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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| BORGWARNER, INC. and BORGWARNER MORSE TEC LLC,<br><br>Appellants,<br><br>v.<br><br>FIRST STATE INSURANCE COMPANY, NORTH RIVER INSURANCE COMPANY, and OWENS CORNING/FIBREBOARD ASBESTOS PERSONAL INJURY TRUST,<br><br>Appellees. | Case No. 413, 2016<br><br>Court Below: Superior Court of the State of Delaware,<br>C.A. No. N15M-05-009<br><br>**CORRECTED VERSION** |

# APPELLEE FIRST STATE INSURANCE COMPANY'S ANSWERING BRIEF

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## NATURE OF THE PROCEEDINGS

This appeal presents an attempt by Appellants BorgWarner, Inc. and BorgWarner Morse TEC LLC (collectively, "BorgWarner") to upset the sound discretion of the Commissioner and force disclosure of documents from an arbitration that has been recognized as confidential for almost thirty years. BorgWarner seeks reversal of the decisions of the Commissioner and the Superior Court denying, in part, enforcement of a subpoena that BorgWarner served to obtain documents for use in connection with an insurance coverage action currently pending in Illinois. The subpoena, served on the Owens-Corning/Fibreboard Asbestos Trust (the "Trust"), seeks confidential information from a confidential alternative dispute resolution ("ADR") proceeding nearly thirty years ago between First State Insurance Company ("First State"), North River Insurance Company ("North River") and Owens-Corning Fiberglas Corporation ("Owens-Corning") (the "Owens-Corning ADR"). BorgWarner was not a party to that proceeding, which bears no relationship at all to the Illinois coverage action.

The Commissioner carefully considered the parties' evidence and arguments, including multiple rounds of briefing pertaining to the confidentiality of the Owens-Corning ADR. The evidence demonstrated that the ADR was conducted under the aegis of the Wellington Agreement, a landmark agreement signed in 1985 by numerous asbestos producers and their insurers in an effort to

streamline the handling of asbestos claims and to settle disputes regarding those claims. The evidence also reflected that the Wellington Agreement provided broad confidentiality protections for all aspects of ADR proceedings among its parties. The Commissioner correctly determined that the parties intended the Owens-Corning ADR materials to be confidential. Because it is the public policy of Delaware to respect and protect the confidentiality of such ADR proceedings, the Commissioner denied BorgWarner's motion to compel documents that have consistently been maintained as confidential. The Superior Court agreed and affirmed.

BorgWarner does not challenge the Commissioner's and Superior Court's determinations that it is the public policy of Delaware to protect the confidentiality of arbitrations and other ADR proceedings. Instead, it argues that the Superior Court erred because it applied the wrong standard when it found good cause, under Rule 45 of the Superior Court Rules of Civil Procedure, to deny enforcement of the subpoena or that the court should not have held that the parties to the Owens-Corning ADR had a legitimate expectation that the Wellington Agreement would protect the confidentiality of the ADR proceedings. Aside from a single Seventh Circuit decision that is not binding on this Court, does not turn on Delaware law, and that was decided on different facts, BorgWarner has no support for its argument. Both Commissioner Manning and Judge Scott correctly applied Rule 45

to the facts of this case, and found that there was good cause to maintain the confidentiality of the Owens Corning ADR in accordance with the provisions of the Wellington Agreement. That was neither contrary to law nor an abuse of discretion, and this Court should affirm that determination.

## SUMMARY OF THE ARGUMENT

1. **DENIED.** The Superior Court properly denied BorgWarner's motion for reconsideration because it correctly found no error of law in the determination of the Commissioner that Delaware public policy favors the protection of arbitration confidentiality and his resulting decision not to enforce the subpoena.

2. **DENIED.** The third-party subpoena was properly quashed under Rule 45, which does not require any showing of good cause to quash a subpoena. Rule 26(c), which pertains to protective orders, is inapplicable here because no protective order was sought or issued.

3. **DENIED.** The Superior Court did not treat BorgWarner as though it were "bound" by the confidentiality provisions of agreements to which it was not a party; indeed, the Superior Court did not rely on contract principles at all. Nor did the Superior Court rely on the Delaware Rapid Arbitration Act. The Superior Court correctly held that BorgWarner, by relying on out-of-state authority that does not reflect either Delaware law or Delaware public policy, failed to show any error of law in the Commissioner's determination that Delaware public policy favors the protection of arbitration confidentiality.

4. **DENIED.** The Superior Court correctly held that BorgWarner failed to show any error of law in the Commissioner's findings concerning the Wellington Agreement and the additional confidentiality agreement. Moreover,

the Superior Court did review the Commissioner's finding and correctly agreed with them. The Wellington Agreement plainly provides for very broad confidentiality for everything relating to the agreement, including ADR proceedings. The additional confidentiality agreement reinforces that confidentiality.

5. **DENIED.** The Superior Court correctly rejected BorgWarner's argument that North River waived confidentiality by disclosing certain of the documents sought by the subpoena in another proceeding. There is no authority under Delaware law for the propositions that (1) a partial disclosure in another proceeding results in a subject-matter waiver in the instant proceeding, or (2) partial disclosure by one party to a confidentiality agreement results in a waiver of the other party's rights of confidentiality.

## STATEMENT OF FACTS

*The Wellington Agreement.* First State, North River, and the Trust (as successor to Owens-Corning) were and still are parties to the Wellington Agreement, an effort by many asbestos producers and their insurers to standardize procedures for processing insurance claims relating to asbestos bodily injury claims. The Wellington Agreement provides a framework for confidentially resolving any disputes concerning the handling of asbestos claims, including various ADR methods, such as binding arbitration. The United State Court of Appeals for the Second Circuit has described the origins of the agreement:

> By the early 1980s, tens of thousands of asbestos injury claims had been filed against asbestos producers who were represented by more than a thousand law firms nationwide. By 1985, manufacturers and their insurers had paid out an estimated one billion dollars on asbestos injury claims--with roughly half going for costs alone. Meanwhile, there was a growing backlog of unresolved claims. Asbestos producers, insurance carriers, and courts tried to craft solutions to meet this crisis.
>
> In 1985, several insurers and asbestos producers entered into the Agreement Concerning Asbestos Related Claims. Known as the Wellington Agreement because of the mediation of then-Yale Law School Dean Harry Wellington, the Agreement established the Asbestos Claims Facility, a non-profit claims handling center that coordinated claim payments on behalf of the asbestos producers. The signatories to the Agreement sought to reduce asbestos litigation awards while lowering the associated costs. The Agreement encouraged settlements in place of costly litigation and established arbitration procedures to adjudicate claims that producers and their insurers could not settle.

*N. River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1200-01 (3d Cir. 1995).

