No. 22-1079

IN THE

Supreme Court of the United States

TRUCK INSURANCE EXCHANGE,

Petitioner,

v.

KAISER GYPSUM COMPANY, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX
Volume 1 of 2

ALLYSON N. HO
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, TX 75201
(214) 698-3100
aho@gibsondunn.com

Counsel of Record for Petitioner

C. KEVIN MARSHALL
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
ckmarshall@jonesday.com

Counsel of Record for Respondents Kaiser Gypsum Company, Inc., and Hanson Permanente Cement, Inc.

(*Additional counsel listed on inside cover*)

Petition for a Writ of Certiorari filed May 3, 2023
Petition for a Writ of Certiorari granted Oct. 13, 2023

KEVIN C. MACLAY
CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
(202) 862-5000
kmaclay@capdale.com

Counsel of Record for Respondent Official Committee of Asbestos Personal Injury Claimants

EDWIN JOHN HARRON
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6703
eharron@ycst.com

Counsel of Record for Respondent Future Claimants' Representative

MARK A. NEBRIG
MOORE & VAN ALLEN PLLC
100 North Tryon Street
Suite 4700
Charlotte, NC 28202
(704) 331-1000
marknebrig@mvalaw.com

Counsel of Record for Respondent Lehigh Hanson, Inc.

TABLE OF CONTENTS

Volume 2

The following items were reproduced in the petition appendix and are omitted from this joint appendix:

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re **KAISER GYPSUM COMPANY, INC., et al**[1] **Debtors**.	**Case No. 16-31602** **Chapter 11** (Jointly Administered)

CHAPTER 11 PLAN OF REORGANIZATION FOR KAISER GYPSUM COMPANY, INC., AND ITS AFFILIATE PROPOSED BY TRUCK INSURANCE EXCHANGE

GIBSON, DUNN & CRUTCHER LLP

Michael A. Rosenthal (admitted *pro hac vice*)
Robert B. Krakow (admitted *pro hac vice*)
Alan Moskowitz (*pro hac vice* pending)
Matthew G. Bouslog (admitted *pro hac vice*)
Jason Zachary Goldstein (*pro hac vice* pending)

GRIER FURR & CRISP, PA

Michael Leon Martinez
101 North Tryon Street, Suite 1240
Charlotte, NC 28246
Telephone: (704) 332-0209
Facsimile: (704) 332-0215

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Kaiser Gypsum Company, Inc. (0188); and Hanson Permanente Cement, Inc. (7313). The Debtors' address is 300 E. John Carpenter Freeway, Irving, Texas 75062.

200 Park Avenue
New York, New York
10166-0193
Telephone:
(212) 351-4000
Facsimile:
(212) 351-4035
Email addresses:
MRosenthal@
gibsondunn.com
RKrakow@
gibsondunn.com
AMoskowitz@
gibsondunn.com
MBouslog@
gibsondunn.com
JGoldstein@
gibsondunn.com

Co-Counsel for the Plan Proponent Truck Insurance Exchange

Email address:
mmartinez@
grierlaw.com

Co-Counsel for the Plan Proponent Truck Insurance Exchange

Dated: April 13, 2018

* * *

INTRODUCTION

Truck Insurance Exchange ("***Truck***"), as creditor, party in interest, and Plan Proponent, respectfully proposes the following Plan pursuant to section 1121(c) of the Bankruptcy Code. This Plan shall be interpreted as, and capitalized terms used, but not otherwise defined in the Plan shall have the meanings, set forth in Exhibit A attached hereto.

Reference is made to the Disclosure Statement with respect to the Plan, distributed contemporaneously herewith, for a discussion of the Debtors' history, businesses, properties, operations, risk factors, a summary and analysis of the Plan, and certain related matters. Subject to the restrictions and requirements set forth in section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, the Plan Proponent respectfully reserves the right to alter, amend, modify, revoke, or withdraw the Plan in the manner set forth herein prior to consummation of the Plan. Truck is the proponent of the Plan within the meaning of section 1129 of the Bankruptcy Code.

THIS PLAN SHOULD BE CONSIDERED ONLY IN CONJUNCTION WITH THE DISCLOSURE STATEMENT AND RELATED MATERIALS TRANSMITTED THEREWITH. THE DISCLOSURE STATEMENT IS INTENDED TO PROVIDE YOU WITH THE INFORMATION THAT YOU NEED TO MAKE AN INFORMED JUDGMENT WHETHER TO ACCEPT OR REJECT THE PLAN.

ARTICLE 1
TREATMENT OF ADMINISTRATIVE EXPENSECLAIMS AND PRIORITY TAX CLAIMS

1.1 Administrative Expense Claims. Subject to the terms herein and unless otherwise agreed to by the Holder of an Allowed Administrative Expense Claim (in which event such other agreement shall govern), Allowed Administrative Expense Claims shall be provided for as follows:

1.1.1. If such Claim is for goods sold or services rendered representing liabilities incurred by the Debtors in the ordinary course of business during the Chapter 11 Cases involving customers, suppliers, or trade or vendor Claims, such Claim shall be paid by the Debtors or the Reorganized Debtors in the ordinary course in accordance with the terms and conditions of any agreements relating thereto;

1.1.2. If such Claim is for amounts necessary to cure executory contracts and unexpired leases assumed by the Debtors, such Claim shall be paid by the Debtors or Reorganized Debtors as soon as practicable after the Effective Date or as ordered by the Bankruptcy Court;

1.1.3. Amounts due to Holders of other Allowed Administrative Expense Claims, including, without limitation, Allowed Fee Claims or Claims arising pursuant to section 503(b)(9) of the Bankruptcy Code, shall be paid as soon as practicable after the Effective Date or as ordered by the Bankruptcy Court, unless otherwise agreed between the Debtors and such Holders; and

1.1.4. Administrative Expense Claims of the Bankruptcy Administrator for fees pursuant to 28

U.S.C. § 1930(a)(6) and (7) shall be paid in accordance with the applicable schedule for payment of such fees by the Debtors.

1.2 Priority Tax Claims. Subject to the terms herein, each Holder of an Allowed Priority Tax Claim shall be paid 100% of the unpaid Allowed Amount of such Allowed Priority Tax Claim in Cash by the Reorganized Debtors on the Distribution Date. Any Claim or demand for penalty relating to any Priority Tax Claim (other than a penalty of the type specified in section 507(a)(8)(G) of the Bankruptcy Code) shall be Disallowed, and the Holder of an Allowed Priority Tax Claim shall not assess or attempt to collect such penalty from the Debtors or Reorganized Debtors, or their Estates or Assets.

ARTICLE 2
CLASSIFICATION AND TREATMENT OF CLAIMS AND EQUITY INTERESTS

2.1 Overview.

The Plan constitutes a separate plan for each Debtor within the meaning of section 1121 of the Bankruptcy Code. The Plan provides for payment in full, in Cash, of Allowed Amounts of all Claims against the Debtors.

In addition to Classes for General Unsecured Claims, Environmental Claims and Equity Interests, the Plan contains four Classes of Asbestos Claims: Settled Asbestos Claims (Class 3), Current Asbestos Claims (Class 4), Future Asbestos Claims (Class 5) and Pre-Petition Judgment Asbestos Claims (Class 6). Each Class of Claims represent the Claims in such Class which could be asserted against either Debtor. The Equity Interests in HPCI and Kaiser are classified in separate Classes.

Current Asbestos Claims and Future Asbestos Claims are all Disputed. These Claims are classified separately because of the divergent interests between Claimants whose alleged asbestos-related conditions have manifested by the Confirmation Date and Claimants whose conditions have not so manifested (and who are therefore represented by the FCR). Allowance and payment of Current Asbestos Claims and Future Asbestos Claims (as Allowed) will take place after the Effective Date. While such Claimants will first have to present their Claims to the Settlement Facility for resolution pursuant to the Settlement Option, the Plan fully preserves the right of each such Claimant to reject the offer made by the Settlement Facility and to pursue the Litigation Option against the Reorganized Debtors.

Pursuant to the Settlement Option, Claimants will submit their Claims to the Settlement Facility for processing pursuant to the CRP. The Settlement Facility will be a trust governed by the Settlement Facility Agreement. It will be managed by the Trustee, who shall meet independence criteria contained in the Settlement Facility Agreement.

The CRP prescribes predetermined settlement offers, without the expense and delay of litigation, based on defined, objective factors. Settlement Option Claimants will have the option of choosing Basic Review or Comprehensive Review, each of which defines settlement offers based on objective factors relating to the Claimant's exposure history and demographic characteristics. Basic Review requires submission of less information than Comprehensive Review and for most Claimants will result in higher settlement offers. Comprehensive Review requires submission of more information but could produce higher settlement

offers for certain Claimants who have a small number of alternative sources of exposure. Claimants may change their election of Basic Review or Comprehensive Review pursuant to the CRP. To receive a payment, Settlement Option Claimants must execute a Settlement Option Release. Settlement Option Claimants who do not receive a settlement offer under the CRP or who choose not to accept the settlement offer may still elect the Litigation Option.

Claimants who choose the Litigation Option must first pursue the Settlement Option and submit their Asbestos Claim to the Settlement Facility and can then proceed to have their Claims Allowed or Disallowed through litigation against the Reorganized Debtors, pursuant to the CMO, which preserves Claimants' rights to jury trial and trial in the district court (28 U.S.C. §§ 157(b)(5), 1411). The procedures under the CMO will be generally consistent with what was proposed in the *Case Management Order for Post-Confirmation Allowance of Disputed GST Claims Electing Litigation Option* submitted by the debtors in *In re Garlock Sealing Technologies LLC*, Case No. 10-31607 (Bankr. W.D.N.C. Apr. 13, 2015) [Docket No. 4548], a copy of which is attached to the Disclosure Statement as Exhibit G. Pretrial proceedings will take place in the District Court or the Bankruptcy Court (if referred to the Bankruptcy Court by the District Court) and any trials will take place in the District Court. Claimants and the Reorganized Debtors will be required to answer standard discovery requests, to be followed by fact and expert depositions. The CMO contains procedures designed to prevent "the manipulation of exposure evidence by plaintiffs and their lawyers," which has been found to lead to inflated recoveries. *In re Garlock Sealing Techs. LLC*, 504 B.R. 71, 82 (Bankr. W.D.N.C. 2014). The Bankruptcy Court

and the District Court under the CMO would reserve their authority to enter orders necessary to manage their respective dockets so as to achieve the orderly and expeditious disposition of Litigation Option Claims, including, but not limited to, orders allocating the pre-trial supervision of some or all Litigation Option Claims between the Bankruptcy Court and District Court; orders establishing an inactive docket or other procedure giving priority to Litigation Option Claimants who can demonstrate impairment, *see, e.g.*, *In re New York City Asbestos Litig.*, 2002 WL 32151568 (N.Y.C. Sup. Ct., N.Y. Dec. 19, 2002); and orders requiring Litigation Option Claimants to produce the medical diagnosis or opinion upon which they rely as if to withstand a dispositive motion before proceeding to discovery, *see, e.g.*, *In re Asbestos Products Liab. Litig. (No. VI)*, MDL-875 (E.D. Pa. Aug. 27, 2009); *In re Asbestos Products Liab. Litig. (No. VI)*, 718 F.3d 236, 241-42 (3d Cir. 2013).

Any Litigation Option Claim Allowed by Final Order will be paid in full by the Settlement Facility or Reorganized Debtors, subject to all Asbestos Contribution Rights, while any Litigation Option Claim Disallowed will not receive any payment. The Settlement Facility will be responsible for defending against each Litigation Option Claim on behalf of the Reorganized Debtors, and will pay all Litigation Expenses, except to the extent that the Settlement Facility tenders defense against a Litigation Option Claim to the Non-Truck Asbestos Insurers and such defense is accepted, in which case such Non-Truck Asbestos Insurer shall assume such defense and pay Litigation Expenses in accordance with the Asbestos Insurance Policies.

For any Litigation Option Claim that is settled, the Settlement Facility shall not agree to pay any

amount that exceeds the Settlement Facility Limit. Any pre-judgment settlement offer by the Settlement Facility (a "***Judgment Offer***") shall be in the form of an offer of judgment under Federal Rule of Civil Procedure 68 and Bankruptcy Rule 7068. If any judgment the Asbestos Claimant obtains under the Litigation Option is not more favorable than the unaccepted Judgment Offer, the Asbestos Claimant must, consistent with Federal Rule of Civil Procedure 68(d), pay the costs incurred by the Settlement Facility after the Judgment Offer was made.

The Class of Pre-Petition Judgment Asbestos Claims includes Claimants who obtained judgments against a Debtor, but the judgments have not yet become subject to a Final Order. These Claimants will have the option after the Effective Date of electing the Settlement Option or completing appeals in state court. If the judgment becomes a Final Order, the Settlement Facility or Reorganized Debtors will pay the judgment, subject to all Asbestos Contribution Rights. If a judgment is reversed by the appellate court and judgment entered in favor of the Reorganized Debtors, the Claim will be Disallowed, with Litigation Expenses paid by the Settlement Facility; *provided*, *however*, that a Non-Truck Asbestos Insurer shall be responsible for paying Litigation Expenses, in accordance with the Asbestos Insurance Policies, if the Settlement Facility has tendered the defense of such Claim to the Non-Truck Asbestos Insurers and such defense is accepted. If a judgment is reversed and such Claim is not dismissed or Disallowed as a result of such reversal (for example, if the Claim is remanded for new trial), the Claimant will be treated like any other Current Asbestos Claimant, with the option of pursuing the Settlement Option, and, after submitting such Asbestos Claim for Basic Review or

Comprehensive Review, and in accordance with the CRP, the Litigation Option (pursuant to the CMO); *provided*, *however*, that any settlement offered by the Settlement Facility pursuant to the Settlement Option shall be reduced by the Litigation Expenses incurred in connection with appeal of the pre-petition judgment.

Allowed Settled Asbestos Claims will be paid in full, on the Distribution Dates applicable to such Claims, by the Settlement Facility or the Reorganized Debtors, subject to all Asbestos Contribution Rights. Settled Asbestos Claimants whose Claims are Disallowed as not settled will nonetheless continue to hold Current Asbestos Claims and may elect the Settlement Option or Litigation Option, subject to any applicable defenses.

In the future, as Future Asbestos Claims are asserted, they shall be treated in substantially the same manner as the treatment of Current Asbestos Claims, and shall be required to assert their Claims as if they had been Current Asbestos Claims as of the date of entry of the Confirmation Order.

Apart from their obligations specifically set forth in the Plan, neither the Reorganized Debtors nor the Plan Proponent will have any additional or further obligation for Asbestos Claims, Settlement Facility Expenses or Litigation Expenses. After the Effective Date, except as otherwise stated herein, all Claims against the Debtors will be discharged, and the Reorganized Debtors will be protected by the Discharge Injunction described in Section 7.1. **All Current Asbestos Claimant and Future Asbestos Claimants shall be subject to the Contribution Injunction described in Section 7.2 and may not, under any circumstances, assert Released Claims against**

any Released Party. **In consideration of the Settlement Facility Contributions, the Released Parties shall receive the benefit of the Contribution Injunction.**

Other Claims and Equity Interests will be treated as described below.

2.2 **Summary**. The Plan constitutes a separate plan proposed by each Debtor within the meaning of section 1121 of the Bankruptcy Code. Pursuant to section 1122 of the Bankruptcy Code, set forth below is a designation of Classes of Claims against and Equity Interests in the Debtors. A Claim or Equity Interest is placed in a particular Class for the purposes of voting on the Plan and receiving Distributions pursuant to the Plan only to the extent that such Claim or Equity Interest is an Allowed Claim or Allowed Equity Interest in that Class and such Claim or Equity Interest has not been paid, released, withdrawn, or otherwise settled prior to the Effective Date. The fact that a particular Class of Claims is designated for the Debtors does not necessarily mean there are any Allowed Claims in such Class.

