, an Iowa corporation; Select
26 Development & Construction, Inc., an
27 Arizona corporation,

Intervenor/Defendants.

(Honorable Cindy K. Jorgenson)

1 Western Surety Company (“Western Surety”) hereby submits its Memorandum
2 regarding the discoverability of its reserve information in light of its attorney’s role in
3 developing such information (“Memorandum”). This Memorandum does not include
4 Western Surety’s positions as set forth in its communication to this Court on October 26,
5 2018, and as further addressed at the hearing on November 7, 2018, which positions are
6 incorporated herein. Rather, Western Surety has discovered that, in addition to its prior
7 arguments against the discoverability of its reserve information, such information is
8 protected by the attorney/client privilege and the work product doctrine, because its Senior
9 Claims Counsel, Doug Mraz, in his capacity as legal counsel, solely set the reserves
10 pertaining to the bonds issued to Select Development (“Bonds”).¹
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14 The Bonds were issued on February 22, 2012, and Doug Mraz, the Western Surety
15 claims counsel assigned to the Select Development matter, determined on March 11, 2013,
16 that it would be advisable to set reserves in connection with the Bonds. It should be noted
17 that the case at bar is far from the first piece of litigation in which Western Surety has been
18 involved as a result of its issuance of the Bonds to Select Development; Western Surety
19 has been a named defendant in various cases related to Select Development dating back to
20 2013, the date Mr. Mraz first set reserves, and was certainly aware of the possibility of
21 litigation before the first complaint was filed. In setting the reserves and in making
22 subsequent adjustments to the reserves, Mr. Mraz handled all aspects including the dates
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26 ¹ A declaration from Mr. Mraz may be submitted upon the Court’s request, but is not
27 attached here in the interest of brevity.

1 the reserves were set or adjusted, the amounts of the reserves, and all other information
2 pertaining to the reserves which reflected his understanding of and mental impressions
3 regarding the status of the Select Development matter. The reserve amounts, which are
4 estimates by Western Surety's legal counsel, have no probative value as to the actual losses
5 suffered by Western Surety, which losses are established by the canceled checks previously
6 submitted Western Surety and undisputed by EMC.
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9 A case cited by Western Surety in its November 7, 2018 brief as well as its
10 Responses to EMC's Interrogatories dated August 9, 2018 is instructive not only on the
11 issues raised in Western Surety's prior arguments against the discoverability of its reserve
12 information, but also the application of the attorney/client privilege and work product
13 doctrine to reserve information. In *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 139
14 F.R.D. 609, 613-14 (E.D. Pa. 1991), the Court denied the plaintiff's motion to compel the
15 production of information related to the defendant's reserves, finding that not only was
16 reserve information of "tenuous relevance," but it also constituted work-product material
17 and was protected by the attorney/client privilege. Citing *Union Carbide Corp. v.*
18 *Travelers Indem. Co.*, 61 F.R.D. 411 (W.D. Pa. 1973), the *Rhone-Poulenc* Court noted that,
19 "[w]here the reserves have been established based on legal input, the results and supporting
20 papers most likely will be work-product and may also reflect attorney-client privilege
21 communications." *Rhone-Poulenc*, 139 F.R.D. at 613-14. Moreover:
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25 Although these risk management documents being sought by plaintiffs may
26 not have in themselves been prepared in anticipation of litigation, they may

1 be protected from discovery to the extent that they disclose the individual
2 case reserves calculated by defendants' attorneys. The individual case reserve
3 figures reveal the mental impressions, thoughts, and conclusions of an
4 attorney in evaluating a legal claim. By their very nature they are prepared in
anticipation of litigation, and consequently, they are protected from
discovery as opinion work-product.

5 *Id.* at 614, citing *Hickman v. Taylor*, 329 U.S. 495, 512 (1947); *In re Murphy*, 560
6 F.2d 326, 336 (8th Cir. 1977). Finding that the defendants sought protection of the “mental
7 processes that go to the essence of the lawyers expertise – establishing the value of a legal
8 claim,” the Court observed that determining the value of a claim is complex, and requires
9 “an assessment of the body of evidence and the particular legal issues involved....[i]t is
10 one of the more challenging and difficult tasks a lawyer confronts.” *Id.* at 614. In addition,
11 “this is not a situation where mental impressions are merely contained within and comprise
12 a part of another document and can be easily redacted....the aggregate and average figures
13 are derived from and necessarily embody the protected material.” *Id.* (citation omitted).
14 Because reserve information “based on mental impressions of [a party’s] lawyers and
15 representatives concerning litigation, strategy and costs may be of limited value,” but must
16 not be the subject of discovery. *Id.* at 615; *see also Sundance Cruises Corp. v. American*
17 *Bureau of Shipping*, No. 87 Civ. 0819, 1992 U.S. Dist. LEXIS 3759, at *2-3 (S.D.N.Y.
18 Mar. 30, 1992) (finding reserve information not discoverable because, “to the extent
19 reserves are ‘an indication of potential liability’ by insurers...they might be based...upon
20 the opinions of counsel...” and finding that the reserve information submitted to the Court
21 for *in camera* review “indicates specifically counsel’s recommendation as to the
22 reserve....”; *Prevost v. Westchester Fire Ins. Co.*, No. 1:13-cv-00046, 2014 U.S. Dist.
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1 LEXIS 200491, at *2 (Feb. 4, 2014) (finding that reserve information was irrelevant,
2 contained proprietary data and was “clearly protected by the work-product doctrine.”).
3 Moreover, because reserve information reflects an attorneys’ opinion in evaluating a legal
4 claim, it constitutes opinion work product, which, unlike ordinary work product, “is
5 accorded almost absolute protection from discovery because any slight factual content that
6 such items may have is generally outweighed by the adversary system’s interest in
7 maintaining the privacy of an attorney’s thought processes....” *Sporck v. Peil*, 759 F.2d
8 312, 316 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985).
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11 The above cases demonstrate merely a sample of the numerous cases finding that
12 reserve information, when it reflects the mental conclusions of an attorney in evaluating a
13 legal claim, is protected by the work product doctrine and attorney/client privileged. *See,*
14 *e.g., Schreib v. American Family Mut. Ins. Co.*, 304 F.R.D. 282, 286-67 (W.D. Wash.
15 2014). In light of the foregoing, and in addition to Western Surety’s previous arguments
16 against the discoverability of its reserve information, Western Surety requests that the
17 Court enter an order denying EMC’s request for production of such information.
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20 RESPECTFULLY SUBMITTED this 21st day of November, 2018.

21 **BELL LAW PLC**

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2018, I filed the foregoing with the Clerk of Court using the CM/ECF system.

BELL LAW PLC

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