The Wellington Agreement provided for an array of compromises on the part of the subscribers concerning various issues that had been litigated in different jurisdictions with inconsistent results. The subscribing producers surrendered certain claims; the subscribing insurers surrendered certain defenses. In partial return for these concessions, the subscribers received a promise that the proceedings would not be used as precedent against them: "All actions taken and statements made by persons and their representatives . . . shall be without prejudice or value as precedents, and shall not be taken as a standard by which other matters may be judged." A89. Even more important, to permit parties on both sides to embrace these compromises, the Wellington Agreement promised confidentiality, offering the parties "full privilege and protection with respect to the disclosure of their actions, statements, documents, papers, and other materials relating to the Agreement." *Id.*

*The Owens-Corning ADR.* Like First State and North River, Owens-Corning was a party to the Wellington Agreement. In the late 1980s, those three parties entered into an ADR proceeding pursuant to the Wellington ADR process. As part of this proceeding, in 1988, the parties entered into an additional agreement (the "Confidentiality Agreement") to provide further protection for the

confidentiality of information exchanged in the Owens-Corning ADR. A135-A138.

*The Genesis of the Subpoena at Issue.* A case concerning insurance coverage for BorgWarner's asbestos liabilities, *Continental Casualty Co., et al. v. BorgWarner Inc., et al.*, No. 04 CH 1708 (Cir. Ct. Cook County, Ill.) (the "Illinois Action"), is currently pending in the Circuit Court of Illinois. The parties to the Illinois Action are seeking declarations regarding their rights and obligations under certain insurance policies. First State is among the parties to that action; North River and the Trust are not.

In the course of the Illinois Action, BorgWarner served a subpoena on the Trust in Delaware seeking certain information allegedly developed in the course of the Owens-Corning ADR. BorgWarner concedes this information has nothing to do with BorgWarner or with any claims against BorgWarner. At most, it purportedly concerns insurance industry practices relating to the payment of defense costs in the 1980s. First State and North River objected on the ground that the information sought was confidential under both the Wellington Agreement and the Confidentiality Agreement, and that the information was in any case irrelevant to the Illinois Action. BorgWarner moved to enforce the subpoena, and First State and North River moved to quash it.

The Commissioner gave the motions full consideration, allowing supplemental briefing on the weight to be given BorgWarner's chief case, *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664 (7th Cir. 2009). In a thoughtful 12-page order (the "Order") entered on March 22, 2016, the Commissioner declined to enforce the subpoena (except with respect to some documents that North River had put into the public record elsewhere). A1000-1012. The Commissioner's decision rested on two principal considerations: first, as the Wellington Agreement and the Confidentiality Agreement made clear, First State, North River, and the Trust clearly expected the Owens-Corning ADR proceeding to be confidential; second, where the parties to an ADR proceeding expect the proceedings to be confidential, the public policy of Delaware protects such confidentiality.

BorgWarner moved for reconsideration under Rule 132(a)(3)(iv) of the Superior Court Rules of Civil Procedure, which provides that a Commissioner's order on a non-case-dispositive matter may be reconsidered only if the order "is based upon findings of fact that are clearly erroneous, or is contrary to law, or is an abuse of discretion." In its motion, BorgWarner contended that the Order was in various ways contrary to law. In a careful 17-page review of the question, the Superior Court found nothing in the Order contrary to law and denied the motion

for reconsideration (the "Opinion") on July 14, 2016. B516-533.[1] This appeal followed.

[1] Appellees First State and North River are submitting a joint appendix and any reference to B__ is to the Joint Appendix filed by North River.

## ARGUMENT

### I. THE SUPERIOR COURT DID NOT ERR IN DECLINING TO APPLY THE STANDARDS OF RULE 26 TO A SUBPOENA SUBJECT TO RULE 45.

#### A. Question Presented

BorgWarner states the question in these terms: "Did the Superior Court err by denying BorgWarner's motion without requiring a showing of good cause for precluding the discovery?" Appellant's Brief ("Brief") at 9. BorgWarner is really seeking a determination of whether the Superior Court erred in applying the standards of Rule 45 specifically applicable to subpoenas, rather than the general standards of Rule 26.

#### B. Standard of Review

In general, this Court reviews discovery rulings on an abuse-of-discretion standard. *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 731 A.2d 811, 815 (Del. 1999) ("[t]his Court reviews a trial court's application of discovery rules for abuse of discretion"). Nonetheless, the Court has held that the question of whether the Superior Court applied the correct legal standard to a discovery dispute is one of law. *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005) (in appeal of

discovery order, "[a] claim that a trial court applied an incorrect legal standard raises a question of law that we review *de novo*").[2]

### C. Merits of the Argument

In Point I of its Argument, BorgWarner contends that it was an error of law for the Superior Court to affirm the Commissioner's quashing of the subpoena without requiring a showing of "good cause." This argument fails in two distinct ways. First, the insurers moved to quash the subpoena under Rule 45, which does not require any showing of good cause. BorgWarner asks the Court to apply the standards of Rule 26, which the Superior Court recognized, are not applicable, and which the insures have not invoked. Second, although he was not required to do so, the Commissioner *did* find good cause for quashing the subpoena: namely, that enforcement of the subpoena would have violated the public policy of Delaware.

Enforcement of the subpoena is governed by Rule 45. Rule 45(c)(3) provides that a court *shall* quash a subpoena if it seeks "protected matter" and *may* quash it if it seeks "confidential . . . commercial information":

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[2] BorgWarner surprisingly asserts that discovery rulings are subject to *de novo* review: "[t]he Superior Court's application of the discovery rules is a question of law, which is reviewable by this Court *de novo*," citing *Cahill*, 884 A.2d at 455 (Del. 2005). Brief at 9. *Doe* in fact holds much more narrowly that "[a] claim that a trial court applied an incorrect legal standard raises a question of law that we review *de novo*." *Cahill*, 884 A.2d at 455. BorgWarner also cites *Wolhar v. Gen'l Motors Corp.*, 712 A.2d 457, 458 (Del. Super. 1997), which is not pertinent here; it concerns the Superior Court's review of exceptions to the findings of a special discovery master.

> (3)(A) On timely motion, **the Court shall quash** or modify the subpoena if it
>
> (i) fails to allow reasonable time for compliance,
>
> (ii) requires disclosure of privileged or **other protected matter** and no exception or waiver applies, or
>
> (iii) subjects a person to undue burden.
>
> (B) If a subpoena
>
> (i) requires disclosure of a trade secret or other **confidential research, development, or commercial information**, or
>
> (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,
>
> **the Court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena** or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the Court may order appearance or production only upon specified conditions.

(emphasis added). Crucially, Rule 45 requires no showing of good cause. Here, the Commissioner determined that the subpoena sought confidential material protected by the public policy of Delaware and declined to enforce it. In doing so, he applied the appropriate legal standard.