Class	Type	Status Under Plan	Voting Rights
1	Secured Claims	Unimpaired	Deemed to accept
2	Priority Claims	Unimpaired	Deemed to accept
3	Settled Asbestos Claims	Unimpaired	Deemed to accept
4	Current Asbestos Claims	Unimpaired	Deemed to accept
5	Future Asbestos Claims	Unimpaired	Deemed to accept
6	Pre-Petition Judgment Asbestos Claims	Unimpaired	Deemed to accept
7	General Unsecured Claims	Unimpaired	Deemed to accept
8	Environmental Claims	Unimpaired	Deemed to accept
9	Intercompany Claims	Unimpaired	Deemed to accept
10	Kaiser Equity Interests	Impaired	Deemed to reject
11	Hanson Equity Interests	Impaired	Deemed to reject

2.3 Class 1—Secured Claims.

2.3.1 Classification. Class 1 consists of all Secured Claims against any Debtor.

2.3.2 Treatment. Subject to the provisions of sections 502 and 506(d) of the Bankruptcy Code and the terms herein, each Holder of an Allowed Class 1 Claim shall, at the option of the Reorganized Debtors, receive treatment according to the following alternatives: (i) the Plan will leave unaltered the legal, equitable and contractual rights to which the Holder of such Claim is entitled, (ii) the Reorganized Debtors shall pay the Allowed Claim in full on the Distribution Date or as soon thereafter as reasonably practicable; or (iii) the Reorganized Debtors shall provide such other treatment as is agreed to in writing between the Debtors or the Reorganized Debtors and the Holders of such Allowed Secured Claim.

2.3.3 Impairment and Voting. Class 1 is Unimpaired. The Holders of Class 1 Secured Claims are deemed to have voted to accept this Plan and, accordingly, their separate vote will not be solicited.

2.4 Class 2—Priority Claims.

2.4.1 Classification. Class 2 consists of all Priority Claims against any Debtor.

2.4.2 Treatment. Each Holder of an Allowed Class 2 Claim shall be paid the Allowed Amount of its Allowed Priority Claim either (i) in full, in Cash, on the Distribution Date, or (ii) upon such other less favorable terms as may be mutually agreed upon between the Holder of an Allowed Priority Claim and the Reorganized Debtors.

2.4.3 Impairment and Voting. Class 2 is Unimpaired. The Holders of Class 2 Priority Claims

are deemed to have voted to accept this Plan and, accordingly, their separate vote will not be solicited.

2.5 Class 3—Settled Asbestos Claims.

2.5.1 Classification. Class 3 consists of all Settled Asbestos Claims against any Debtor.

2.5.2 Treatment.

Each Allowed Settled Asbestos Claim shall be paid the Allowed Amount of such Claimant's Settled Asbestos Claim on the Distribution Date by the Settlement Facility or the Reorganized Debtors, subject to all Asbestos Contribution Rights. Such payment shall be (i) in full, in Cash, or (ii) upon such other less favorable terms as may be mutually agreed upon between the Holder of an Allowed Settled Asbestos Claim and the Settlement Facility.

Settled Asbestos Claimants whose Claims are Disallowed as not settled shall nonetheless continue to hold Current Asbestos Claims and may elect the Settlement Option or Litigation Option.

2.5.3 Impairment and Voting. Class 3 is Unimpaired. The Holders of Class 3 Settled Asbestos Claims are deemed to have voted to accept this Plan and, accordingly, their separate vote will not be solicited.

2.6 Class 4—Current Asbestos Claims.

2.6.1 Classification. Class 4 consists of all Current Asbestos Claims against any Debtor.

2.6.1 Treatment.

(a) All Current Asbestos Claimants shall file their claims with the Settlement Facility pursuant to the procedures set forth in the CRP. Current Asbestos Claimants shall have their Claims processed by the

Settlement Facility in accordance with the terms, provisions and procedures of the CRP, which describe in full detail the criteria for qualifying for payment. If Allowed under the CRP, the Claim shall be paid in full, in Cash, by the Settlement Facility or the Reorganized Debtors pursuant to the terms of the CRP. To receive payment, the Current Asbestos Claimant must execute a Settlement Option Release in substantially the form attached to the CRP. Any Current Asbestos Claimant who has sought Basic Review or Comprehensive Review and who either (i) has such Claim rejected by the Settlement Facility or (ii) receives an offer from the Settlement Facility under the CRP and rejects such offer may, thereafter, elect the Litigation Option described in subsection (c) below.

(c) Current Asbestos Claimants who have first submitted their Asbestos Claim to the Settlement Facility pursuant to the Settlement Option and who either (i) have such Claim rejected by the Settlement Facility or (ii) receive an offer from the Settlement Facility under the CRP and reject such offer shall be entitled to pursue, as their sole litigation remedy, the Litigation Option by Filing a proof of Claim pursuant to the CMO and serving it on the Settlement Facility and the Reorganized Debtors. Litigation Option Claims that result in judgments or settlements shall be paid in full, in Cash, as provided in the CRP and CMO; Litigation Option Claims that do not result in judgments or settlements shall be Disallowed and receive no Distribution. The Settlement Facility will be responsible for defending against each Litigation Option Claim, and will pay all Litigation Expenses, except to the extent that the Settlement Facility tenders defense against a Litigation Option Claim to the Non-Truck Asbestos Insurers and such defense is accepted, in which case such Non-Truck Asbestos Insurer shall

assume such defense and pay Litigation Expenses in accordance with the Asbestos Insurance Policies.

(d) To be eligible for the Litigation Option, all Asbestos Claims that are Related to the Current Asbestos Claim must first submit such Claims to the Settlement Facility in accordance with the CRP. Conversely, if any Current Asbestos Claimant elects to settle an Asbestos Claim pursuant to the Settlement Option, all Related Claims shall be ineligible for the Litigation Option.

(e) The Settlement Facility shall not be obligated to offer the Litigation Option Claimant any settlement. For any settlement of a Litigation Option Claim, the Settlement Facility shall not agree to pay more than the Settlement Facility Limit. No Asbestos Insurer shall be liable for payment of any portion of a Litigation Option Claim unless it has expressly agreed to do so or is otherwise required under the Non-Truck Asbestos Insurance Policies.

2.6.3 Injunctions.

Current Asbestos Claims shall be discharged and subject to the Discharge Injunction described in Section 7.1 and, except as expressly provided in this Plan, may not under any circumstance assert their Claims against the Reorganized Debtors.

Additionally, Current Asbestos Claimants shall be subject to the Third Party Release described in Section 7.5 and the Contribution Injunction described in Section 7.2 and may not, under any circumstances, assert Released Claims against any Released Party.

2.6.4 Impairment and Voting. Class 4 is Unimpaired. The Holders of Class 4 Current Asbestos

Claims are deemed to have voted to accept this Plan and, accordingly, their separate vote will not be solicited.

2.7 Class 5—Future Asbestos Claims.

2.7.1 Classification. Class 5 consists of all Future Asbestos Claims against any Debtor.

2.7.2 Treatment.

(a) All Future Asbestos Claimants shall file their claims with the Settlement Facility pursuant to the procedures set forth in the CRP.

(b) Future Asbestos Claimants shall have their Claims processed by the Settlement Facility in accordance with the terms, provisions and procedures of the CRP, which describe in full detail the criteria for qualifying for payment. If Allowed under the CRP, the Claim shall be paid in full, in Cash, by the Settlement Facility or the Reorganized Debtors pursuant to the terms of the CRP. To receive payment, the Current Asbestos Claimant must execute a Settlement Option Release in substantially the form attached to the CRP. Any Current Asbestos Claimant who has sought Basic Review or Comprehensive Review and who either (i) have such Claim rejected by the Settlement Facility or (ii) receive an offer from the Settlement Facility under the CRP and rejects such offer may, thereafter, elect the Litigation Option described in subsection (c) below.

(c) Future Asbestos Claimants who have first submitted their Asbestos Claim to the Settlement Facility pursuant to the Settlement Option and who either (i) have such Claim rejected by the Settlement Facility or (ii) receive an offer from the Settlement Facility under the CRP and reject such offer shall be entitled to pursue, as their sole litigation remedy, the

Litigation Option by Filing a proof of Claim pursuant to the CMO and serving it on the Settlement Facility and the Reorganized Debtors. Litigation Option Claims that result in judgments or settlements shall be paid in full, in Cash, as provided in the CRP and CMO; Litigation Option Claims that do not result in judgments or settlements shall be Disallowed and receive no Distribution. The Settlement Facility will be responsible for defending against each Litigation Option Claim, and will pay all Litigation Expenses, except to the extent that the Settlement Facility tenders defense against a Litigation Option Claim to the Non-Truck Asbestos Insurers and such defense is accepted, in which case such Non-Truck Asbestos Insurer shall assume such defense and pay Litigation Expenses in accordance with the Asbestos Insurance Policies.

(d) To be eligible for the Litigation Option, all Asbestos Claims that are Related to the Future Asbestos Claim must first submit such Claims to the Settlement Facility in accordance with the CRP. Conversely, if any Future Asbestos Claimant elects to settle an Asbestos Claim pursuant to the Settlement Option, all Related Claims shall be ineligible for the Litigation Option.

(e) The Settlement Facility shall not be obligated to offer the Litigation Option Claimant any settlement. For any settlement of a Litigation Option Claim, the Settlement Facility shall not agree to pay more than the Settlement Facility Limit. No Asbestos Insurer shall be liable for payment of any portion of a Litigation Option Claim unless it has expressly agreed to do so or is otherwise required under the Non-Truck Asbestos Insurance Policies.

2.7.3 Injunctions.

Future Asbestos Claims shall be discharged and subject to the Discharge Injunction described in Section 7.1 and, except as expressly provided in this Plan, may not under any circumstance assert their Claims against the Reorganized Debtors.

Additionally, Future Asbestos Claimants shall be subject to the Third Party Release described in Section 7.5 and the Contribution Injunction described in Section 7.2 and may not, under any circumstances, assert Released Claims against any Released Party.

2.7.4 Impairment and Voting. Class 5 is Unimpaired. The Holders of Class 5 Future Asbestos Claims are deemed to have voted to accept this Plan and, accordingly, their separate vote will not be solicited.

2.8 Class 6—Pre-Petition Judgment Asbestos Claims.

2.8.1 Classification. Class 6 consists of all Pre-Petition Judgment Asbestos Claims against any Debtor.

2.8.2 Treatment.

(a) All Pre-Petition Judgment Asbestos Claimants shall in the first instance have the option to elect the Settlement Option or instead litigate to conclusion the pending appeals of their judgments.

(b) If such a Claimant chooses to litigate the pending appeal of a judgment to conclusion such Claim shall be deemed a Litigation Option Claim, and if the judgment becomes a Final Order, the Settlement Facility or the Reorganized Debtors will pay the

judgment, subject to all Asbestos Contribution Rights. If a judgment is reversed by the appellate court and judgment entered in favor of the Reorganized Debtors, the Claim will be Disallowed, with Litigation Expenses paid by the Settlement Facility; *provided*, *however*, that a Non-Truck Asbestos Insurer shall be responsible for paying Litigation Expenses, in accordance with the Asbestos Insurance Policies, if the Settlement Facility has tendered the defense of such Claim to the Non-Truck Asbestos Insurers and such defense is accepted. If a judgment is reversed and such Claim is not dismissed or Disallowed as a result of such reversal (for example, if the Claim is remanded for new trial), the Claimant will be treated like any other Current Asbestos Claimant as set forth in Section 2.6.2, with the option of pursuing the Settlement Option, and, after submitting such Asbestos Claim to the Settlement Facility in accordance with the CRP, the Litigation Option (pursuant to the CMO); *provided*, *however*, that any settlement offered by the Settlement Facility pursuant to the Settlement Option, shall be reduced by the Litigation Expenses incurred in connection with appeal of the pre-petition judgment.

(c) To be eligible for the Litigation Option, all Asbestos Claims that are Related to the Pre-Petition Judgment Asbestos Claim must first submit such Claims to the Settlement Facility in accordance with the CRP. Conversely, if any Pre-Petition Judgment Asbestos Claimant elects to settle an Asbestos Claim pursuant to the Settlement Option, all Related Claims shall be ineligible for the Litigation Option.

(d) Pre-Petition Judgment Asbestos Claimants who elect the Settlement Option (either in lieu of litigating appeals of a judgment to conclusion, or after

reversal of any judgment on appeal that does not result in Disallowance) shall have their Claims processed by the Settlement Facility in accordance with the terms, provisions and procedures of the CRP, which describe in full detail the criteria for qualifying for payment. If Allowed under the CRP, the Claim shall be paid in full, in Cash, by the Settlement Facility or the Reorganized Debtors pursuant to the terms of the CRP. To receive payment, the Pre-Petition Judgment Asbestos Claimant must execute a Settlement Option Release in substantially the form attached to the CRP. Any Pre-Petition Judgment Asbestos Claimant who has sought Basic Review or Comprehensive Review and who either (i) has such Claim rejected by the Settlement Facility or (ii) receives an offer from the Settlement Facility under the CRP and rejects such offer may, thereafter, elect the Litigation Option described in subsection (e) below.

(e) Pre-Petition Judgment Asbestos Claimants who elect the Settlement Option, and submit their Asbestos Claim to the Settlement Facility pursuant to the Settlement Option , and who either (i) have such Claim rejected by the Settlement Facility or (ii) receive an offer from the Settlement Facility under the CRP and reject such offer shall be entitled to pursue, as their sole litigation remedy, the Litigation Option by Filing a proof of Claim pursuant to the CMO and serving it on the Settlement Facility and the Reorganized Debtors. Litigation Option Claims that result in judgments or settlements shall be paid in full, in Cash, as provided in the CRP and CMO; Litigation Option Claims that do not result in judgments or settlements shall be Disallowed and receive no Distribution. The Settlement Facility will be responsible for defending against each Litigation Option Claim, and will pay all Litigation Expenses, except to the

extent that the Settlement Facility tenders defense against a Litigation Option Claim to the Non-Truck Asbestos Insurers and such defense is accepted, in which case such Non-Truck Asbestos Insurer shall assume such defense and pay Litigation Expenses in accordance with the Asbestos Insurance Policies.

(f) The Settlement Facility shall not be obligated to offer the Litigation Option Claimant any settlement. For any settlement of a Litigation Option Claim, the Settlement Facility shall not agree to pay more than the Settlement Facility Limit. No Asbestos Insurer shall be liable for payment of any portion of a settled Litigation Option Claim unless it has expressly agreed to do so or is otherwise required under the Non-Truck Asbestos Insurance Policies.

2.8.3 Injunctions.

Pre-Petition Judgment Asbestos Claims shall be discharged and subject to the Discharge Injunction described in Section 7.1 and, except as expressly provided in this Plan, may not under any circumstance assert their Claims against the Reorganized Debtors.

Additionally, Pre-Petition Judgment Asbestos Claimants shall be subject to the Third Party Release described in Section 7.5 and the Contribution Injunction described in Section 7.2 and may not, under any circumstances, assert Released Claims against any Released Party.

2.8.4 Impairment and Voting. Class 6 is Unimpaired. The Holders of Class 6 Pre-Petition Judgment Asbestos Claims are deemed to have voted to accept this Plan and, accordingly, their separate vote will not be solicited.