In the proceedings before the Commissioner, BorgWarner apparently recognized that Rule 45 governs here: in the three separate briefs it submitted to

the Commissioner, the phrase "good cause" does not appear a single time. *See* A444-450; A717-724; A957-962. However, BorgWarner, needing to manufacture some error of law justifying reconsideration, contended in the Superior Court that the Commissioner erred by failing to apply the standard of Rule 26(c). That rule, captioned "Protective Orders," allows a court to issue a protective order limiting or prohibiting discovery upon a showing of good cause. As the Superior Court observed, BorgWarner's argument "fails to show why Rule 26(c) is applicable in the absence of any request by a party or the Trust for a protective order or that a showing of good cause is otherwise required under the applicable discovery rules." B522.

Here, BorgWarner repeats the argument that the Superior Court properly rejected. It argues that the proper legal standard to apply to a motion to quash a subpoena is not the standard of Rule 45, concerning motions to quash subpoenas, but rather the standard of Rule 26(c), concerning protective orders, which were never issued in this case. Stated plainly, this argument is self-refuting.

BorgWarner tries to persuade the Court that, even though Rule 45 and Rule 26(c) explicitly state different standards, they are really the same, and therefore the Court can read into Rule 45(c) a requirement for good cause that the drafters of the rule simply forgot to supply. But no decision of this Court, or indeed of the Superior Court, suggests that that same standard applies to both rules. On the

contrary, the cases consistently recognize the distinction between, on the one hand, Rule 26 and the concomitant Rules 30 and 34, which govern discovery and document production between the parties, and, on the other hand, Rule 45, which governs non-party subpoenas. *See Van Sant v. Ross*, 171 A.2d 910, 913 (Del. Super. 1961) (reading Rule 45 to include parties "would make Rule 34 a nullity and rob it of its meaning"); *Div. of Family Servs. v. Redman*, 979 A.2d 1138, 1147 (Del. Fam. Ct. 2009) (following *Van Sant*); *SunTrust Bank v. Gibson*, 2014 WL 5315265, at *1 (Del. Com. Pl. Aug. 1, 2014) ("Civil Rules 30 and 34 outline the process for taking discovery of parties; however, both Civil Rules 30 and 34 direct that discovery of non-parties should be made in accordance with the process outlined in Civil Rule 45").

As it did before the Superior Court, BorgWarner relies chiefly on one unreported case from the Court of Common Pleas, *Tekstrom, Inc. v. Savla*, 2007 WL 3231632 (Del. Com. P. Oct. 24, 2007), which, it says, stands for the proposition that the "good cause" requirement of Rule 26(c) applies to discovery subpoenas. In fact, the case does no such thing. It merely quotes the text of Court of Common Pleas Civil Rule 26(c) in passing; in ruling on the motion to quash, it actually *applied* the standards of Court of Common Pleas Civil Rule 45(b). That rule -- in stark contrast to Superior Court Rule 45(c) at issue here -- allows a court to quash only upon a showing that the subpoena is "unreasonable and oppressive."

The *Tekstrom* court found that the subpoena "does not appear to be unreasonable, oppressive, or place any due burden" on the opposing party. 2007 WL 3231632 at *5. In the words of the Superior Court, *Tekstrom* "offers little guidance," and, even if it were on point, it "in no way stands as binding precedent in any event." B523. The Superior Court also took note of the difference in the rules at issue: "*Tekstrom* addressed the issue of scope in conjunction with a motion to quash brought pursuant to Court of Common Pleas Civil Rule 45(b), which Rule in no way corresponds to Superior Court of Civil Procedure Rule 45(c)(3)(A) at issue here." *Id.*

In short, the Superior Court correctly pointed out that the Court of Common Pleas and the Superior Court apply entirely different versions of Rule 45 governing subpoenas. To this observation, BorgWarner makes an amazing response:

> Contrary to the Superior Court's conclusion, *Tekstrom*, while interpreting the Delaware Court of Common Pleas' discovery rules, is relevant here because those rules are identical in all relevant respects to the Superior Court's applicable discovery rules. *Compare* Super. Ct. R. 26(b), 26(c) *with* Com. P. R. 26(b), 26(c).

Brief at 10 n.20. Here, BorgWarner simply disregards the Superior Court's reliance on the difference in the two versions of Rule 45 and tries to pretend that that court was invoking Rule 26.[3]

[3] The only other case BorgWarner cites in support of applying a "good cause" standard to a motion to quash a subpoena is *Wiggins v. Burge*, 173 F.R.D. 226

BorgWarner is unable to cite even one case standing for the position it urges: that a party seeking to quash a subpoena must show good cause. The Commissioner properly applied the standard set forth in Rule 45 to the insurers' motions to quash the subpoena.

But even if the "good cause" standard were relevant here, BorgWarner's argument would fail anyway, because the Commissioner did in fact find good cause. Assuming for argument's sake that Rule 26 governs, that rule indicates that discovery may be prohibited for many reasons, among them that it seeks "confidential . . . commercial information." The cases indicate that a party's desire to protect such information may in itself constitute good cause. *See, e.g.*, *Espinoza v. Hewlett-Packard Co.*, 2011 WL 941464, at *5 (Del. Ch. Mar. 17, 2011) ("[t]his Court previously has held that good cause exists under Rule 5(g) to seal documents containing trade secrets, nonpublic financial information, and third-party confidential material"); *Incyte Corp. v. Flexus Biosciences, Inc.*, 2016 WL 3251163, at *1 (Del. Super. June 6, 2016) (granting protective order under Rules 5(g) and 26(c) to protect confidential and sensitive material).

Here, the Commissioner recognized that the material the insurers seek to protect was confidential, which by itself is enough to meet the good cause standard. And the Commissioner also found that Delaware's public policy of

(1997), which concerns discovery between parties and makes no reference to a subpoena anywhere.

favoring arbitration and arbitration confidentiality would be served by quashing the subpoena: "for reasons of public policy discussed *infra*, the Court declines to compel the Trust to produce the information sought under the facts of this case." A1008. As discussed more fully in the next section, the Commissioner relied on Delaware's policy of favoring arbitration and other ADR proceedings and the need for confidentiality in such proceedings. The advancement of that public policy is independent grounds for finding good cause. *See, e.g.*, *Wilson v. City of Wilmington*, 2015 WL 4594510 (D. Del. July 29, 2015) (citing public policy as good cause for denying discovery). In affirming both the insurers' private interest in protecting confidential commercial information and the State's public-policy interest in assuring the confidentiality of arbitration materials, the Commissioner did not merely find good cause, but good cause on two related but separate grounds.

## II. THE SUPERIOR COURT DID NOT ERR BY ACCEPTING AND AFFIRMING THE COMMISIONER'S VIEW OF PUBLIC POLICY AND NOT SUBTITUTING BORGWARNER'S VIEW.

### A. Question Presented

BorgWarner states the issue as follows: "Did the Superior Court err by denying BorgWarner discovery of relevant, non-privileged information based on (1) confidentiality agreements to which BorgWarner was not a party, and (2) the Delaware Rapid Arbitration Act?" Brief at 14. In other words, BorgWarner contends that the Superior Court abused its discretion by affirming the Commissioner's decision to quash the subpoena in the interests of public policy.

### B. Standard of Review

This Court reviews discovery rulings on an abuse-of-discretion standard. *ABB Flakt*, 731 A.2d at 815 (Del. 1999) ("[t]his Court reviews a trial court's application of discovery rules for abuse of discretion").

### C. Merits of the Argument

In Point II of its Argument, BorgWarner sets forth a number of reasons why it thinks the Commissioner should have exercised his discretion differently and why the Superior Court should have reconsidered. But BorgWarner does not even try to show (and it cannot show) how the Superior Court's affirmance of the Commissioner's thoughtful decision amounted to either an error of law or an abuse of discretion, and the arguments it does present do not begin to show that anything

in the decision was contrary to law. As the Superior Court remarked, although BorgWarner must show that Commissioner's decision was "contrary to law," for the most part its arguments "either fail to include 'law' that the Court is bound to apply or follow or, as to areas of unsettled law, fail to show how the Commissioner's reasoning in declining to follow another jurisdiction's holding is contrary to the law of Delaware." B521-22. BorgWarner's brief to this Court suffers from the same defects. To the extent that BorgWarner even makes an effort to show an actual error of law, it does so by disregarding or misrepresenting what the Commissioner and the Superior Court actually said and found.

1. BorgWarner Ignores the Public-Policy Basis of the Decision Being Appealed.

As the Commissioner held in the Order, "[i]t is well established that Delaware public policy favors arbitration and the concomitant confidentiality that naturally ensues from not having a public trial." A1007. The Commissioner was correct. *See Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. 1999) ("Delaware recognizes a strong public policy in favor of arbitration"); *LG Elecs., Inc. v. InterDigital Commc'ns, Inc.*, 114 A.3d 1246, 1253 (Del. 2015) (quoting *Elf Atochem*); *SOC–SMG, Inc. v. Day & Zimmermann, Inc.*, 2010 WL 3634204, at *3 (Del. Ch. Sept. 15, 2010) (citing "our state's--and our nation's--strong public policy favoring arbitration").

The Commissioner was also correct that, at least in Delaware, confidentiality is an essential part of ADR. Since 1995, confidentiality in ADR proceedings has been safeguarded by statute:

> All ADR proceedings shall be confidential and any memoranda submitted to the ADR Specialist, any statements made during the ADR and any notes or other materials made by the ADR Specialist or any party in connection with the ADR shall not be subject to discovery or introduced into evidence in any proceeding and shall not be construed to be a waiver of any otherwise applicable privilege.

Del. Code Ann. tit. 6, § 7716 (West). *See also Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 48 (Del. Ch. 2005) ("It is the public policy of this State to encourage the voluntary resolution of disputes through mediation. **Confidentiality is vital** to the mediation process.") (emphasis supplied).[4] As the Commissioner remarked, "had the Wellington ADR occurred under current Delaware law, there is absolutely no doubt that the evidence presented during the proceeding would be considered confidential." A1007 (citing § 7716).

The policy of protecting arbitration confidentiality is, of course, by no means confined to Delaware. Courts across the country have endorsed that policy. *See,*

[4] There are, to be sure, differences between mediation and arbitration, but as, *Princeton Insurance* observes, they are both ADR procedures that are, from the standpoint of confidentiality, very comparable. *Vergano*, 883 A.2d at 61 (referring to "alternative dispute resolution, such as mediation or arbitration," in discussion of confidentiality). *See also In re Teligent, Inc.*, 640 F.3d 53, 57–58 (2d Cir. 2011) ("[c]onfidentiality is an important feature of the mediation and other alternative dispute resolution processes").

*e.g.*, *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008) ("confidentiality is a paradigmatic aspect of arbitration"); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) ("the plaintiffs' attack on the confidentiality provision is, in part, an attack on the character of arbitration itself"); *Fireman's Fund Ins. Co. v. Cunningham Lindsey Claims Mgmt., Inc.*, 2005 WL 1522783, at *3-4 (E.D.N.Y. June 28, 2005) ("protecting confidentiality agreements . . . promotes federal policy and encourages ADR by ensuring that parties in an arbitration proceeding get the protections for which they contracted"); *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 841 N.Y.S.2d 225, 227 (1st App. Div. 2007), *aff'd*, 901 N.E.2d 732 (N.Y. 2008) ("[g]iven the important public interest in protecting the rights of parties who submit to confidential arbitration, the court correctly concluded that no aspect of the Belgian arbitration, to which Occidental is not a party, may be subject to compulsory disclosure in this litigation"); *Wise v. King*, 2014 WL 3395614, at *2 (W.D. Pa. July 11, 2014) ("permitting discovery of the [ADR] proceedings would fly in the face of this contract, relevant statutes, our local ADR Rules, as well as the overwhelming case law on this issue").

It is not difficult to understand why court and public policy respect the confidentiality of arbitration. For the courts, arbitration conserves scarce judicial resources. For the parties, arbitration's more informal, streamlined procedures can

reduce the costs of litigation in time and money. Moreover, an informal voluntary proceeding gives the parties opportunities for compromise and even conciliation -- so long as they can be sure that compromise position will not be taken out of context and used against them elsewhere. The substantive provisions of the Wellington Agreement -- concerning, among other things, allocation of liability among insurers and the waiver of various claims and defenses -- reflect many such compromises, and the Agreement provides a framework for resolving disputes through ADR proceedings that, the parties hoped, would reflect the same spirit of compromise.[5]

But these benefits have costs of their own: by agreeing to engage in arbitration and to forego their right to litigate, the parties agree to sacrifice the formal procedural protections of litigation. Unless they are assured of confidentiality, potential ADR parties may simply be unwilling to take that risk.

Delaware has a special interest in making arbitration convenient and practical for corporations. This State is home to more than half of all publicly traded corporations in the United States. It has maintained this position of leadership by being responsive to the concerns of its corporate citizens. *See* Roberta Romano, *The Genius of American Corporate Law* 38-39 (AEI Press 1993)

[5] A partial list of the waivers and compromises reflected in the Wellington Agreement is included after the conclusion of this brief at Exhibit 1and the text of the chart is included in the word count of this brief.

("The most important transaction-specific asset in the chartering relation is an intangible asset, Delaware's reputation for responsiveness to corporate concerns"). One recent legislative manifestation of this responsiveness was the passage of the Delaware Rapid Arbitration Act ("DRAA") in 2015, which was designed to "give Delaware business entities a method by which they may resolve business dispute in a prompt, cost-effective, and efficient manner, through voluntary arbitration conducted by expert arbitrators, and to ensure rapid resolution of those business disputes." Delaware State Code, Title 10: Courts & Judicial Procedures, Chapter 58: Delaware Rapid Arb. Act. Preserving the ADR confidentiality safeguards valued and expected by corporations will assist in helping Delaware maintain its traditional place as a corporate capital.