2.9 Class 7—General Unsecured Claims.

2.9.1 Classification. Class 7 consists of all General Unsecured Claims against any Debtor.

2.9.2 Treatment.

Each Holder of an Allowed Class 7 Claim shall be paid the Allowed Amount of its General Unsecured Claim on the Distribution Date. Such payment shall be (i) in full, in Cash, or (ii) upon such other less favorable terms as may be mutually agreed upon between the Holder of an Allowed General Unsecured Claim and the Reorganized Debtors.

2.9.3 Impairment and Voting. Class 7 is Unimpaired. The Holders of Class 7 General Unsecured Claims are deemed to have voted to accept this Plan and, accordingly, their separate vote will not be solicited.

2.10 Class 8—Environmental Claims.

2.10.1 Classification. Class 8 consists of all Environmental Claims against any Debtor.

2.10.2 Treatment.

Each Holder of an Allowed Class 8 Claim shall be paid the Allowed Amount of its Environmental Claim on the Distribution Date. Such payment shall be (i) in full, in Cash, or (ii) upon such other less favorable terms as may be mutually agreed upon between the Holder of an Allowed General Unsecured Claim and the Reorganized Debtors.

2.10.3 Impairment and Voting. Class 8 is Unimpaired. The Holders of Class 8 Environmental Claims are deemed to have voted to accept this Plan and, accordingly, their separate vote will not be solicited.

2.11 Class 9—Intercompany Claims.

2.11.1 Classification. Class 9 consists of all Intercompany Claims against any Debtor.

2.11.2 Treatment. On the Effective Date, all Intercompany Claims between and among the Debtors shall be preserved by the Plan.

2.11.3 Impairment and Voting. Class 9 is Unimpaired. The Holders of Class 9 Intercompany Claims are deemed to have voted to accept this Plan and, accordingly, their separate vote will not be solicited.

2.12 Class 10—Kaiser Equity Interests.

2.12.1 Classification. Class 10 consists of all Kaiser Equity Interests.

2.12.2 Treatment. On the Effective Date, all Kaiser Equity Interests shall be extinguished and deemed null and void.

2.12.3 Impairment and Voting. Class 10 is Impaired and deemed to reject.

2.13 Class 11—HCPI Equity Interests.

2.13.1 Classification. Class 11 consists of all HPCI Equity Interests.

2.13.2 Treatment. On the Effective Date, all HPCI Equity Interests shall be extinguished and deemed null and void.

2.13.3 Impairment and Voting. Class 11 is Impaired and deemed to reject.

ARTICLE 3
MODIFICATION OR WITHDRAWAL OF PLAN

3.1 Modification of Plan; Amendment of Plan Documents.

3.1.1 Modification of Plan. The Plan Proponent may alter, amend, or modify this Plan, or any other Plan Document, under section 1127(a) of the Bankruptcy Code at any time prior to the Confirmation Date so long as this Plan, as modified, meets the requirements of sections 1122 and 1123 of the Bankruptcy Code or the Court has approved such modifications to the Plan. After the Confirmation Date, and prior to the Effective Date, the Plan Proponent may alter, amend, or modify this Plan in accordance with section 1127(b) of the Bankruptcy Code.

3.1.2 Amendment of Plan Documents. From and after the Effective Date, the authority to amend, modify, or supplement the Plan Documents shall be as provided in this Plan or such documents.

3.2 Withdrawal of Plan.

3.2.1 Right to Withdraw Plan. The Plan Proponent reserves its right, in the exercise of its sole discretion, to withdraw the Plan at any time prior to the Confirmation Date.

3.2.2 Effect of Withdrawal. If the Plan is withdrawn prior to the Confirmation Date, this Plan shall be deemed null and void. In such event, nothing contained herein or in any of the Plan Documents shall be deemed to constitute a waiver or release of any claims or defenses of, or an admission or statement against interest by, the Plan Proponent, the Debtors or any other Person or to prejudice in any manner the rights of any Person in any further proceedings involving the Debtors.

ARTICLE 4
PROVISIONS FOR TREATMENT OF DISPUTED CLAIMS

4.1 Objections to Claims; Prosecution of Disputed Claims.

Prior to the Effective Date, the Plan Proponent, the Debtors or Reorganized Debtors, as applicable, the Bankruptcy Administrator and any other party in interest may object to the allowance of any Administrative Expense Claim, Priority Tax Claim, or other Claim Filed with the Bankruptcy Court or to be otherwise resolved by the Debtors or Reorganized Debtors pursuant to any provisions of this Plan with respect to which they dispute liability, in whole or in part. Any pending objections by the Debtors to any such Claims as of the Effective Date shall be transferred to the Reorganized Debtors for final resolution.

All objections to such Claims that are Filed and prosecuted by the Reorganized Debtors as provided herein may be (i) compromised and settled in accordance with the business judgment of the Reorganized Debtors without approval of the Bankruptcy Court or (ii) litigated to Final Order by the Reorganized Debtors. After the Effective Date, only the Reorganized Debtors shall be permitted to prosecute objections to such Claims (other than Asbestos Claims, which shall be Allowed or Disallowed as set forth herein and in the CRP). Unless otherwise provided herein or ordered by the Bankruptcy Court, all objections by the Reorganized Debtors to such Claims shall be served and Filed no later than six (6) months after the Effective Date, subject to any extensions granted pursuant to a further order of the Bankruptcy Court with respect to any Claims Filed after the Effective Date. Such further order may be obtained by the

Reorganized Debtors without a hearing or notice. The Debtors reserve the right to designate, upon notice to the Holders of such Claim, any Claim as a Disputed Claim on or before the Confirmation Date.

To the extent that the Court enters an alternative dispute resolution order which contemplates that an order shall survive confirmation of this Plan, such order shall be controlling.

All Current Asbestos Claims, Future Asbestos Claims, and Pre-Petition Judgment Asbestos Claims shall be regarded as Disputed. The Reorganized Debtors and the Settlement Facility shall be deemed to object to all such Claims, and such Claims shall be determined pursuant to the Settlement Option and Litigation Option, as set forth in the CRP and CMO. The Plan expressly reserves the right to tender defense against an Asbestos Claim to the Non-Truck Asbestos Insurers and for the Non-Truck Asbestos Insurers to accept such defense.

4.1.1 Amendments to Claims. After the Confirmation Date, no Claim (other than Asbestos Claims) may be Filed or amended to increase the amount or a lien or priority demanded unless otherwise provided by order of the Bankruptcy Court. Unless otherwise provided herein, any such new or amended Claim Filed after the Confirmation Date shall be disregarded and deemed Disallowed in full and expunged without need for objection, unless the Holder of such Claim has obtained prior Bankruptcy Court authorization for the Filing. Submission and amendment of Asbestos Claims shall be governed by the CRP and CMO, as applicable.

4.2 Distribution on Account of Disputed Claims. Notwithstanding Section 4.1 hereof, a

Distribution shall be made to the Holder of a Disputed Claim only when, and to the extent that, such Disputed Claim becomes Allowed and pursuant to the appropriate provisions of the Plan covering the Class of which such Disputed Claim is a part. No Distribution shall be made with respect to all or any portion of any Disputed Claim pending the entire resolution thereof in the manner prescribed by Section 4.1 hereof.

4.3 Bar Dates for Administrative Expense Claims.

4.3.1 Administrative Expense Claims.

All parties seeking payment of an Administrative Expense Claim that is not a Fee Claim must File with the Bankruptcy Court and serve upon the Debtors a request for payment of such Administrative Expense Claim prior to the applicable deadline set forth below; *provided*, *however*, that parties seeking payment of postpetition ordinary course trade obligations, postpetition payroll obligations incurred in the ordinary course of a Debtor's postpetition business, and amounts arising under agreements approved by the Bankruptcy Court or the Plan need not File such a request.

All Holders of Administrative Expense Claims must File with the Bankruptcy Court and serve on the Debtors a request for payment of such Administrative Expense Claim so as to be received on or before 4:00 p.m. (Eastern Time) on the date that is the first Business Day after the date that is thirty (30) days after the Effective Date, unless otherwise agreed to by the appropriate Debtor or Reorganized Debtor, without further approval by the Bankruptcy Court. Failure to comply with these deadlines shall forever bar the

holder of an Administrative Expense Claim from seeking payment thereof.

Any Holder of an Administrative Expense Claim that does not assert such Administrative Expense Claim in accordance with this Section shall have its Administrative Expense Claim deemed Disallowed under this Plan and be forever barred from asserting such Claim against any of the Debtors, their Estates or their Assets. Any such Administrative Expense Claim and the Holder thereof shall be enjoined from commencing or continuing any action, employment of process, or act to collect, offset, recoup, or recover such Administrative Expense Claim.

4.3.2 Fee Claims.

All parties seeking payment of a Fee Claim must File with the Bankruptcy Court and serve upon the Debtors a proof or application for payment of such Fee Claim in accordance with the Fee Order by the date that is the first Business Day after the date that is ninety (90) days after the Effective Date unless otherwise agreed to by the Debtors, without further approval by the Bankruptcy Court. Failure to comply with these deadlines shall forever bar the Holder of a Fee Claim from seeking payment thereof.

Any Holder of a Fee Claim that does not assert such Fee Claim in accordance with the Fee Order and this Section shall have its Claim deemed Disallowed under this Plan and be forever barred from asserting such Fee Claim against any of the Debtors, their Estates or their Assets. Any such Fee Claim and the Holder thereof shall be enjoined from commencing or continuing any action, employment of process or act to collect, offset, recoup or recover such claim.

The Debtors and Reorganized Debtors expressly preserve the right to object to any Fee Claim prior to and after the Effective Date, subject to the provisions of this Plan.

ARTICLE 5
ACCEPTANCE OR REJECTION OF THE PLAN

5.1 Unimpaired Classes. All Classes of Claims are Unimpaired under the Plain. Therefore, under section 1126(f) of the Bankruptcy Code, Holders of Claims in all Classes are conclusively presumed to have voted to accept the Plan.

5.2 Nonconsensual Confirmation. The Plan Proponent hereby requests that the Bankruptcy Court confirm the Plan in accordance with section 1129(b) of the Bankruptcy Code with respect to any Impaired Class that fail to accept this Plan in accordance with section 1126 and 1129(a) of the Bankruptcy Code. Subject to section 1127 of the Bankruptcy Code, the Plan Proponent reserve its right to modify the Plan to the extent that confirmation pursuant to section 1129(b) of the Bankruptcy Code requires modification.

ARTICLE 6
IMPLEMENTATION OF THE PLAN

6.1 Vesting of Assets of the Debtors.

On the Effective Date pursuant to section 1141(b) of the Bankruptcy Code, except as otherwise expressly provided in the Plan or in the Confirmation Order, the New Equity Interests shall be issued to the Settlement Facility, and the Assets and property of the Debtors shall vest or revest in the appropriate Reorganized Debtors for use, sale and distribution in accordance with operation of the Reorganized Debtors' business and this Plan.

As of the Effective Date, all Assets vested or revested, and all Assets dealt with by the Plan, shall be free and clear of all Claims, liens, and interests except as otherwise specifically provided in the Plan and/or the Confirmation Order.

From and after the Effective Date, the Reorganized Debtors may operate their businesses and use, acquire, sell and otherwise dispose of property without supervision or approval of the Bankruptcy Court, free of any restrictions of the Bankruptcy Code, the Bankruptcy Rules, and the guidelines and requirements of the Bankruptcy Administrator, other than those restrictions expressly imposed by the Plan or the Confirmation Order; *provided*, *however*, that nothing herein restricts the right of the Reorganized Debtors to seek Bankruptcy Court approval for the sale, assignment, transfer, or other disposal of certain of the Reorganized Debtors' Assets after the Confirmation Date in the event that such Court approval is deemed to be beneficial or advisable.

All Retained Causes of Action and Unknown Causes of Action are expressly preserved for the benefit of the Reorganized Debtors pursuant to Section 10.3.

6.2 Implementation Funding. The payments required by the Plan, including those to be made by the Settlement Facility, shall be funded from the Assets of the Reorganized Debtors, the Settlement Facility Contributions, the Non-Truck Asbestos Insurance Policies and the Environmental Insurance Policies.

6.3 Insurance Policies. On the Effective Date, the Truck Asbestos Insurance Policies shall be resolved by the Truck Contribution. All Non-Truck Asbestos Insurance Policies, all Environmental

Insurance Policies and all other Insurance Policies shall vest in the Reorganized Debtors. For the avoidance of doubt, all Asbestos Contribution Rights of the Debtors, including all rights under the Non-Truck Asbestos Insurance Policies for contribution, reimbursement or otherwise shall be fully preserved and shall be enforceable based on the Lowest Truck Policy Limit, and the Settlement Facility and the Reorganized Debtors shall be entitled to exercise such rights.

6.4 Corporate Governance of the Debtors.

6.4.1 Amendment of Certificates of Incorporation of the Debtors. The Certificates of Incorporation or By-Laws of each of the Debtors shall be amended as of the Effective Date as needed to effectuate the terms of the Plan and the requirements of the Bankruptcy Code. The amended Certificates of Incorporation or By-Laws of the Debtors shall, among other things: (i) prohibit the issuance of nonvoting equity securities as required by section 1123(a)(6) of the Bankruptcy Code, and subject to further amendment as permitted by applicable law; (ii) as to any classes of securities possessing voting power, provide for an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in payment of such dividends; (iii) provide for the issuance of the New Equity Interests; and (iv) effectuate any other provisions of this Plan. The amended Certificates of Incorporation of the Debtors shall be filed with the Secretary of State or equivalent official in their respective jurisdictions of incorporation on or prior to

the Effective Date and be in full force and effect without any further amendment as of the Effective Date.

6.4.2 D&O and Fiduciary Liability Tail Coverage Policies.

The Reorganized Debtors shall maintain continuous directors and officers liability insurance coverage with regard to any liabilities, losses, damages, claims, costs and expenses they or any current or former officer, manager, or director of any of the Debtors may incur, including but not limited to attorneys' fees, arising out of or due to the actions or omissions of any of them or the consequences of such actions or omissions, including, without limitation, service as an officer, manager, or director, other than as a result of their willful misconduct or fraud. Each such policy shall cover each current and former officer, manager, or director of any of the Debtors.

Except as otherwise specifically provided herein, any obligations of the Debtors to indemnify their present and former directors, managers, officers, employees or professionals under their Certificates of Incorporation, By-Laws, employee indemnification policy, or under state law or any agreement with respect to any claim, demand, suit, cause of action, or proceeding, shall be deemed assumed by the Reorganized Debtors on the Effective Date, and shall survive and be unaffected by this Plan's confirmation, and remain an obligation of the Reorganized Debtors, regardless of whether the right to indemnification arose before or after the Petition Date.

6.5 Settlement Facility.

6.5.1 Creation of Settlement Facility. On the Effective Date, the Trustee shall execute the Settlement Facility Agreement as authorized by the

Confirmation Order, the New Equity Interests shall be issued to the Settlement Facility, Truck shall make the Truck Contribution due on the Effective Date to the Settlement Facility and, if applicable, the other Settlement Facility Contributions shall be made. Except for the obligations of the Settlement Facility pursuant to this plan, the Settlement Facility Contributions shall be vested in the Settlement Facility free and clear of all Claims, Equity Interests, encumbrances, and other claims or interests of any Person. On the Effective Date, the CMO and the CRP shall become effective, and the Trustee shall serve as the Trustee of the Settlement Facility.

6.5.2 Obligations of Reorganized Debtors. Following the Effective Date, the Reorganized Debtors shall be entitled to continue to operating their ongoing businesses and shall perform their obligations under the Plan which, with respect to Asbestos Claims, shall specifically include:

(a) Compliance with their obligations under the CMO; and

(b) Compliance with their obligations under the Non-Truck Asbestos Insurance Policies.

6.5.3 Obligations of Truck. Following the Effective Date, the obligations of Truck under the Plan with respect to Asbestos Claims shall consist solely of paying the Truck Contribution, when and as due.

6.5.4 Rights and Obligations of Non-Truck Asbestos Insurers. Following the Effective Date, the rights and obligations of each Non-Truck Asbestos Insurer under the Non-Truck Asbestos

Insurance Policies will not be affected and, for the avoidance of doubt, will include the following:

(a) Exercise its option, at such Non-Truck Asbestos Insurer's discretion, to defend against a Litigation Option Claim;

(b) To the extent that a Non-Truck Asbestos Insurer has agreed to defend against a Litigation Option Claim, then it shall have authority to settle and pay any such Litigation Option Claim; *provided*, *however*, that the Settlement Facility shall not be permitted to contribute any amount to such settlement except as provided in this Plan; and

(c) Contribute to and/or reimburse the Settlement Facility or Reorganized Debtors, in accordance with the Non-Truck Asbestos Insurance Policies, for payments made by the Settlement Facility in respect of Asbestos Claims.

6.5.5 Obligations of Settlement Facility.

On the Effective Date, without any further action of any Entity, the Trustee shall administer the Settlement Facility pursuant to the terms of the Settlement Facility Agreement, and the Settlement Facility shall be responsible for the resolution and/or litigation, as applicable, of all Asbestos Claims pursuant to the terms of the Plan, the CMO and the CRP.

The Settlement Facility shall be responsible for fulfilling all other obligations under the Settlement Facility Agreement and shall be exclusively responsible for paying all Settlement Facility Expenses.

The Settlement Facility shall replenish the Litigation Fund on an annual basis to maintain a balance of at least $10 million.

The Settlement Facility Agreement will include provisions requiring the Settlement Facility to defend and indemnify the Released Parties from and against any Asbestos Claims asserted against them after the Effective Date and hold the Released Parties harmless from any losses associated with such Claims.

The Settlement Facility shall be a Qualified Settlement Fund for federal income tax purposes within the meaning of IRC § 468B and regulations issued pursuant to IRC § 468B.

6.5.6 Appointment and Termination of Settlement Facility Trustee. On or before the Confirmation Date, the Plan Proponent shall nominate an individual meeting the independence criteria of the Settlement Facility Agreement to serve as Trustee of the Settlement Facility. The Bankruptcy Court, after notice and opportunity for hearing, shall be asked to appoint this individual to serve as Settlement Facility Trustee effective as of the Effective Date. Upon termination of the Settlement Facility, the Trustee's employment shall be deemed terminated, and the Trustee shall be released and discharged of and from all further authority, duties, responsibilities, and obligations relating to or arising from or in connection with the Chapter 11 Cases. The Settlement Facility Agreement provides procedures for the replacement of the Trustee of the Settlement Facility.

6.6 Approval of Settlements. The Confirmation Order shall include provisions approving all settlements contemplated hereunder and extinguishing all Released Claims against the Released Parties.

6.7 Payments and Distributions Under the Plan.

6.7.1 Settlement Option and Litigation Option Payments and Plan Distributions. Payments to Settlement Option Claimants and Litigation Option Claimants shall be made by the Settlement Facility, the Reorganized Debtors or Non-Truck Asbestos Insurers in accordance with the Plan, Settlement Facility Agreement, CRP and CMO, as applicable. All other Distributions or payments required or permitted to be made under this Plan (other than payments to Professionals) shall be made by the Reorganized Debtors in accordance with the treatment for each such Holder as specified herein (unless otherwise ordered by the Bankruptcy Court). Distributions shall be deemed actually made on the Distribution Date if made either (i) on the Distribution Date or (ii) as soon as practicable thereafter. Professionals shall be paid by the Debtors or Reorganized Debtors pursuant to orders of the Bankruptcy Court.

6.7.2 Timing of Plan Distributions. Whenever any Distribution to be made under this Plan shall be due on a day other than a Business Day, such Distribution shall instead be made, without the accrual of any additional interest, on the immediately succeeding Business Day, but shall be deemed to have been made on the date due.

6.7.3 Manner of Payments under Plan. Unless the Person receiving a Distribution or payment agrees otherwise, any such Distribution or payment in Cash to be made by the Reorganized Debtors, the Settlement Facility or Non-Truck Asbestos Insurer shall be made, at the election of the Reorganized Debtors, the Settlement Facility or Non-Truck

Asbestos Insurer (as applicable) by check drawn on a domestic bank or by wire transfer from a domestic bank.

6.8 Delivery of Distributions and Undeliverable or Unclaimed Distributions.

6.8.1 Delivery of Distributions in General. Payments to Settlement Option Claimants and Litigation Option Claimants shall be made in accordance with this Plan, the Settlement Facility Agreement, the CRP, and the CMO, as applicable. All other Distributions to Holders of Allowed Claims shall be made at the address of the Holder of such Claim as set forth on the Schedules, or as set forth (i) in another writing Filed in the Chapter 11 Cases notifying the Reorganized Debtors of a change of address prior to the Distribution Date (including, without limitation, any timely proof of Claim) or (ii) in a request for payment of an Administrative Expense Claim, as the case may be.

6.8.2 Undeliverable Distributions by the Reorganized Debtors. Any Cash, Assets, and other properties Distributed by the Reorganized Debtors under this Plan to Holders of Claims that remain unclaimed (including by a Person's failure to negotiate a check issued to such Person) or otherwise not deliverable to the Person entitled thereto before one year after the Distribution Date, shall become vested in, and shall be transferred and delivered to, the Reorganized Debtors on the date that is one year after the Distribution Date. In such event, such Person's Claim shall no longer be deemed to be Allowed, and such Person shall be deemed to have waived all rights to such payments or Distributions under this Plan pursuant to section 1143 of the Bankruptcy Code, shall have no further Claim in respect of such Distribution, and

shall not participate in any further Distributions under this Plan with respect to such Claim.

6.8.3 Undeliverable Distributions by the Settlement Facility. Any Cash, Assets or other properties Distributed by the Settlement Facility to Settlement Option Claimants or Litigation Option Claimants that remain unclaimed (including by a Person's failure to negotiate a check issued to such Person) or otherwise not deliverable to the Person entitled thereto before one year after the Distribution Date, shall re-vest in the Settlement Facility and become available for Distribution to other Settlement Option Claims or Litigation Option Claims that are Allowed, or payment of Litigation Expenses, on the date that is one year after the Distribution Date. In such event, such Person's Claim shall no longer be deemed to be Allowed, and such Person shall be deemed to have waived all right to such payments or Distributions under this Plan, the Settlement Facility Agreement, CRP, and CMO, as applicable, pursuant to section 1143 of the Bankruptcy Code, shall have no further Claim in respect of such Distribution, and shall not participate in any further Distributions under this Plan, the Settlement Facility Agreement, CRP, and CMO, as applicable, with respect to such Claim.

6.9 Conditions Precedent to Confirmation and Consummation of the Plan.

6.9.1 Conditions Precedent to Confirmation. The Bankruptcy Court will not enter the Confirmation Order unless and until the following conditions have been satisfied or duly waived by the Plan Proponent:

(a) The Confirmation Order, and Findings of Fact and Conclusions of Law in support thereof, shall be in form and substance acceptable to the Plan Proponent.

(b) The Bankruptcy Court shall have recommended that the District Court approve the CMO in form and substance proposed or, if amended, in form and substance acceptable to the Plan Proponent.

(c) The Confirmation Order shall approve and provide for the implementation of the other Plan Documents.

(d) The Confirmation Order shall have found that all Asbestos Claims are Claims and are subject to the Discharge Injunction.

(e) The Bankruptcy Court shall have found and concluded that the Released Claims are property of the Debtors' estates and that the terms of the Plan are fair and reasonable and should be approved, and shall have either approved or recommended that the District Court approve entry of the Contribution Injunction in form and substance acceptable to the Plan Proponent.

(f) The Bankruptcy Court shall have found that notice of the Plan and Disclosure Statement was sufficient and accords due process to all Asbestos Claimants.

(g) The Bankruptcy Court shall have entered the Estimation Order.

6.9.2 Conditions Precedent to Effective Date. The Effective Date shall not occur, and this Plan shall not be consummated unless and until each of the following conditions have been satisfied or duly waived by the Plan Proponent:

(a) The Bankruptcy Court shall have entered the Confirmation Order and the Confirmation Order and the Estimation Order shall have become a Final Order; provided that, at the option of the Plan Proponent, the Effective Date may occur at a point in time when the Confirmation Order or the Estimation Order is not a Final Order unless the effectiveness of the Confirmation Order or the Estimation Order has been stayed or vacated, in which case, at the option of the Plan Proponent, the Effective Date may be the first Business Day immediately following the expiration or other termination of any stay of effectiveness of the Confirmation Order and the Estimation Order.

(b) The Contribution Injunction shall have been approved by the District Court or approved by the Bankruptcy Court and, thereafter, affirmed by the District Court, and any such order shall contain findings of fact and conclusions of law supporting such injunction and the Bankruptcy Court or the District Court shall have entered the Contribution Injunction and such order or orders shall be in form and substance satisfactory to the Plan Proponent and shall have become a Final Order or Final Orders; provided that at the option of the Plan Proponent, the Effective Date may occur if the applicable court does not enter the Contribution Injunction or the order embodying the Contribution Injunction has not become a Final Order with respect to the Contribution Injunction.

(c) The Bankruptcy Court shall have entered an order (contemplated to be part of the Confirmation Order) approving and authorizing the Debtors and Reorganized Debtors to take all actions necessary or appropriate to implement the Plan.

(d) The Internal Revenue Service shall have issued a ruling reasonably satisfactory to the

Plan Proponent that the Settlement Facility will be treated as a Qualified Settlement Fund within the meaning of IRC 468B, as amended, and the Treasury Regulations promulgated thereunder.

(e) The Plan Documents necessary or appropriate to implement this Plan shall have been executed, in the forms proposed or, if amended in forms acceptable to the Plan Proponent and, where applicable, filed with the appropriate governmental or supervisory authorities.

(f) The Certificates of Incorporation and By-Laws, as applicable, of each of the Debtors, as amended in accordance with this Plan, shall be in full force and effect.

(g) The District Court shall have approved and entered the CMO in form and substance proposed or, if amended, in form and substance acceptable to the Plan Proponent.

The Effective Date shall not occur unless and until each of the foregoing conditions is either satisfied or waived by the Plan Proponent. Notice of the occurrence of the Effective Date reflecting that the foregoing conditions have been satisfied or waived shall: (i) be signed by the Plan Proponent; (ii) state the date of the Effective Date; and (iii) be Filed with the Bankruptcy Court by the Plan Proponent's counsel. No waiver shall be effective unless it complies with the requirements of this provision.

6.10 Management of the Reorganized Debtors. On and after the Effective Date, the business and affairs of the Reorganized Debtors will be managed by their respective Boards of Directors. Upon the Effective Date, the Board of Directors of each of the Reorganized Debtors shall be composed of at least one (1)

director. The director(s) of the Reorganized Debtors shall be listed in the Plan Supplement. The director(s) or manager(s) may be replaced by action of the shareholder or member, as applicable. On and after the Effective Date, there shall be no restrictions on the management of the business and affairs of the Reorganized Debtors pursuant to this Plan or any Order entered in these Chapter 11 Cases, other than the Reorganized Debtors' obligations under this Plan and the Confirmation Order.

6.11 Corporate Action. On or prior to the Effective Date, the Boards of Directors of the respective Debtors shall adopt an amendment to their respective By-Laws and Certificates of Incorporation, and such corporate actions shall be authorized and approved in all respects, in each case without further action under applicable law, regulation, order, or rule. On the Effective Date or as soon thereafter as is practicable, the Debtors shall file with the Secretary of State or equivalent Governmental Unit of the state of such Debtor's incorporation or organization, in accordance with applicable law, such amendment to their Certificate of Incorporation. On the Effective Date, the approval and effectiveness of matters provided under this Plan involving the corporate structure of the Reorganized Debtors or corporate action by the Reorganized Debtors shall be deemed to have occurred and to have been authorized, and shall be in effect from and after the Effective Date without requiring further action under applicable law, regulation, order, or rule, including any action by the stockholders, directors, managers, or members (as applicable) of the Debtors or the Reorganized Debtors.

6.12 Effectuating Documents and Further Transactions. Each of the officers of the Plan

Proponent, the Debtors and the Reorganized Debtors is authorized to execute, deliver, file, or record such contracts, instruments, releases, indentures, and other agreements or documents and to take such actions as may be necessary or appropriate, for and on behalf of the Debtors and the Reorganized Debtors, to effectuate and further evidence the terms and conditions of the Plan, the transactions contemplated by this Plan, and any securities issued pursuant to the Plan.

6.13 No Successor Liability. Except as otherwise expressly provided in this Plan, neither the Debtors, the Reorganized Debtors, the Asbestos Committee, the FCR, the Settlement Facility, nor the Released Parties will, pursuant to this Plan or otherwise, assume, agree to perform, pay, or indemnify Creditors or otherwise have any responsibilities for any liabilities or obligations either (i) as such liabilities or obligations may relate to or arise out of the operations of the Assets of the Debtors, whether arising prior to, or resulting from actions, events, or circumstances occurring or existing at any time prior to the Confirmation Date, or (ii) as such liabilities or obligations may relate to or arise from the Released Claims. Neither the Reorganized Debtors, the Released Parties, nor the Settlement Facility are, or shall be deemed to be, successors-in-interest to the Debtors by reason of any theory of law or equity, and none of them shall have any successor or transferee liability of any kind or character, except that (i) the Reorganized Debtors and the Settlement Facility shall assume the obligations specified in this Plan and the Confirmation Order, and (ii) the relevant parties shall pay the Settlement Consideration. For the avoidance of doubt, the Debtors do not intend or purport to release or bar any claim against any Released Party that is (a) based upon

such Released Party's independent liability to any Person and (b) would not be an Asbestos Claim in these Chapter 11 Cases if it were to be asserted directly against one or more Debtors.

ARTICLE 7
INJUNCTIONS, RELEASES & DISCHARGE

7.1 Discharge.

7.1.1 Discharge of Debtors and Related Discharge Injunction.

The rights afforded in this Plan and the treatment of all Claims and Equity Interests herein shall be in exchange for and in complete satisfaction, discharge, and release of all Claims (including, without limitation, all Asbestos Claims) and Equity Interests of any nature whatsoever, including any interest accrued thereon from and after the Petition Date, against the Debtors or their Estates, Assets, properties, or interests in property. Except as otherwise provided herein, on the Effective Date, the Debtors shall be discharged from and their liability shall be extinguished completely in respect of any Claim, whether reduced to judgment or not, liquidated or unliquidated, contingent or noncontingent, asserted or unasserted, fixed or not, matured or unmatured, disputed or undisputed, legal or equitable, known or unknown, that arose from any agreement of the Debtor entered into or obligation of the Debtor incurred before the Confirmation Date, or from any conduct of the Debtor prior to the Confirmation Date, or that otherwise arose before the Confirmation Date, including, without limitation, all interest, if any, on any such Claims, whether such interest accrued before or after the date of commencement of the Case.

The Reorganized Debtors shall not be responsible for any obligations of the Debtors except those expressly assumed by the Reorganized Debtors pursuant to this Plan. All Persons shall be precluded and forever barred from asserting against the Debtors and the Reorganized Debtors, or their Assets, properties, or interests in property any other or further Claims or claims based upon any act or omission, transaction, or other activity, event, or occurrence of any kind or nature that occurred prior to the Confirmation Date, whether or not the facts of or legal bases therefor were known or existed prior to the Confirmation Date, except as expressly provided in this Plan.