When the Superior Court affirmed the Commissioner's decision to quash the subpoena, it acted squarely in accordance with Delaware's public policy favoring arbitration and its concomitant confidentiality, as attested in the case law and statutes of Delaware. In its motion seeking reconsideration, BorgWarner never challenged the determination that Delaware public policy favors confidential arbitration: "the Court notes that BorgWarner does not appear to -- nor could it in good faith -- challenge the Commissioner's determination that 'Delaware public policy favors arbitration and the concomitant confidentiality that naturally ensues from not having a public trial.'" B528. On the contrary, BorgWarner argued for

enforcement of the subpoena "without considering or even mentioning Delaware public policy's preference for arbitration -- a finding that undergirds the Commissioner's Order in this regard." B525. In short, the Commissioner based his decision on Delaware public policy, and so far as the motion for reconsideration showed, BorgWarner does not actually disagree or show that the determination of public policy was wrong.

BorgWarner adheres to this strategy before this Court. At no point in its brief does BorgWarner actually dispute that Delaware public policy favors arbitration and confidentiality in arbitration. It is BorgWarner's burden to show an error of law or an abuse of discretion. But the most BorgWarner can show is that there is one federal circuit where they *might* do things differently.

Perhaps recognizing as much, BorgWarner does make one feeble attempt at a public policy argument. It asserts that "even assuming Delaware public policy favors arbitration, that policy applies only when a party has agreed to arbitrate." Brief at 24. But this makes no sense at all. Public policy by its very nature takes into account more than the interests of the parties most immediately concerned -- it considers the public interest. To have a public policy favoring arbitration means *encouraging* arbitration -- giving parties reasons to agree to arbitrate by making the procedure serve the parties' interests, such as preserving confidentiality. *See Pettinaro Const. Co. v. Harry C. Partridge, Jr., & Sons, Inc.*, 408 A.2d 957, 962

(Del. Ch. 1979) (citing "the public policy encouraging arbitration"). If confidentiality could be overcome by anyone not a party to the arbitration agreement, as BorgWarner suggests, parties would have additional reasons to decline to arbitrate, which would of course disfavor arbitration.

2. The Commissioner and the Superior Court Were Not Bound to Apply Out-of-State, Off-Point Authority.

In making its affirmative argument, BorgWarner starts off with two red herrings. First, it contends that "a person cannot be bound to a contract to which he did not agree and to which he is not a party." Brief at 15. That may well be true, but it has nothing to do with this case. BorgWarner is bound by Rule 45, which authorizes a court to quash a subpoena to protect confidential information. Moreover, the Commissioner and the Superior Court relied on Delaware public policy favoring confidentiality in arbitration; they never purported to "bind" BorgWarner by the insurers' confidentiality agreements. Indeed, BorgWarner does not even try to show that they did. Instead, it argues that the Superior Court erred by "disregarding" this principle. Brief at 15. But this is hopelessly illogical: the Commissioner and the Superior Court could only have "disregarded" this principle if they had invoked contract principles in the first place and held that BorgWarner *was* bound by the parties' agreements. They did nothing of the kind. Their rulings were grounded in public policy, not contract law.

Second, BorgWarner contends that parties cannot "restrict the power of courts to order discovery by agreeing between themselves that certain materials they have exchanged are confidential." Brief at 16; *see also id.* at 19 (making same argument). Once again, this proposition has nothing to with this case. The Commissioner and the Superior Court did not conclude that the confidentiality agreements deprived them of the "power" to enforce the subpoena. Rather, they determined that enforcing the subpoena would be contrary to the public policy of Delaware. The only Delaware cases BorgWarner cites do not concern arbitration in any way. As the Superior Court remarked, they "involved the discovery of confidential settlement agreements to non-settling parties and, thus, are irrelevant to the issue of confidentiality of and Delaware public policy favoring arbitration."[6]

BorgWarner attempts to shore up this second argument by invoking *Gotham*, 580 F.3d 664, where the Seventh Circuit affirmed a district court's decision to allow a litigant to subpoena documents from an arbitration in the hands of a third

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[6] One of these cases affirms that "[p]arties to litigation do not have an absolute right to deny access to the terms of their settlement to the non-settling parties." *Gruwell v. Allstate Ins. Co.*, 2010 WL 3528900, at *1 (Del. Super. Sept. 9, 2010). The issue here is not "absolute rights" but public policy. The other case grants discovery of a single paragraph of a settlement agreement and barred discovery of the rest, noting that "[t]he public policy favoring and encouraging settlement agreements would be undermined by needless revelations of the terms of particular agreements." *Council of Unit Owners of Sea Colony E. v. Carl M. Freeman Associates*, 1990 WL 128185, at *3 (Del. Super. Sept. 5, 1990). Neither of these cases can possibly support the proposition that the Superior Court erred as a matter of law.

party. Even if *Gotham* were directly on point, it would still not be a Delaware case and the Commissioner and the Superior Court could not possibly have rendered a decision "contrary to law" by declining to follow it. In the words of the Superior Court: "Even if the facts and reasoning in *Gotham* were completely analogous to the case *sub judice*, which BorgWarner has failed to show, decisions from the Seventh Circuit are not binding on this Court. Therefore, BorgWarner's argument, even in ideal circumstances, lacks merit." B526. [7]

But the Commissioner and the Superior Court had several reasons *not* to follow *Gotham*. First, the procedural posture there was diametrically opposed to the one here. There, the District Court chose to enforce the subpoena, not to quash it. Although in its two-page decision the *Gotham* court did not trouble to state the standard of review, the Seventh Circuit reviews discovery rulings on an abuse-of-discretion standard, *see Gile v. United Airlines, Inc.*, 95 F.3d 492, 495 (7th Cir.

[7] BorgWarner also relied below on *In re Armstrong World Indus., Inc.*, No. 00-04471-KG (Bankr. D. Del. Sept. 8, 2003), an unpublished decision expressly stating that it "shall not serve as precedent for disclosure and may not be cited as such for disclosure." A345-46. Rebuking BorgWarner for its reliance on *Armstrong*, the Superior Court described that case as "not only factually and legally distinguishable, but also non-binding," and stated that BorgWarner's "citation to and in-depth discussion" of that case "borders on the disingenuous." B533. This rebuke unfortunately remains relevant because BorgWarner continues to rely on *Armstrong*, although only in one sentence in its "Summary of the Argument" section, and without either providing the case citation or including the case in the Table of Authorities. Brief at 2.

1996), and therefore the *Gotham* court could only have reversed for abuse of discretion.

Second, the confidentiality agreement in *Gotham* was completely different. The confidentiality agreement in that case ***specifically provided*** that documents from the arbitration could be produced in response to a subpoena. *Gotham*, 580 F.3d at 665 ("the agreement . . . provides that materials from the arbitration may be disclosed in response to a subpoena"). In other words, by enforcing the subpoena, the *Gotham* court was not thwarting the parties' expectations, it was giving effect to them. Here, neither of the two distinct confidentiality agreements at issue contains a comparable exception.[8]

Third, the *Gotham* court noted that the party resisting the subpoena had, earlier in the same case, itself put at issue the arbitration award and some of the documents exchanged in arbitration by submitting them to the trial court. The party seeking to enforce the subpoena very reasonably claimed waiver. *Gotham*, 580 F.3d at 665.

Fourth, *Gotham* rests on a view of national public policy concerning arbitration that is directly at odds with Delaware's view of its own public policy.

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[8] In dictum, the *Gotham* court suggested that it would have reached the same result even if the agreement had not contained an exception for subpoenas. But that dictum rests on the court's questionable determination that there is no *federal* policy favoring arbitration. As shown above, Delaware public policy does favor arbitration.

In *Gotham*, the court flatly rejected the appeal to public policy made by the party resisting the subpoena:

> According to Health Grades, access to the information would undermine the national policy favoring arbitration. **There is no such policy**. Arbitration agreements are optional and enforced just like other contracts. The Federal Arbitration Act eliminates hostility to private dispute resolution; it does not create a preference for that process.

580 F.3d at 666 (emphasis supplied). For the *Gotham* court to declare that there is no national policy favoring arbitration is a little perplexing; the Supreme Court has said on dozens of occasions that there ***is*** such a policy. *See, e.g.*, *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("Section 2 [of the Federal Arbitration Act] is congressional declaration of a liberal federal policy favoring arbitration agreements"); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289-90 (2002) (citing "the strong federal policy favoring arbitration"); *Nitro-Lift Techs., L.L.C. v. Howard*, -- U.S. --, 133 S. Ct. 500, 503 (2012) (citing "national policy favoring arbitration") (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). The *Gotham* court's views of federal public policy need not detain us, however, because this case concerns *Delaware* public policy. As shown above, Delaware policy unquestionably favors arbitration and not even BorgWarner questions that.

Fifth, as already shown above, numerous federal cases are in accord with Delaware public policy and protect confidentiality in arbitration. *Gotham* does not even represent the majority federal rule.[9]

Sixth, the *Gotham* court's analysis is deeply flawed. Like BorgWarner, the court stressed that "contracts bind only the parties" and that "[n]o one can 'agree' with someone else that a stranger's resort to discovery . . . will be cut off." *Gotham*, 580 F.3d at 665. No one doubts these general truisms, but they do not apply here. In entering into the Wellington Agreement, the parties were not agreeing among themselves to deny civil discovery of existing business records to others. Rather, they were agreeing to surrender their rights to litigate their claims and defenses in a public lawsuit and to confine themselves to an expedited, unofficial form of dispute resolution favored by public policy. A condition of their

[9] *Gotham* is literally the only case BorgWarner cites dealing with confidentiality in the relevant context -- arbitration or other ADR proceedings. In addition to the two Delaware cases already discussed, *see supra* n. 6, it cites three federal district cases for the unexceptionable proposition that a private agreement, without more, does not shield otherwise discoverable material from discovery. *See* Brief at 16. None of these cases concerns arbitration, none is a Delaware case, and none discusses the public policy of Delaware or any other jurisdiction. *See Sonnino v. Univ. of Kansas Hosp. Auth.*, 2004 WL 769325, at *4 (D. Kan. Apr. 8, 2004) ("the mere fact that Plaintiff entered into a settlement agreement with her former employer and this settlement agreement contains a clause that prohibits her from disclosing the underlying facts pertaining to that charge of discrimination . . . does not create a privilege"); *In re Application of O'Keeffe*, 2016 WL 2771697, at *4 (D. Nev. Apr. 4, 2016) ("the information and documents O'Keeffe seeks are not shielded from disclosure merely because they have been designated as 'confidential' in an agreement"); *Green v. Cosby*, 314 F.R.D. 164, 170–71 (E.D. Pa. 2016) (private agreement does not shield material from discovery).

agreeing to do so was that the proceedings remain confidential. Consequently, the information that BorgWarner seeks ***would not even exist*** if the parties had not exchanged mutual, binding promises of confidentiality on which they relied, allowing them to speak more freely and more informally in the expectation that their words would not be thrown back in their faces. BorgWarner is not seeking information to which it otherwise would have been entitled but for a confidentiality agreement. It is seeking to exploit the Wellington parties' disclosure conditioned on a promise of confidentiality by changing the rules after the disclosure.

The courts below properly concluded that public policy does not favor exploiting expectations of confidentiality. The Commissioner held it was consistent with Delaware's public policy to protect those expectations, and the Superior Court agreed and ruled that that BorgWarner had failed to show that his ruling was contrary to law. BorgWarner has again failed to make any showing that the ruling was incorrect or contrary to law, and the Court should affirm.

3. <u>BorgWarner's Other Arguments for Enforcing the Subpoena Fail.</u>

a. *What the Insurers May Have Done Elsewhere is Irrelevant.*

BorgWarner asserts that in two cases elsewhere the insurers have "successfully made the same arguments that BorgWarner is making here to obtain confidential documents from asbestos trusts." Brief at 20. The Superior Court

described this argument, which apparently seeks some sort of estoppel without a showing that *any* of the elements of estoppel are present, as "a last ditch attempt to undermine" the insurers' arguments. B527. Once again, neither of the cases BorgWarner cites are from Delaware and neither discusses Delaware public policy, so at most those cases might have the weight of *Gotham*: non-binding authority from other jurisdictions that the Commissioner and Superior Court cannot have committed legal error in declining to follow.

In fact, the cases are even less relevant than that because they are, in the Superior Court's vivid phrase, "vastly distinguishable" from the issue here. B528. Neither case even concerns arbitration. In *Federal-Mogul Products v. AIG Casualty Co.*, the Special Discovery Master pointed out that the confidentiality provisions in question, like that in *Gotham* but unlike that here, "expressly permit production of claimant information in response to a valid subpoena, and accordingly, these confidentiality provisions on their face embrace the discovery requested herein." A407. Perhaps even more important, the claimants had themselves put the information in question at issue. As First State showed in *Federal-Mogul*, A369, in two cases directly on point courts have held that claimants waive expectations of absolute privacy by submitting claims to a bankruptcy trust. *See Volkswagen of Am., Inc. v. Super. Ct.*, 43 Cal. Rptr. 3d 723, 729 (Cal. Ct. App. 2006); *In re Asbestos Prods. Liab. Litig.*, 256 F.R.D. 151, 155

(E.D. Pa. 2009). Moreover, unlike the material at issue here, the confidential information in *Federal-Mogul* did not come into being as the result of an agreement to arbitrate on condition of confidentiality; it was ordinary personal information relevant to the claim. A368-69.

BorgWarner's reliance on *National Union Fire Insurance Co. of Pittsburgh, Pa. v. Porter Hayden Co.*, 2012 WL 628493 (D. Md. Feb. 24, 2012), which concerns claimant information similar to that in *Federal-Mogul*, is equally unjustified. As in *Federal-Mogul*, the discovery at issue concerned asbestos trusts that expressly contemplated production of documents in response to a valid subpoena. Although BorgWarner describes that case as involving "various insurers," the unpublished opinion mentions only two, National Union and American Home Assurance Company, which are related entities that are parties neither here nor in the Illinois Action.