With respect to any debts discharged by operation of law under section 1141 of the Bankruptcy Code, including but not limited to any and all liability for any Asbestos Claims, the discharge of the Debtors operates under section 524(a) of the Bankruptcy Code as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any such debt as a personal liability of the Debtor, whether or not the discharge of such debt is waived; *provided, however*, that the obligations of the Reorganized Debtors under this Plan are not so discharged.

Accordingly, Holders of Asbestos Claims shall have no right whatsoever at any time to assert any such Claim against the Reorganized Debtors, their Estates, or any property or interest (including any Distributions made pursuant to this Plan) in any property of any Reorganized Debtor, except as expressly provided in this Plan.

Without limiting the generality of the foregoing, from and after the Effective Date, the Discharge Injunction shall apply to all Asbestos Claims, and all such Holders permanently and forever shall be stayed, restrained, and enjoined from taking any of the following actions against the Debtors or the Reorganized Debtors for the purpose of, directly or indirectly, collecting, recovering, or receiving payment of, on, or with respect to any Asbestos Claims, except as expressly permitted by this Plan, including but not limited to:

(a) Commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action, or other proceeding (including a judicial, arbitration, administrative, or other proceeding) in any forum against or affecting any Reorganized Debtor, or any property or interest in property of any Reorganized Debtor;

(b) Enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering by any means or in any manner, whether directly or indirectly, any judgment, award, decree, or other order against any Reorganized Debtor, or any property or interest in property of any Reorganized Debtor;

(c) Creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance against any Reorganized Debtor, or any property or interest in property of any Reorganized Debtor;

(d) Setting off, seeking reimbursement of, indemnification or contribution from, or subrogation against, or otherwise recouping in any

manner, directly or indirectly, any amount against any liability owed to any Reorganized Debtor, or any property or interest in property of any Reorganized Debtor; and

(e) Proceeding in any other manner against any Reorganized Debtor with regard to any matter that is subject to resolution pursuant to the Plan, Settlement Facility Agreement, CRP, and CMO, except in conformity and compliance with such Plan Documents.

Except as otherwise expressly provided in this Plan, nothing contained in this Plan shall constitute or be deemed a waiver of any claim, right, or Cause of Action that the Debtors, the Affiliates, the Reorganized Debtors, or the Settlement Facility may have against any Person in connection with or arising out of or related to any Asbestos Claim.

7.1.2 Disallowed Claims. On and after the Effective Date, the Debtors, the Reorganized Debtors and their Representatives shall be fully and finally discharged of any liability or obligation on a Disallowed Claim, and any order creating a Disallowed Claim that is not a Final Order as of the Effective Date solely because of Person's right to move for reconsideration of such order pursuant to section 502 of the Bankruptcy Code or Bankruptcy Rule 3008 shall nevertheless become and be deemed to be a Final Order on the Effective Date.

7.2 Contribution Injunction. In consideration of the Settlement Facility Contributions, and pursuant to the Court's powers under sections 105, 362 and 1141 of the Bankruptcy Code, Bankruptcy Rule 9019, and the Court's supplemental jurisdiction under 28 U.S.C. §§ 1367 and

1651, all Persons shall be permanently enjoined on and after the Effective Date from:

(a) Commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action, or other proceeding (including a judicial, arbitration, administrative, or other proceeding) in any forum against or affecting any Released Party, or any property or interest in property of any Released Party, on account of any Released Claim;

(b) Enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering by any means or in any manner, whether directly or indirectly, any judgment, award, decree, or other order against any Released Party, or any property or interest in property of any Released Party, on account of any Released Claim;

(c) Creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance against any Released Party, or any property or interest in property of any Released Party, on account of any Released Claim;

(d) Setting off, seeking reimbursement of, indemnification or contribution from, or subrogation against, or otherwise recouping in any manner, directly or indirectly, any amount against any liability owed to any Released Party, or any property or interest in property of any Released Party, on account of any Released Claim.

For the avoidance of doubt, any Released Party that fails to make its portion of the Settlement Facility

Contributions shall not be deemed a Released Party and shall not have the benefits under this this Section 7.2. The Court shall retain jurisdiction with respect to all matters relating to the Contribution Injunction. In the event any Person takes any action that is prohibited by, or is otherwise inconsistent with the provisions of this Section 7.2, then, upon notice to the Court by an affected Released Party, the Court shall take such actions necessary to enforce the Contribution Injunction, including, without limitation, ordering such Person to discontinue the action or proceeding in which the Claim of such Person is asserted.

7.3 Releases by the Debtors on Behalf of the Estates. Except as otherwise provided in the Plan or in the Confirmation Order, as of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, the Debtors in their individual capacities and as debtors in possession on behalf of their Estates will be deemed to release and forever waive and discharge the Released Parties from and against all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, and liabilities whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or part on any act, omission, transaction, event, or other occurrence taking place on or prior to the Effective Date (including prior to the Petition Date) in any way relating to the Debtors or their Affiliates, the Chapter 11 Cases, the Plan, or the Disclosure Statement, the subject matter of, or the transactions or events giving rise to, any Claim or Equity

Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, including, without limitation, the Truck Asbestos Insurance Policies, the restructuring of Claims and Equity Interests prior to or in the Chapter 11 Cases, the negotiation, formulation, or preparation of the Plan, the Plan Supplement, the Disclosure Statement, or related agreements, instruments, or other documents, or upon any other act or omission, transaction, agreement, event, or other occurrence taking place before the Effective Date and that could have been asserted by or on behalf of the Debtors or their Estates at any time on or prior to the Effective Date against the Released Parties, other than Claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes fraud, willful misconduct, gross negligence, malpractice, criminal conduct, unauthorized use of confidential information that causes damages, or ultra vires acts. Notwithstanding anything to the contrary in the foregoing, the release set forth above does not release any post-Effective Date obligations of any party under the Plan or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan, including, without limitation, any obligations arising under the Settlement Facility.

7.4 Certain Waivers. Solely with respect to the release under Section 7.3, each Debtor hereby waives the effect of section 1542 of the California Civil Code to the extent that such section is applicable to the Debtors. Section 1542 of the California Civil Code provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

7.5 Third Party Release.

Each Holder of a Claim shall be deemed on behalf of itself and its estate, affiliates, heirs, executors, administrators, successors, assigns, managers, business managers, accountants, attorneys, representatives, consultants, agents, and any and all other Persons or parties claiming under or through them, to release, discharge, and acquit the Released Parties from any and all claims, counterclaims, disputes, liabilities, suits, demands, defenses, liens, actions, administrative proceedings, and Causes of Action of every kind and nature, or for any type or form of relief, and from all damages, injuries, losses, contributions, indemnities, compensation, obligations, costs, attorneys' fees, and expenses, of whatever kind and character, whether past or present, known or unknown, suspected or unsuspected, fixed or contingent, asserted or unasserted, accrued or unaccrued, liquidated or unliquidated, whether in law or equity, whether sounding in tort or contract, whether arising under federal or state statutory or common law, or any other applicable international, foreign, or domestic law, rule, statute, regulation, treaty, right, duty, or requirement, and claims of every kind, nature, and character

whatsoever, including avoidance claims, Causes of Action, and rights of recovery arising under chapter 5 of the Bankruptcy Code and any and all claims based on avoidance powers under any applicable non-bankruptcy law that any such releasing party ever had or claimed to have, or has or claims to have presently or at any future date, against any Released Party arising from or related in any way whatsoever to the Debtors.

Nothing in the Plan shall be construed as releasing any Cause of Action held by Truck against any Person other than the Released Parties. For the avoidance of doubt, any Released Party that fails to make its portion of the Settlement Facility Contributions shall not be deemed a Released Party and shall not have the benefits under this this Section 7.5.

7.6 Term of Certain Injunctions and Automatic Stay.

7.6.1 Injunctions and/or Automatic Stays in Existence Immediately prior to Confirmation. All of the injunctions and/or automatic stays provided for in or in connection with the Chapter 11 Cases, whether pursuant to sections 105 and 362 of the Bankruptcy Code, or any other provision of the Bankruptcy Code or other applicable law, in existence immediately prior to the Confirmation Date, shall remain in full force and effect until the injunctions set forth in this Plan become effective, and thereafter if so provided by this Plan, the Confirmation Order, or by their own terms. In addition, on and after the Confirmation Date, the Plan Proponent may seek such further orders as it may deem necessary or appropriate to preserve the status quo during the time between the Confirmation Date and the Effective Date.

7.6.2 Injunctions Provided for in the Plan. Each of the injunctions and the Third Party Release provided for in the Plan shall become effective on the Effective Date and shall continue in effect at all times thereafter. Notwithstanding anything to the contrary contained in this Plan, all actions in the nature of those to be enjoined by such injunctions shall be enjoined during the period between the Confirmation Date and the Effective Date.

7.7 Exculpation. None of the Plan Proponent, the Debtors, the Reorganized Debtors, their Affiliates, the Settlement Facility or its trustee, the Asbestos Committee, the Unsecured Creditors' Committee, the FCR, or any of their respective Representatives are to have or incur any liability to any Person for any pre- or post-Petition Date act or omission in connection with, related to, or arising out of the administration of these Chapter 11 Cases, the negotiation of this Plan or the Plan Documents, the pursuit of confirmation of this Plan, the consummation of this Plan, or the administration of this Plan or the property to be Distributed under this Plan so long as, in each case such action, or failure to act, did not constitute willful misconduct. In all respects, all such Persons shall be entitled to rely upon the advice of counsel and financial and other experts or professionals employed by them, and such reliance shall conclusively establish good faith. In any action, suit, or proceeding by any Claimant, Interest Holder, or other party in interest contesting the action by, or non-action of, the Plan Proponent, the Debtors, the Reorganized Debtors, the Asbestos Committee, the Unsecured Creditors' Committee, the FCR, or the respective Representatives of any such Person, as amounting to willful misconduct or not being in good faith, the reasonable attorney's fees and costs of the prevailing party shall be paid by the losing

party and, as a condition of going forward with such action, suit, or proceeding, at the onset thereof, all parties thereto shall be required to provide appropriate proof and assurances of their capacity to make such payments of reasonable attorney's fees and costs in the event they fail to prevail. Any act or omission taken with the approval of the Bankruptcy Court will be conclusively deemed not to constitute willful misconduct. This Section is not intended to preclude a Governmental Unit from enforcing its police and regulatory powers.

7.8 No Release of Third Party Claims. Except as expressly provided in this Plan with respect to Released Parties, nothing in this Plan shall release any Person from any liability with respect to Asbestos Claims, including without limitation any such liability of any Non-Truck Asbestos Insurer that is not a Participating Non-Truck Asbestos Insurer and Lehigh Hanson if it does not make the Lehigh Hanson Contribution. The Reorganized Debtors and the Settlement Facility, as applicable, shall be entitled to pursue and enforce any and all of the rights and remedies of the Debtors, the Reorganized Debtors and/or the Settlement Facility against any such Persons, including without limitation any rights and remedies with respect to any Non-Truck Asbestos Insurer that is not a Participating Non-Truck Asbestos Insurer.

ARTICLE 8
EXECUTORY CONTRACTS, UNEXPIRED LEASES, GUARANTIES, AND INDEMNITY AGREEMENTS

8.1 Assumption of Executory Contracts and Unexpired Leases.

Except for (i) executory contracts and unexpired leases that the Debtors reject prior to the entry of the Disclosure Statement Order, (ii) agreements constituting or relating to Truck Asbestos Insurance Policies and (iii) agreements, to the extent executory, providing for indemnification of third parties for Asbestos Claims, all executory contracts and unexpired leases, including agreements constituting or relating to Non-Truck Asbestos Insurance Policies (other than such Asbestos Insurance Policies related to Participating Non-Truck Asbestos Insurers) and Environmental Insurance Policies, not previously assumed by the Debtors pursuant to section 365 of the Bankruptcy Code, shall be deemed to have been assumed by the Reorganized Debtors on the Effective Date, and this Plan shall constitute a motion to assume such executory contracts and unexpired leases as of the Effective Date.

Pursuant to the terms of the Bar Date Order and Bankruptcy Rule 3002(c)(4), and except as otherwise ordered by the Bankruptcy Court, a proof of Claim for each Claim arising from the rejection of an executory contract or unexpired lease pursuant to this Plan or otherwise shall be Filed with the Bankruptcy Court within thirty (30) days of the later of (i) the date of the entry of an order, prior to the Confirmation Date, approving such rejection; (ii) the Confirmation Date; or (iii) service of notice of rejection if such party is an affected party as described in the paragraph

immediately above. Any Claims not Filed within such applicable time period shall be forever barred from assertion. All Allowed Claims for damages arising from the rejection of an executory contract or unexpired lease shall be included in Class 7 and shall be treated in accordance with Article 2 herein.

Subject to the occurrence of the Effective Date, entry of the Confirmation Order shall constitute approval of such assumptions pursuant to section 365(a) of the Bankruptcy Code and a finding by the Court that each such assumption is in the best interests of the Debtors, their Estates, and all parties in interest in the Chapter 11 Cases.

With respect to each such executory contract or unexpired lease assumed by the Reorganized Debtors, unless otherwise determined by the Court pursuant to a Final Order or agreed to by the parties thereto prior to the Effective Date, any defaults of the Debtors with respect to such assumed executory contracts or leases existing as of the Effective Date shall be cured in the ordinary course of the Reorganized Debtors' business promptly after any such default becomes known to the Debtors and, if the cure amount is disputed, such cure amount shall be established pursuant to applicable law, and the assumed executory contracts or leases shall be binding upon and enforceable upon the parties thereto, subject to any rights and defenses existing thereunder. Subject to the occurrence of the Effective Date, upon payment of such cure amount, all defaults of the Debtors existing as of the Confirmation Date with respect to such executory contract or unexpired lease shall be deemed cured.

To the extent executory, all agreements (i) providing for indemnification of third parties for Asbestos Claims and (ii) constituting or

relating to Truck Asbestos Insurance Policies shall be deemed rejected by operation of entry of the Confirmation Order unless expressly identified and assumed pursuant to an order of the Bankruptcy Court. The Released Parties shall retain any and all rights to indemnification for any Claim.

Executory contracts and unexpired leases previously assumed by the Debtors during the case pursuant to section 365 of the Bankruptcy Code shall be governed by and subject to the provisions of the order of the Court authorizing the assumption thereof.

The Bankruptcy Court shall retain jurisdiction to hear and determine any and all motions or applications for the assumption and/or assignment or rejection of (i) executory contracts, (ii) unexpired leases or (iii) written indemnity agreements to which the Debtors are parties or with respect to which the Debtors may be liable that are pending on the Confirmation Date, and to review and determine all Claims resulting from the expiration or termination of any executory contract or unexpired lease prior to the Confirmation Date.

8.2 Compensation and Benefits Programs. Unless otherwise agreed to by the affected parties, or modified by order of the Court, all of the Debtors' obligations under employment and severance contracts and policies, and all compensation and benefit plans, policies, and programs, shall be treated as though they are executory contracts that are deemed assumed under the Plan.

ARTICLE 9
RETENTION OF JURISDICTION

9.1 General. The Bankruptcy Court (and, to the extent the Bankruptcy Court is found to lack jurisdiction or authority, the District Court) shall retain the fullest and most extensive jurisdiction permissible, including that necessary to ensure that the purposes and intent of the Plan are carried out. Moreover, the Settlement Facility shall be subject to the continuing jurisdiction of the Bankruptcy Court in accordance with the requirements of IRC § 468B and regulations issued pursuant thereto.

9.2 Specific Purposes. In addition to the foregoing and except as provided in Section 9.3, the Bankruptcy Court (and the District Court to the extent the Bankruptcy Court is found not to have authority or jurisdiction) shall retain jurisdiction for the following specific purposes after the Confirmation Date:

9.2.1 Plan Documents. To interpret, enforce, and administer the terms of the Plan Documents (and all annexes and exhibits thereto);

9.2.2 Disputed Claims Allowance/Disallowance. To hear and determine any objections to: (i) the allowance of Claims, including any objections to the classification of any Claim; (ii) to Allow or Disallow any Disputed Claim in whole or in part pursuant to 28 U.S.C. § 157(b)(2)(B); and (iii) to Allow or Disallow any Litigation Option Claim pursuant to the terms of the CMO;

9.2.3 Enforcement/Modification of this Plan. To interpret, enforce, and administer the terms of the Plan Documents (and all annexes and exhibits thereto);

(a) To issue such orders in aid of execution of this Plan to the extent authorized or contemplated by section 1142 of the Bankruptcy Code;

(b) To consider and approve any modifications of this Plan or Plan Documents, remedy any defect or omission, or reconcile any inconsistency in any order of the Court, including the Confirmation Order;

(c) To hear and determine all controversies, suits, and disputes that may relate to, impact upon, or arise in connection with this Plan or any other Plan Documents or their interpretation, implementation, enforcement, or consummation;

(d) To hear and determine all objections to the termination of the Settlement Facility;

(e) To determine such other matters that may be set forth in, or that may arise in connection with, this Plan, the Confirmation Order, the Discharge Injunction, the Contribution Injunction, or the Settlement Facility Agreement, including any disputes related to the Settlement Facility Agreement or CRP or disputes relating to the administration of the Settlement Facility;

(f) To hear and determine any proceeding that involves the Discharge Injunction or the Contribution Injunction, including the validity, application, construction, or enforcement of the Discharge Injunction or Contribution Injunction;

(g) To enter an order or Final Decree closing the Chapter 11 Cases;

(h) To hear and determine any other matters related hereto, including matters related to

the implementation and enforcement of all orders entered by the Court in the Chapter 11 Cases;

(i) To enter orders authorizing immaterial modifications to this Plan which are necessary to comply with IRC § 4688;

9.2.4 Compensation of Professionals. To hear and determine all applications for allowance of compensation and reimbursement of expenses of Professionals under sections 327, 328, 329, 330, 331 and 363 of the Bankruptcy Code and any other fees and expenses authorized to be paid or reimbursed under this Plan;

9.2.5 Settlements. To the extent that Court approval is required, to consider and act on the compromise and settlement of any Claim or cause of action by or against the Debtors, Reorganized Debtors, or Settlement Facility;

9.2.6 Taxes. To hear and determine matters concerning state, local, and federal taxes (including the amount of net operating loss carry forwards), fines, penalties, or additions to taxes for which the Debtors may be liable, directly or indirectly, in accordance with sections 346, 505 and 1146 of the Bankruptcy Code;

9.2.7 Specific Purposes. To hear and determine such other matters and for such other purposes as may be provided in the Confirmation Order; and

9.2.8 Insurance Matters. To hear and determine matters concerning asbestos-related insurance from any Asbestos Insurance Company; provided that the Court shall have nonexclusive jurisdiction over such matters.

9.3 Orders Closing Chapter 11 Cases. Any order entered pursuant to section 350(a) of the Bankruptcy Code and Bankruptcy Rule 3022 closing the Chapter 11 Cases shall provide that, notwithstanding the closure of the Chapter 11 Cases (a) the Court expressly retains jurisdiction over the matters described in Sections 9.1 and 9.2, including, without limitation, jurisdiction to (i) enforce any of its orders issued in the Chapter 11 Cases; (ii) resolve any cases, controversies, suits or disputes that may arise in connection with the interpretation or enforcement of the Plan or any contract, instrument, release or other agreement or document that is entered into or delivered pursuant to the Plan or that resolves any claim objections or other disputes relating to the Debtors; (iii) hear any matters related to the Allowance or Disallowance of Claims by Holders who pursue the Litigation Option pursuant to the CMO; (iv) resolve any other claim objections or other disputes relating to the Debtors; (v) supervise the Settlement Facility as contemplated by the Settlement Facility Agreement; and (vi) consider any proper requests to reopen the Chapter 11 Cases under section 350(b) of the Bankruptcy Code; and (b) the clerk of the Court shall accept for Filing on the docket of Case No. 16-BK-31602, without the requirement that any party in interest File a request to reopen the Chapter 11 Cases, the annual reports of the Settlement Facility and any pleadings, motions, subpoenas, or other papers pursuant to which any party in interest seeks to invoke the exclusive jurisdiction that the Bankruptcy Court retains pursuant to Section 9.1 and Section 9.2 of this Plan, including allowance litigation concerning Claims electing the Litigation Option pursuant to the CMO.

ARTICLE 10
MISCELLANEOUS PROVISIONS

10.1 Authority of the Debtors. On the Confirmation Date, the Plan Proponent and the Debtors shall be empowered and authorized to take or cause to be taken, prior to the Effective Date, all actions necessary to enable them to implement effectively (i) the provisions of this Plan and (ii) the creation of the Settlement Facility.

10.2 Payment of Statutory Fees. All fees payable pursuant to 28 U.S.C. § 1930, as determined by the Court at the hearing on confirmation of this Plan, shall be paid by the Debtors on or before the Effective Date.

10.3 Retained Causes of Action.

10.3.1 Maintenance of Causes of Action.

Nothing in this Section 10.3 of the Plan shall be deemed to be a transfer by the Debtors or the Reorganized Debtors of any claims, causes of action, or defenses relating to assumed executory contracts, or otherwise which are required by the Reorganized Debtors to conduct their businesses in the ordinary course subsequent to the Effective Date. Moreover, except as otherwise expressly contemplated by this Plan or other Plan Documents, from and after the Effective Date, the Reorganized Debtors shall have and retain any and all rights to commence and pursue any and all claims, Causes of Action, including the Retained Causes of Action, Unknown Causes of Action, or defenses against any parties, including Claimants and Holders of Equity Interests, whether such Causes of Action accrued before or after the Petition Date.

The Reorganized Debtors shall retain and may exclusively enforce any and all such claims, rights or

causes of action, including Retained Causes of Action and Unknown Causes of Action, and commence, pursue and settle the causes of action in accordance with this Plan. The Reorganized Debtors shall have the exclusive right, authority, and discretion to institute, prosecute, abandon, settle, or compromise any and all such claims, rights, and Causes of Action, including Retained Causes of Action and Unknown Causes of Action, without the consent or approval of any third party and without any further order of the Court, including, without limitation, the right to assign and/or transfer any Retained Causes of Action or Unknown Causes of Action to any Entity as such Reorganized Debtor deems appropriate in its sole discretion.

10.3.2 Preservation of Causes of Action.

The Debtors are currently litigating causes of action against certain Persons, and continue to investigate whether to pursue potential Causes of Action against other Persons. That additional investigation has not been completed to date, and, under this Plan, the Reorganized Debtors retain the right on behalf of the Debtors to commence and pursue any and all Retained Causes of Action. The current litigation and other potential causes of action currently being investigated by the Debtors, which may, but need not, be pursued by the Debtors before the Effective Date, or by the Reorganized Debtors after the Effective Date, shall be set forth in the Plan Supplement. **In addition, there may be numerous Unknown Causes of Action**. **The failure to list any such Unknown Causes of Action in the Disclosure Statement or in the Plan Supplement shall not limit the rights of the Reorganized Debtors to pursue any Unknown Cause of Action to the extent the facts underlying such Unknown Cause of Action**

become fully known to the Debtors after the entry of the Disclosure Statement Order.

Unless a claim or Cause of Action against a Persons is expressly waived, relinquished, released, compromised, or settled in this Plan or any Final Order, the Debtors expressly reserve such claim, Retained Cause of Action or Unknown Cause of Action for later adjudication by the Debtors or Reorganized Debtors, as applicable. Therefore, no preclusion doctrine, including the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, waiver, estoppel (judicial, equitable, or otherwise), or laches shall apply to such claims, Retained Causes of Action or Unknown Causes of Action upon or after the Confirmation Date or Effective Date of this Plan based on the Plan Documents or the Confirmation Order, except where such claims or Retained Causes of Action have been released in this Plan or other Final Order. In addition, the Debtors, the Reorganized Debtors, and the successor Entities under this Plan expressly reserve the right to pursue or adopt any claim alleged in any lawsuit in which the Debtors are defendants or an interested party, against any Person, including the plaintiffs or codefendants in such lawsuits.

Any Person to whom the Debtors have incurred an obligation (whether on account of services, purchase or sale of goods or otherwise), or who has received services from the Debtors or a transfer of money or property of the Debtors, or who has transacted business with the Debtors, or leased equipment or property from the Debtors should assume that such obligation,

transfer, or transaction may be reviewed by the Debtors or the Reorganized Debtors, and may, if appropriate, be the subject of an action after the Effective Date (unless such claim or cause of action of the Debtor was released, settled, or abandoned prior to the Confirmation Date pursuant to Order of the Bankruptcy Court), whether or not (i) such Person has Filed a proof of Claim against the Debtors in the Chapter 11 Cases; (ii) such Claimant's proof of Claim has been objected to; (iii) such Claimant's Claim was included in the Debtors' Schedules; or (iv) such Claimant's scheduled Claim has been objected to by the Debtors or has been identified by the Debtors as a Disputed, contingent or unliquidated.

10.4 Third-Party Agreements. The Distributions to the various classes of Claims hereunder will not affect the right of any Person to levy, garnish, attach, or employ any other legal process with respect to such Distributions by reason of any claimed subordination rights or otherwise. All of such rights and any agreements relating thereto will remain in full force and effect.

10.5 Dissolution of the Unsecured Creditors' Committee and the Asbestos Committee; Continued Retention of the Future Claimants' Representative.

On the Effective Date, the Asbestos Committee and the Unsecured Creditors' Committee shall each thereupon be released and discharged of and from all further authority, duties, responsibilities, and obligations relating to or arising from or in connection with the Chapter 11 Cases, and such committee shall be deemed dissolved.

Notwithstanding the foregoing, if the Effective Date occurs prior to the entry of a Final Order with respect to final fee applications of Professionals retained by order of the Bankruptcy Court during the Chapter 11 Cases, the Unsecured Creditors' Committee and the Asbestos Committee may, at their option, continue to serve until a Final Order is entered with respect to such proceedings.

The FCR shall continue to serve through the termination of the Settlement Facility in order to perform the functions required by the Settlement Facility Agreement. Upon termination of the Settlement Facility, the FCR's employment shall be deemed terminated and the FCR shall be released and discharged of and from all further authority, duties, responsibilities, and obligations relating to or arising from or in connection with the Chapter 11 Cases.

All reasonable and necessary post-Effective Date fees and expenses of the Professionals retained by the Unsecured Creditors' Committee or Asbestos Committee shall be paid by the Reorganized Debtors. If any dispute regarding the payment of such fees and expenses arises, the parties shall attempt to resolve such dispute in good faith. If they fail to resolve such dispute, they shall submit the dispute to the Bankruptcy Court for resolution.

10.6 Title to Assets. Upon the transfer of the payments to the Settlement Facility, each such transfer shall be vested in the Settlement Facility free and clear of all Claims, Equity Interests, encumbrances, and other interests of any Person. Except as otherwise provided in this Plan and in accordance with section 1123(b)(3) of the Bankruptcy Code, on the Effective Date, title to all of the Debtors' Assets and properties and interests in property, including the

Retained Causes of Action and Unknown Causes of Action, shall vest in the Reorganized Debtors free and clear of all Claims, Equity Interests, encumbrances, and other interests, and the Confirmation Order shall be a judicial determination of discharge of the liabilities of the Debtors.

10.7 Notices. Any notices, statements, requests, and demands required or permitted to be provided under the Plan, in order to be effective, must be: (i) in writing (including by facsimile transmission), and unless otherwise expressly provided herein, shall be deemed to have been duly given or made (a) if personally delivered or if delivered by facsimile or courier service, when actually received by the Entity to whom notice is sent, (b) if deposited with the United States Postal Service (but only when actually received), at the close of business on the third business day following the day when placed in the mail, postage prepaid, certified or registered with return receipt requested, or (c) one (1) Business Day after being sent to the recipient by reputable overnight courier service (charges prepaid) (but only when actually received) and (ii) addressed to the appropriate Entity or Entities to whom such notice, statement, request or demand is directed (and, if required, its counsel), at the address of such Entity or Entities set forth below (or at such other address as such Entity may designate from time to time by written notice to all other Entities listed below in accordance with this Section 10.7):

If to the Plan Proponent:

Truck Insurance Exchange
Attn: Greg Mareno
31051 Agoura Road
Westlake Village, Ca. 91360
Email: greg.mareno@farmersinsurance.com

With a copy to:

Gibson, Dunn & Crutcher LLP
Attn: Michael A. Rosenthal
Matthew G. Bouslog
200 Park Avenue, Suite 4700
New York, New York 10166-0193
Email: mrosenthal@gibsondunn.com
mbouslog@gibsondunn.cm

If to the Debtors:

Kaiser Gypsum Company, Inc.
Attn: President
300 E. John Carpenter Freeway
Irving, Texas 75062
Email: [_____]

With a copy to:

Jones Day
Attn: Gregory M. Gordon
2727 N. Harwood Street
Dallas, Texas 75201
Email: gmgordon@jonesday.com

If to the Unsecured Creditors' Committee:

Blank Rome LLP
Attn: Ira L. Herman
The Chrysler Building
405 Lexington Avenue
New York, New York 10174-0208
Email: iherman@blankrome.com

If to the Asbestos Committee:

Caplin & Drysdale, Chartered
Attn: Kevin C. Maclay
One Thomas Circle, NW Suite 1100
Washington, DC 20005
Email: kmaclay@capdale.com

If to the Future Claimants' Representative:

Lawrence Fitzpatrick
100 American Metro Blvd., Suite 108
Hamilton, NJ 08619

With a copy to:

Hull & Chandler, P.A.
Attn: Felton E. Parrish
1001 Morehead Square Drive, Suite 450
Charlotte, NC 28203
Email: fparrish@lawyercarolina.com

10.8 Headings. The headings used in this Plan are inserted for convenience only and neither constitute a portion of this Plan nor in any manner affect the construction of the provisions of this Plan.

10.9 Rules Governing Conflicts Between Documents. To the extent any provision of the Disclosure Statement or any other solicitation document may be inconsistent with the terms of the Plan, the terms of the Plan shall be binding and conclusive. In the event of a conflict between the terms or provisions of the Plan and any Plan Documents other than the Plan, the terms of the Plan shall control over such Plan Documents. In the event of a conflict between the terms of the Plan or the Plan Documents, on the one hand, and the terms of the Confirmation Order, on the other hand, the terms of the Confirmation Order shall control.

10.10 Governing Law. Unless a rule of law or procedure is supplied by federal law (including the Bankruptcy Code and Bankruptcy Rules), the laws of the State of North Carolina, without giving effect to any conflicts of law principles thereof that would result in the application of the laws of any other jurisdiction, shall govern the construction of this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise expressly provided in such instruments, agreements, or documents.

10.11 Filing of Additional Documents. On or before the Effective Date, the Plan Proponent and/or the Debtors shall File with the Court such agreements and other documents as may be necessary or appropriate to effectuate and further evidence the terms and conditions of this Plan.