In short, BorgWarner has chosen to rely heavily on two non-Delaware cases that involve a completely different issue of confidentiality and that do not in any way concern either arbitration or public policy. Arguments of this kind merely highlight the weakness of BorgWarner's position.

b. *The Commissioner Did Not "Apply" the DRAA.*

According to BorgWarner, the "Commissioner and the Superior Court relied on the pro-arbitration policy of the DRAA," but the DRAA "does not apply here

because it was not enacted until 2015." Brief at 23. This argument is pure sleight of hand. The Commissioner "relied" on the DRAA merely as "[f]urther evidence of Delaware's preference for arbitration." A1007. The DRAA plainly ***is*** evidence of Delaware policy favoring arbitration, and if BorgWarner thinks otherwise, it never explains why. Instead, it complains that the DRAA does not apply retroactively and that the insurers here did not fulfill the formalities necessary to make it apply. Brief at 23-24. This argument would make sense only if the Commissioner or the Superior Court had held that the DRAA is controlling here -- that it "applies" in the sense of furnishing the rule of decision. But of course neither the Commissioner nor the Superior Court ever suggested any such thing. They merely note that the DRAA exemplifies Delaware's public policy favoring arbitration, and not even BorgWarner denies that that Delaware favors arbitration. In its eagerness to find some legal error, BorgWarner is imputing to the Commissioner and the Superior Court rulings they did not make.

## III. THE SUPERIOR COURT DID NOT ERR BY FAILING TO EXAMINE THE COMMISSIONER'S RULING THAT THE ARBITRATION PROCEEDINGS WERE CONFIDENTIAL.

### A. Question Presented

BorgWarner states the question as: "Did the Superior Court err by denying BorgWarner's discovery without examining the Commissioner's holding that the Wellington Agreement's plain terms, and a separate confidentiality agreement, preclude it?" Brief at 26. Restated to reflect the relevant standard of review, the question is: Did the Superior Court err by determining that (1) BorgWarner failed to show that the Commissioner's ruling was contrary to law, and (2) in any event, the Wellington Agreement and the Confidentiality Agreement support the Commissioner's decision to quash the subpoena on ground of public policy?

### B. Standard of Review

In general, this Court reviews discovery rulings on an abuse-of-discretion standard. *ABB Flakt*, 731 A.2d at 815 (Del. 1999) ("[t]his Court reviews a trial court's application of discovery rules for abuse of discretion").

### C. Merits of the Argument

#### 1. BorgWarner Has Misstated the Issue.

In Point III of its Argument, BorgWarner asserts the Superior Court "erred by declining to review the Commissioner's reading of the text of the Wellington Agreement and a separate confidentiality agreement among Owens-Corning, North

River, and First State to preclude the discovery BorgWarner seeks." Brief at 26. Once again, BorgWarner has misstated what the Commissioner actually did. He did not state that the Wellington Agreement and the Confidentiality Agreement "preclude" discovery; on the contrary, he explicitly stated he was *not* bound by the text of those agreements:

> When read as a whole, the [Wellington] Agreement and associated 1989 Confidentiality Agreement both make it abundantly clear that the parties intended every part of the arbitration -- from evidence to result -- to be confidential. Accordingly, the Court, ***while not bound by this fact***, will honor the agreement of the parties in this regard as a matter of public policy for the reasons discussed below.

A1006 (emphasis added). In other words, the Commissioner plainly did not construe the two agreements to preclude discovery as a matter of contract law. Rather, the Commissioner found that the agreements reflected the parties' intention to preserve confidentiality, and that giving effect to that intention would advance the public policy of Delaware.

On review, the Superior Court could reconsider the Commissioner's Order only if it was "contrary to law,"[10] but BorgWarner failed to cite any case law or statute to which the Order was "contrary." The Superior Court therefore properly

[10] To be precise, Rule 132 provides that a judge may reconsider a pretrial matter only "where is has been shown on the record that Commissioner's order is based on findings of fact that are clearly erroneous, or is contrary to law, or is an abuse of discretion." BorgWarner's argument to the Superior Court was that the Order was contrary to law.

concluded that it was "without any basis upon which to review the Commissioner's finding in this regard." B524.

Nor has BorgWarner provided this Court with any basis for review. It does not even attempt to show that the Superior Court was incorrect in affirming the Commissioner's determination that the two agreements protect confidentiality.

2. The Determination Below that the Parties to the Owens-Corning ADR Intended to Maintain Confidentiality Was Correct.

Although it concluded that it had no basis to review the Commissioner's findings, the Superior Court nonetheless went on to *agree* with those findings:

> Even so, a cursory review of BorgWarner's argument that the Commissioner's Order is contrary to the "plain text" of the Wellington documents leads the Court to concur with the Commissioner's rather candid description of the Wellington Agreement as "tortured." Further, as to the "side confidentiality agreement," BorgWarner devotes a mere three sentences to its alleged inapplicability to the matter at hand, none of which points the Court in the direction of any law, so to speak.

B525.

The Commissioner and the Superior Court were correct on the merits. The Wellington Agreement protects as confidential everything done or undertaken in connection with the Wellington Agreement:

> All person subscribing to or otherwise associating themselves with the Agreement request all Courts to take note of its underlying purpose, and to accord to all persons subscribing to or otherwise associating themselves with the Agreement and

> their representatives full privilege and protection with respect to the disclosure of their actions, statements, documents, papers, and other materials relating to the Agreement, including its development and implementation.

A89. This is an extraordinarily broad provision, calling for "full privilege and protection," not only for the subscribers but also for all those "associating" with the Agreement and their representatives. This "full privilege and protection" extends to their "actions, statements, documents, papers, and other materials" -- *i.e.*, everything -- "***relating*** to the Agreement."[11] The word "relating," which is as general and all-inclusive as any word could be in this context, broadens confidentiality as much as possible. And the last phrase -- "including its development and implementation" -- makes clear that confidentiality reaches both the drafting and preparation -- "development" -- of the Agreement and everything done under its aegis -- "implementation."

BorgWarner takes this last phrase and tries to use it to negate the entire preceding paragraph. According to BorgWarner, this provision "relates only to the development and implementation of the Wellington Agreement and not to disputes that arise after development." Brief at 27. This assertion -- which cannot be called

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[11] Other provisions of the Wellington Agreement further reinforce the protection of confidentiality. *See* A89 (all actions pursuant to Agreement "shall be without prejudice or value as precedents"); A90 (facility "shall maintain the confidentiality of confidential or propriety information submitted" by subscribers); A118 ("Nothing from the ADR process is admissible in subsequent litigation"); A121 ("There will be no precedential effect of any decision rendered in the ADR Procedure").

an "argument," because BorgWarner offers no elaboration whatever -- seems to ignore the very terms of the agreement it cites. The Wellington Agreement was an agreement on a method to resolve disputes through ADR. "Implementation" of such an agreement necessarily includes *resolving disputes through ADR.* Accordingly, confidentiality extends to ADR proceedings under the Wellington Agreement.