10.12 Compliance with Tax Requirements. In connection with the Plan, the Debtors, the Reorganized Debtors and the Settlement Facility will comply with all applicable withholding and reporting requirements imposed by federal, state, and local taxing authorities, and all Distributions hereunder or under any Plan Document shall be subject to such withholding and reporting requirements, if any. Notwithstanding any other provision of this Plan, each Person receiving a Distribution pursuant to this Plan, or any other Plan Document, will have sole and exclusive responsibility for the satisfaction and payment of any tax obligations imposed by any governmental entity, including income tax and other obligations, on account of that Distribution.

10.13 Exemption From Transfer Taxes. Pursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer, or exchange of notes or equity

securities under this Plan, the creation of any mortgage, deed of trust, or other security interest, the making or assignment of any lease or sublease, or the making or delivery of any deed or other instrument of transfer under, in furtherance of, or in connection with this Plan, shall be exempt from all taxes.

10.14 Section 1145 Exemption. Under section 1145 of the Bankruptcy Code, the issuance of the interests in the Reorganized Debtors under the Plan shall be exempt from registration under the Securities Act of 1933, as amended, and all applicable state and local laws requiring registration of securities.

10.15 Time. Time shall be calculated in accordance with Bankruptcy Rule 9006.

10.16 Further Assurances. The Plan Proponent, the Debtors, the Reorganized Debtors, the Released Parties, the Asbestos Insurance Companies, the Settlement Facility, all Holders of Claims receiving Distributions under this Plan, all Holders of Equity Interests and all other parties in interest shall, from time to time, prepare, execute, and deliver any agreements or documents and take any other action consistent with the terms of this Plan as may be necessary to effectuate the provisions and intent of this Plan, with each such Entity to bear its own costs incurred in connection therewith.

10.17 Further Authorizations. The Plan Proponent, the Debtors, and, after the Effective Date, the Reorganized Debtors, and the Settlement Facility, if and to the extent necessary, may seek such orders, judgments, injunctions, and rulings that any of them deem necessary to carry out further the intentions and purposes of, and to give full effect to the

provisions of, this Plan, with each such Entity to bear its own costs in connection therewith.

ARTICLE 11
REQUEST FOR CONFIRMATION

11.1 Request for Confirmation. The Plan Proponent requests Confirmation of the Plan in accordance with section 1129 of the Bankruptcy Code.

IN WITNESS WHEREOF, the plan proponent has executed the plan this 13th day of April, 2018

TRUCK INSURANCE EXCHANGE

By: /s/ Keith G. Daly
Name: Keith G. Daly
Title: Authorized Signatory

EXHIBIT A TO CHAPTER 11 PLAN OF REORGANIZATION FOR KAISER GYPSUM COMPANY, INC., AND ITS AFFILIATE

DEFINITIONS AND INTERPRETATION

A. Rules of Interpretation. Unless otherwise specified, all Section, Article, and Exhibit references in the Plan are to the respective Section in, Article of, or Exhibit to the Plan, as the same may be amended, waived, or modified from time to time. The headings in the Plan are for convenience of reference only and shall not limit or otherwise affect the provisions hereof. Words denoting the singular number shall include the plural number and vice versa, unless the context requires otherwise. Pronouns stated in the masculine, feminine, or neuter gender shall include the masculine, the feminine, and the neuter. The words "herein," "hereof," "hereto," "hereunder," and others of similar import refer to the Plan as a whole, and not to any particular Section, Subsection, or clause contained in the Plan. In construing the Plan, the rules of construction set forth in section 102 of the Bankruptcy Code shall apply. As used in the Plan, "defending against a Litigation Option Claim" shall be interpreted to constitute an objection to such Litigation Option Claim.

B. Definitions. Terms and phrases, whether capitalized or not, that are used and not defined in the Plan, but that are defined in the Bankruptcy Code or Bankruptcy Rules, have the meanings ascribed to them in the Bankruptcy Code or Bankruptcy Rules, as applicable. Unless otherwise provided in the Plan, the following terms have the respective meanings set forth below, and such meanings shall be equally

applicable to the singular and plural forms of the terms defined, unless the context otherwise requires.

1. "***Administrative Expense Claim***" means a claim for costs and expenses of administration of the Chapter 11 Cases allowed under sections 503(b) or 507(a)(2) of the Bankruptcy Code. Administrative Expense Claims shall, without limitation, include Fee Claims, claims under section 503(b)(9) of the Bankruptcy Code.

2. "***Allowed***" means, with reference to any Claim, (a) any Claim against any Debtor that has been listed by such Debtor in the Schedules, as such Schedules may be amended from time to time in accordance with Bankruptcy Rule 1009, as liquidated in amount and not disputed or contingent or unknown and for which no contrary proof of Claim has been Filed; (b) any Claim listed on the Schedules or timely Filed proof of Claim, as to which no objection to allowance has been interposed in accordance with the Plan by the Claims Objection Deadline or such other applicable period of limitation fixed by the Bankruptcy Code, the Bankruptcy Rules, or the Bankruptcy Court, or as to which any objection has been determined by a Final Order to the extent such objection is determined in favor of the respective Holder of such Claim; (c) any Claim expressly allowed by a Final Order or under the Plan; (d) with respect to any Asbestos Claim submitted for Basic Review or Comprehensive Review, such Asbestos Claim receives an offer from the Settlement Facility as a result of the review process, and the offer is accepted by the Holder of such Asbestos Claim; or (e) any Claim that is allowed pursuant to the Plan, the CRP or the CMO.

3. "***Asbestos Claim***" means a Claim against a Debtor, Reorganized Debtor or any Released Party,

whether or not such Claim is reduced to judgment, liquidated, unliquidated, fixed, settled, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, whether or not the facts of or legal bases therefor are known or unknown, whether the disease or condition upon which the Claim is based had manifested, become evident, or been diagnosed before or after the Confirmation Date, and whether in the nature of or sounding in tort, or under contract (including settlement agreements alleged to be enforceable under applicable law), warranty, guarantee, contribution, joint and several liability, subrogation, reimbursement, or indemnity, or any other statute or theory of law, equity, admiralty, or otherwise (including conspiracy and piercing the corporate veil, alter ego, and similar theories), including (i) all related claims, debts, rights, remedies, liabilities, or obligations for compensatory (including general, special, proximate, or consequential damages, loss of consortium, lost wages or other opportunities, wrongful death, medical monitoring, or survivorship), punitive or exemplary damages, or costs or expenses, and (ii) all crossclaims, contribution claims, subrogation claims, reimbursement claims, or indemnity claims, in each case for, based on, arising out of, resulting from, attributable to, or under the laws of any jurisdiction, by reason of, in whole or in part, directly or indirectly:

(a) death, wrongful death, personal or bodily injury (whether physical, emotional, or otherwise), sickness, illness, ailment, disease, medical monitoring for increased risk, fear of or increased risk of any of the foregoing, loss of consortium, lost wages or other opportunities, survivorship, or other personal injuries (whether physical, emotional, or otherwise) or other damages (including medical, legal, and other expenses

or punitive damages), caused or allegedly caused by, based on or allegedly based on or arising or allegedly arising from or attributable to, directly or indirectly, in whole or in part, acts, omissions, or conduct of any Debtor or any other Person for whose products or operations any Debtor allegedly has liability or is otherwise liable, including any past or present Affiliate, predecessor, successor, or assign of any Debtor; and

(b) the presence of, exposure to, or contact with, at any time, asbestos or any products or materials containing asbestos that were mined, processed, consumed, used, stored, manufactured, fabricated, constructed, designed, engineered, sold, assembled, supplied, produced, specified, selected, distributed, released, maintained, repaired, purchased, owned, occupied, serviced, removed, replaced, disposed of, installed by, or in any way marketed by, or on behalf of any Debtor or any other Person (including any past or present Affiliate, predecessor, successor, or assign of any Debtor) for whose products or operations any Debtor allegedly has liability or is otherwise liable.

4. "***Asbestos Claimant***" means the Holder of an Asbestos Claim.

5. "***Asbestos Committee***" means the Official Committee of Asbestos Personal Injury Claimants appointed in the Chapter 11 Cases.

6. "***Asbestos Contribution Rights***" means any and all rights, titles, privileges, interests, claims, demands or entitlements to any proceeds, contributions, payments, defense costs, indemnification, escrowed funds, initial or supplemental dividends, scheme payments, supplemental scheme payments, causes of action, and choses in action of any Debtor or other Person with respect to any Asbestos Claim, including any

rights against Non-Released Parties, rights under a Non-Truck Asbestos Insurance Policy, any rights under any Asbestos Insurance Agreement, and any rights in any Asbestos Insurance Action.

7. "***Asbestos Insurance Action***" means any claim, Cause of Action, or right of any Debtor, under the laws of any jurisdiction, against any Asbestos Insurance Entity, arising from or based on: (i) any such Asbestos Insurance Entity's failure to provide coverage for, or failure to pay or agree to pay, any claim under any Asbestos Insurance Policy or any related settlement or agreement; (ii) the refusal of any such Asbestos Insurance Entity to compromise or settle any claim under or pursuant to any Asbestos Insurance Policy or any related settlement or agreement; (iii) the interpretation or enforcement of the terms of any Asbestos Insurance Policy or any related settlement or agreement; or (iv) any conduct of any Asbestos Insurance Entity constituting "bad faith," violations of state insurance codes, unfair claims practices, or other wrongful conduct under applicable law with respect to any Asbestos Insurance Policy or any related settlement or agreement.

8. "***Asbestos Insurance Agreement***" means any settlement agreement or coverage-in-place agreement between an Asbestos Insurance Entity and any of the Debtors or their Affiliates relating to an Asbestos Insurance Policy.

9. "***Asbestos Insurance Entity***" means any Entity, including any insurance company, broker, or guaranty association, that has issued, or that has or had actual or potential liability, duties or obligations under or with respect to, any Asbestos Insurance Policy or any agreements or settlements relating to any Asbestos Insurance Policy.

10. "***Asbestos Insurance Policy***" means any insurance policy under which any Debtor or Affiliate of the Debtors has or had indemnity, defense, or other insurance coverage, whether known or unknown, that actually or potentially provides insurance coverage for any Asbestos Claim, including but not limited to the policies listed in the Plan Supplement.

11. "***Assets***" means any and all right, title, and interest in and to property of whatever type or nature.

12. "***Avoidance Actions***" means any and all of the Debtors' Causes of Action for avoidance or equitable subordination or recovery under chapter 5 of the Bankruptcy Code or similar state law and all proceeds thereof.

13. "***Bankruptcy Administrator***" means the office of the United States Bankruptcy Administrator for the Western District of North Carolina.

14. "***Bankruptcy Code***" means title 11 of the United States Code, sections 101-1532, as now in effect or as hereafter amended.

15. "***Bankruptcy Court***" means the United States Bankruptcy Court for the Western District of North Carolina, or, if such court ceases to exercise jurisdiction, the court or adjunct thereof that exercises jurisdiction over the Chapter 11 Cases.

16. "***Bankruptcy Rules***" means the Federal Rules of Bankruptcy Procedure, as amended and promulgated under section 2075 of Title 28 of the United States Code, together with (a) the Rules of Practice and Procedures of the United States Bankruptcy Court for the Western District of North Carolina as now in effect or as the same may from time to time hereafter be amended and (b) the *Amended Standing Order of Reference* from the United States

District Court for the Western District of North Carolina dated as of April 4, 2014.

17. "***Bar Date***" means the date by which a proof of Claim is required to be Filed with respect to a Claim pursuant to the Bar Date Order.

18. "***Bar Date Order***" means the *Order Establishing Bar Dates for Filing Proofs of Claim Other Than Asbestos Personal Injury Claims and Approving Related Relief* [Docket No. 553].

19. "***Basic Review***" means the process for determining settlement offers under the Settlement Option as set forth in Appendix Ito the CRP.

20. "***Basic Review CRP Amount***" means, as to any Asbestos Claim, (a) the Matrix Amount offered by the Settlement Facility with respect to such Asbestos Claim under Basic Review or (b) the Matrix Amount that would have been offered by the Settlement Facility with respect to such Asbestos Claim if it had been submitted for Basic Review.

21. "***Board of Directors***" means the board of directors, managers, or equivalent thereof of any of the Debtors, or any of the Reorganized Debtors, as the case may be, as it may exist from time to time.

22. "***Business Day***" means any day that is not a Saturday, Sunday, or "legal holiday" within the meaning of Bankruptcy Rule 9006(a).

23. "***By-Laws***" means the by-laws or operating agreements of any of the specified Entities, as amended as of the Effective Date or thereafter.

24. "***Case Management Order***" or "***CMO***" means the order to be entered by the District Court pursuant to which Litigation Option Claims shall be Allowed or Disallowed, which order shall be in

substantially the form attached as an exhibit to the Plan Supplement.

25. "***Cash***" means lawful currency of the United States and its equivalents.

26. "***Causes of Action***" means any action, class action, claim, cause of action, controversy, demand, right, action, Lien, indemnity, guaranty, suit, obligation, liability, damage, judgment, account, defense, offset, power, privilege, license, and franchise of any kind or character whatsoever, whether known or unknown, contingent or non-contingent, matured or unmatured, suspected or unsuspected, liquidated or unliquidated, disputed or undisputed, secured or unsecured, assertable directly or derivatively, whether arising before, on, or after the Petition Date, in contract or in tort, in law or in equity, or pursuant to any other theory of law. Causes of Action also include: (a) any right of setoff, counterclaim, or recoupment and any claim for breaches of duties imposed by law or in equity; (b) the right to object to Claims or Equity Interests; (c) any claim or cause of action pursuant to section 362 of the Bankruptcy Code or chapter 5 of the Bankruptcy Code or similar state law; (d) any claim or defense, including fraud, mistake, duress, and usury and any other defenses set forth in section 558 of the Bankruptcy Code; and (e) all Asbestos Contribution Rights.

27. "***Certificate of Incorporation***" means the articles of incorporation, articles of organization, or equivalent document of any of the Reorganized Debtors, as applicable, as amended as of the Effective Date or thereafter.

28. "***Chapter 11 Cases***" means (a) when used with reference to a particular Debtor, the case

pending for that Debtor under chapter 11 of the Bankruptcy Code and (b) when used with reference to all Debtors, the procedurally consolidated chapter 11 cases pending for the Debtors in the Bankruptcy Court under case number 16-31602 (JCW).

29. "***Claim***" means a claim, as defined in section 101(5) of the Bankruptcy Code, or a Demand against a Debtor or its Estate whether or not asserted or Allowed.

30. "***Claimant***" means a Holder of a Claim.

31. "***Claims Resolution Procedures***" or "***CRP***" means the procedures, in the form attached to the Settlement Facility Agreement, to be implemented by the Settlement Facility pursuant to the terms and conditions of the Plan and the Settlement Facility Agreement, to process, review, and pay (if Allowed) Settlement Option Claims.

32. "***Class***" means one of the categories of Claims or Equity Interests established under Article 2 of the Plan in accordance with sections 1122 and 1123(a) of the Bankruptcy Code.

33. "***Comprehensive Review***" means the process for determining settlement offers under the Settlement Option as set forth in Appendix II to the CRP.

34. "***Comprehensive Review CRP Amount***" means, as to any Asbestos Claim, (a) the Matrix Amount offered by the Settlement Facility with respect to such Asbestos Claim under Comprehensive Review or (b) the Matrix Amount that would have been offered by the Settlement Facility with respect to such Asbestos Claim if it had been submitted for Comprehensive Review.

35. "***Confirmation Date***" means the date on which the clerk of the Bankruptcy Court enters the Confirmation Order on the docket.