Presumably BorgWarner reads "implementation" to mean something much narrower than the actual resolution of disputes, although it does not say what. Under this understanding, BorgWarner is arguing that "including its development and implementation" means "but ***only*** as to its development and implementation," or "excluding everything ***except*** its development and implementation," which would not include ADR proceedings. That argument is indefensible. "Including" simply does not mean "excluding everything except," just as "This house is private, including the yard and the garage" does not mean "Everyone is welcome to come into the house without knocking, but stay out of the yard and the garage."

The Wellington Agreement was intended to expedite dispute resolution among insurers and producers. The parties took care to specify that "all actions taken and statements made" in connection with the Wellington Agreement would be "without prejudice or value as precedents, and shall not be taken as a standard by which other matters may be judged." A89. BorgWarner asks this Court to

believe that, although the parties drafted an agreement for dispute resolution and included an apparently sweeping grant of confidentiality, they really meant to limit that confidentiality to the "development" of the Wellington Agreement and to some undefined but narrow activities constituting its "implementation," and did not mean to include dispute resolution under the Wellington Agreement -- which is the whole purpose of the Wellington Agreement. In describing this interpretation of the Wellington Agreement as "tortured," the Commissioner was, if anything, understating the case.

In addition to the Wellington Agreement, the parties to the Owens-Corning ADR entered into the Confidentiality Agreement, which contains confidentiality protections of its own. BorgWarner asserts that the Confidentiality Agreement "applies only to designated documents exchanged during the Wellington ADR and does not protect other material BorgWarner seeks, such as the Wellington ADR testimony." Brief at 30. The Confidentiality Agreement does indeed specify that it applies to "certain documents exchanged between and among the parties and their counsel in Alternative Dispute Resolution." A135. But the Confidentiality Agreement so specifies because the parties knew their ADR proceedings were already protected under the Wellington Agreement itself.

## IV. THE SUPERIOR COURT DID NOT ERR IN REJECTING BORGWARNER'S WAIVER ARGUMENT.

### A. Question Presented

BorgWarner states the question as: "Did the Superior Court err by denying enforcement of BorgWarner's subpoena, despite the fact that North River had waived protection over many of the document sought through disclosure in *North River Insurance Company v. CIGNA Reinsurance*?" Brief at 31. First State restates the question as follows: Did the Superior Court err in rejecting BorgWarner's argument that North River's use of certain documents in another proceeding waived any confidentiality for any of the documents sought by the subpoena with respect to both North River and First State?

### B. Standard of Review

This Court reviews discovery rulings on an abuse-of-discretion standard. *ABB Flakt*, 731 A.2d at 815 (Del. 1999) ("[t]his Court reviews a trial court's application of discovery rules for abuse of discretion").

### C. Merits of the Argument

The Superior Court affirmed the Commissioner's ruling declining to find a broad subject matter waiver and holding that North River waived confidentiality only with respect to those documents that it put into the record in another proceeding. The Superior Court did not abuse its discretion but rather was entirely correct in affirming the Commissioner, for at least three reasons.

First, as the Superior Court recognized, the rationale behind the prohibition on partial disclosure is one of fairness. B530. A party should not be allowed to make affirmative use of some favorable information on a particular subject matter while at the same time withholding other information on the same subject matter. That rationale has no application here. North River has not sought to use in the Illinois Action any material sought by the subpoena, and therefore there is no unfairness to BorgWarner. Indeed, North River is not even a party to the Illinois Action. BorgWarner has cited no case in which a partial disclosure in one action was found to cause a subject matter waiver in a completely unrelated action.

Second, even if a subject-matter waiver were appropriate here, which it is not, BorgWarner has not even begun to make a showing that all the documents sought by the subpoena do in fact relate to the same subject matter as the documents North River made public. What BorgWarner is seeking here is not to make use of information on subjects addressed in the materials North River disclosed, but rather to exploit the disclosure to create an across-the-board abolition of all ADR-related confidentiality.

Third, even if waiver were appropriate for North River, BorgWarner has not shown that First State has waived the smallest particle of the confidentiality attaching to materials from the Owens-Corning ADR. It is hornbook law that a claim of confidentiality or privilege can only be waived by its holder. *See*, *e.g.*,

*Wolhar*, 712 A.2d at 461 ("evidentiary privileges can be waived by their holder") (quoting Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 2173 (1970)). BorgWarner cannot use the unilateral actions of North River to prejudice First State.

## CONCLUSION

For the foregoing reasons, First State respectfully requests that the Court affirm the rulings below.

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**PARTIAL LIST OF WELLINGTON AGREEMENT PROVISIONS**
**CONSTITUTING COMPROMISE POSITIONS**

| Issue | Wellington Compromise |
|---|---|
| Insurers' Right to Defend and Resolve Asbestos Claims | Section IV.1.: "[E]ach Subscribing Producer and each Subscribing Insurer designates the Facility as its sole agent . . . . As sole agent, the Facility shall have exclusive authority and discretion to administer, evaluate, settle, pay or defend all asbestos-related claims." A90. |
| Waiver of Claims for Declaratory Relief: | Section VIII.1.: "Each Subscribing Producer and each Subscribing Insurer shall forgo all claims for declaratory relief or damages, as to other Subscribing Producers and Subscribing Insurers, relating to . . . asbestos-related claims within the scope of the Agreement." A92. |
| Waiver of Contribution Claims | Section VIII.2.: "Each Subscribing Producer and each Subscribing Insurer shall forgo all claims for contribution or indemnity . . . against other Subscribing Producers and Subscribing Insurers." A92. |
| Insurers' Waiver of Policy Exclusions | Section VIII.5.: "Except as otherwise provided in Appendix B hereto, each Subscribing Insurer shall waive and permanently abandon and shall not assert or apply any conditions or defenses based upon, or exclusionary provisions contained in, insurance policies, which defenses or provisions have the effect of reducing or denying insurance coverage . . . ." A92. |
| Application of limits to the number of deductibles that can be collected: | Section XVI.1.: "Where deductibles and retentions are not limited explicitly by the insurance policy language, the following schedule of multipliers shall apply to limit per policy year such deductibles and retentions . . . ." A96. |
| Limits of liability for part-year policies: | Section XVIII.1.: "Unless it expressly provides otherwise, an insurance policy of less than 12 months shall carry full aggregate limits for the term of such policy." A98. |
| Insurer Obligation to pay in lieu of another, non-paying insurer: | Section XX.3.: "Whenever an insurance policy described in Paragraph 1 hereinabove would have had to make payments or to pay expenses on a particular claim . . . each insurance policy in the coverage block covering a |

| Issue | Wellington Compromise |
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| | part of the exposure period for such claim shall make payments and pay expenses, subject to applicable limits of liability, on a pro-rata basis in lieu of the non-signatory insurance policy . . . ." A100. |