36. "***Confirmation Hearing***" means the hearing(s) before the Bankruptcy Court in accordance with section 1128 of the Bankruptcy Code to consider confirmation of the Plan, as such hearing(s) may be delayed, continued, or rescheduled.

37. "***Confirmation Order***" means the order of the Bankruptcy Court confirming the Plan in accordance with section 1129 of the Bankruptcy Code, as such order may be amended, modified, or supplemented.

38. "***Contribution Injunction***" means the order(s) entered by the Court (including, as appropriate, any provision of the Confirmation Order) permanently and forever staying, restraining, and enjoining any Person from taking any action against any Released Party for the purpose of, directly or indirectly, collecting, recovering, or receiving payment of, on, or with respect to any Released Claim, the form of which Contribution Injunction shall be acceptable to the Debtors, the Reorganized Debtors and Truck.

39. "***Court***" means either the Bankruptcy Court or the District Court, as appropriate.

40. "***Creditor***" means any Person that has a Claim against one or more of the Debtors.

41. "***Current Asbestos Claim***" means an Asbestos Claim that is not a Settled Asbestos Claim or Pre-Petition Judgment Asbestos Claim, and for which an alleged asbestos-related injury has manifested, become evident, or been diagnosed as of the date the Confirmation Order is entered by the Court.

42. "***Current Asbestos Claimant***" means the Holder of a Current Asbestos Claim.

43. "***D&O Insurance***" means all of the Debtors' director and officer insurance and any and all proceeds therefrom.

44. "***D&O Policies***" means any and all policies providing D&O Insurance.

45. "***Debtors***" means, together, Kaiser and HPCI.

46. "***Demand***" means a Future Asbestos Claim asserted by a Future Asbestos Claimant.

47. "***Disallowed***" means, with respect to a Claim, any Claim or portion thereof that (a) has been disallowed by a Final Order, (b) is identified in the Schedules in the amount of zero dollars or as contingent, unliquidated, or disputed and as to which a proof of Claim was not Filed on or before the applicable Bar Date, (c) is not identified in the Schedules and as to which no proof of Claim has been Filed or deemed Filed on or before the applicable Bar Date, as applicable, (d) was not Filed in a timely manner as provided by the Plan, the Confirmation Order, or other relevant order of the Bankruptcy Court, or (e) is disallowed by agreement with the Creditor in accordance with the Plan, the CRP or the CMO.

48. "***Discharge Injunction***" means the injunction described in Section 7.1.1 under section 524(a) of the Bankruptcy Code.

49. "***Disclosure Statement***" means the disclosure statement with respect to the Plan, approved by the Bankruptcy Court as containing adequate information for the purpose of dissemination and solicitation of votes on (if applicable) and confirmation of the

Plan, as it may be altered, amended, or modified from time to time in accordance with the provisions of the Bankruptcy Code and the Bankruptcy Rules.

50. "***Disclosure Statement Order***" means the order of the Bankruptcy Court approving the Disclosure Statement as containing adequate information pursuant to section 1125 of the Bankruptcy Code.

51. "***Disputed***" means any Claim or any portion thereof that is not an Allowed Claim or a Disallowed Claim. For the purposes of the Plan, all Current Asbestos Claims, Future Asbestos Claims, and Pre-Petition Judgment Asbestos Claims shall be considered Disputed Claims until they are Allowed or Disallowed, and the Debtors' right to object to allowance of such Claims (including after the Confirmation Date) is expressly preserved by this Plan. Furthermore, any other Claim shall be considered a Disputed Claim (a) before the time that an objection has been or may be filed if: (i) the amount or classification of the Claim specified in the relevant proof of Claim or request for payment of the Claim exceeds the amount or is different from the classification of any corresponding Claim scheduled by the relevant Debtor in its Schedules; (ii) any corresponding Claim scheduled by the relevant Debtor has been scheduled as disputed, contingent or unliquidated; or (iii) no corresponding Claim has been scheduled by the relevant Debtor in its Schedules; (b) if such Claim is the subject of an objection not yet resolved by a Final Order; or (c) if an Avoidance Action asserted against the Holder of such Claim has not been resolved by a Final Order.

52. "***Distribution***" means any distribution to the Holder of an Allowed Claim in accordance with the Plan.

53. "***Distribution Date***" means, with respect to an Allowed Claim, the date which is as soon as reasonably practicable after the later of: (i) the Effective Date, (ii) the date on which such Claim becomes Allowed or (iii) such other date agreed to in writing by such Claimant and the Debtors or Reorganized Debtors, as applicable. any Distribution to the Holder of an Allowed Claim in accordance with the Plan.

54. "***District Court***" means the United States District Court for the Western District of North Carolina.

55. "***Effective Date***" means the first Business Day after the date on which all of the conditions precedent to the effectiveness of the Plan specified in Section 6.9.2 of the Plan shall have been satisfied or waived or, if a stay of the Confirmation Order is in effect on such date, the first Business Day after the expiration, dissolution, or lifting of such stay.

56. "***Entity***" has the meaning set forth in section 101(15) of the Bankruptcy Code.

57. "***Environmental Claim***" means any Claim arising out of, related to or based upon federal or state environmental laws or regulations, environmental orders, consent decrees and other obligations in connection with sites that are not part of the Debtors' Estates, including previously owned or operated sites that are no longer owned or operated by the Debtors and third-party sites that have never been owned or operated by the Debtors to which the Debtors or their predecessors are alleged to have sent waste or other materials.

58. "***Environmental Insurance Policy***" means any insurance policy under which any Debtor or Affiliate of the Debtors has or had indemnity,

defense, or other insurance coverage, whether known or unknown, that actually or potentially provides insurance coverage for any Environmental Claim, including but not limited to the policies listed in the Plan Supplement.

59. "***Equity Interest***" means any ownership interest or share in any of the Debtor Entities (including all options, warrants, or other rights to obtain such an interest or share in the Debtor Entities) whether or not transferable, preferred, common, voting, or denominated as "stock" or a similar security.

60. "***Estate(s)***" means, individually, the estate created for each of the Debtors and, collectively, the estates created for all the Debtors pursuant to section 541 of the Bankruptcy Code upon the commencement of the Chapter 11 Cases.

61. "***Estate Assets***" means the respective Assets of the Debtors and their Estates as of the Effective Date, including any and all proceeds, rents, products, offspring, and profits arising from or generated by such property after the Effective Date.

62. "***Estimation Order***" means an order of the Bankruptcy Court estimating the present value, as of the Effective Date, of (a) all Settled Asbestos Claims, all Pre-Petition Judgment Asbestos Claims, Current Asbestos Claims and Future Asbestos Claims; and (b) the projected costs, other than Litigation Expenses, of the Settlement Facility for administration of the Settlement Facility for the 20-year period following the Effective Date.

63. "***Fee Claim***" means a Claim by a Professional for compensation and/or reimbursement of expenses pursuant to sections 327, 328, 330, 331, 503(b), or 1103 of the Bankruptcy Code in connection with an

application made to the Bankruptcy Court in the Chapter 11 Cases.

64. "***Fee Order***" means the Bankruptcy Court's *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals*, dated November 7, 2016 [Docket No. 216], in the Chapter 11 Cases, as may have been amended or supplemented from time to time.

65. "***File***", "***Filed***" or "***Filing***" means file, filed or filing with the Bankruptcy Court or its authorized designee in the Chapter 11 Cases.

66. "***Final Decree***" means the decree contemplated under Bankruptcy Rule 3022.

67. "***Final Order***" means a judgment, order, ruling, or other decree issued and entered by the Bankruptcy Court, or by any state, provincial, or other federal court or other tribunal having jurisdiction over the subject matter thereof, which judgment, order, ruling, or other decree has not been reversed, stayed, modified, or amended and as to which: (a) the time to appeal or petition for review, rehearing, or certiorari or move for reargument has expired or shall have been waived in writing in form and substance satisfactory to the Plan Proponent and as to which no appeal or petition for review, rehearing, or certiorari or motion for reargument is pending; or (b) any appeal or petition for review, rehearing, certiorari, or reargument has been finally decided and no further appeal or petition for review, rehearing, certiorari, or reargument can be taken or granted; *provided*, *however*, that the possibility that a motion under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules or applicable state court rules of civil procedure, may be Filed with

respect to such order shall not cause such order not to be a Final Order.

68. "***Future Asbestos Claim***" means an Asbestos Claim for which an alleged asbestos-related injury has not manifested, become evident, or been diagnosed as of the date the Confirmation Order is entered by the Court.

69. "***Future Asbestos Claimant***" means the Holder of a Future Asbestos Claim.

70. "***Future Claimants' Representative***" or "***FCR***" means Lawrence Fitzpatrick (or any court-appointed successor), appointed as the legal representative to represent the interests of, appear on behalf of, and be a fiduciary to the *Holders of Future Asbestos Claims in the Order Appointing Lawrence Fitzpatrick as Legal Representative for Future Claimants* [Docket No. 99].

71. "***General Unsecured Claim***" means any Claim that is not an Administrative Expense Claim, a Priority Tax Claim, a Secured Claim, a Priority Claim, an Intercompany Claim, or an Asbestos Claim, including any portion of a Secured Claim that exceeds the value of the collateral securing such Secured Claim unless an election has been made under section 1111(b) of the Bankruptcy Code.

72. "***Governmental Unit***" has the meaning set forth in section 101(27) of the Bankruptcy Code.

73. "***Holder***" means the Person that is the record owner of a Claim or Equity Interest, as applicable.

74. "***HPCI***" means Hanson Permanente Cement, Inc.

75. "***Impaired***" means a Claim or a Class of Claims that is impaired within the meaning of section 1124 of the Bankruptcy Code.

76. "***Insurance Entity***" means any Entity, including any insurance company, broker, or guaranty association, that has issued, or that has or had actual or potential liability, duties or obligations under or with respect to any Insurance Policy or any agreements or settlements relating to any Insurance Policy.

77. "***Insurance Policy***" means any insurance policy under which any Debtor or Affiliate of the Debtors has or had indemnity, defense, or other insurance coverage, whether known or unknown, that actually or potentially provides insurance coverage for any Claim, including but not limited Asbestos Insurance Policies, Environmental Insurance Policies, and any other policies listed in the Plan Supplement.

78. "***Intercompany Claims***" means any Claim held by a Debtor against another Debtor.

79. "***IRC***" means the Internal Revenue Code of 1986, as amended, and any applicable regulations (including temporary and proposed regulations) promulgated thereunder by the United States Treasury Department.

80. "***Kaiser***" means Kaiser Gypsum Company, Inc.

81. "***Lehigh Hanson***" means Lehigh Hanson, Inc.

82. "***Lehigh Hanson Contribution***" means a $49 million Cash payment by Lehigh Hanson to the Settlement Facility on the Effective Date.

83. "***Liens***" means a lien as defined in section 101(37) of the Bankruptcy Code.

84. "***Litigation Expenses***" means costs incurred in defending against a particular Litigation Option Claim. Litigation Expenses shall include fees for defense attorneys, other advisors, testifying and consulting experts, court costs, and any other costs attributable to particular Litigation Option Claims. For the avoidance of doubt, Litigation Expenses do not include any fees or costs incurred by a Claimant in pursuing a Claim.

85. "***Litigation Fund***" means the fund to be maintained by the Settlement Facility for payment of Litigation Expenses, which fund shall be replenished on a semiannual basis to maintain a balance of at least $10 million.

86. "***Litigation Option***" means the option of each Holder of a Current Asbestos Claim, Future Asbestos Claim, or Pre-Petition Judgment Asbestos Claim (the latter under certain circumstances described herein) to elect to have his or her Claim Allowed through litigation against the Reorganized Debtors after the Confirmation Date pursuant to the CMO.

87. "***Litigation Option Claim***" means a Current Asbestos Claim, Future Asbestos Claim, or Pre-Petition Judgment Asbestos Claim whose Holder elects the Litigation Option.

88. "***Litigation Option Claimant***" means the Holder of a Litigation Option Claim.

89. "***Lowest Truck Policy Limit***" means, as to any Asbestos Claim, the per claim occurrence limit under the Truck Asbestos Insurance Policy with the lowest occurrence limit applicable to such Asbestos Claim.

90. "***Matrix Amount***" means, as to any Asbestos Claim, the value assigned to such Claim by the Settlement Facility after completion of the process and calculations set forth in Appendix I (Basic Review) or Appendix II (Comprehensive Review) to the CRP, as applicable.

91. "***New Equity Interests***" means the New HPCI Common Stock and the New Kaiser Common Stock.

92. "***New HPCI Common Stock***" means the new common stock issued by Reorganized HPCI to the Settlement Facility pursuant to the provisions of the Plan.

93. "***New Kaiser Common Stock***" means the new common stock issued by Reorganized Kaiser to the Settlement Facility pursuant to the provisions of the Plan.

94. "***Non-Compensatory Damages Claims***" means, as to any Claim, any and all damages that are penal in nature, including, without limitation, punitive, punitory, exemplary, vindictive, imaginary, or presumptive damages.

95. "***Non-Released Party***" means any Person that is not a Released Party, including, without limitation, any Non-Truck Asbestos Insurer that is not a Participating Non-Truck Asbestos Insurer and Lehigh Hanson if it does not make the Lehigh Hanson Contribution.

96. "***Non-Truck Asbestos Insurance Policy***" means any Asbestos Insurance Policy other than the Truck Asbestos Insurance.

97. "***Non-Truck Asbestos Insurer***" means any Asbestos Insurance Entity other than Truck.

98. "***Non-Truck Asbestos Insurer Contribution***" means the amount, if any, agreed with the Non-Truck Asbestos Insurers, which amount shall be set forth in the Plan Supplement.

99. "***Participating Non-Truck Asbestos Insurers***" means the Non-Truck Asbestos Insurers, set forth in the Plan Supplement, which make the Non-Truck Asbestos Insurer Contribution.

100. "***Person***" means person, including without limitation, any individual, Entity, corporation, partnership, limited liability company, limited liability partnership, joint venture, association, joint stock company, estate, trust, unincorporated association or organization, official committee, ad hoc committee or group, governmental agency or political subdivision thereof, the Bankruptcy Administrator, and any successors or assigns of any of the foregoing.

101. "***Petition Date***" means September 30, 2016.

102. "***Plan***" means this Chapter 11 Plan of Reorganization for Kaiser Gypsum Company, Inc. and its Affiliate Proposed By Truck Insurance Exchange (including all exhibits annexed hereto and the Plan Supplement), as it may be altered, amended, or modified from time to time in accordance with the provisions hereof and of the Bankruptcy Code and the Bankruptcy Rules.

103. "***Plan Documents***" means the Plan, the Disclosure Statement and Plan Supplement, together with all exhibits, and either in their present form or as each may be amended, supplemented or otherwise modified from time to time.

104. "***Plan Proponent***" means Truck, in its capacity as a proponent of the Plan.

105. "***Plan Supplement***" means the collection of Plan-related documents to be Filed with the Court, which may consist of one or multiple Filings.

106. "***Pre-Petition Judgment Asbestos Claim***" means an Asbestos Claim against a Debtor evidenced by a written judgment entered before the Petition Date that was not yet subject to a Final Order as of the Confirmation Date.

107. "***Pre-Petition Judgment Asbestos Claimant***" means the Holder of a Pre-Petition Judgment Asbestos Claim.

108. "***Priority Claim***" means a Claim, other than an Administrative Expense Claim, entitled to priority in right of payment under section 502(i) or 507(a) of the Bankruptcy Code.

109. "***Priority Tax Claim***" means a Priority Claim of a kind specified in section 507(a)(8) of the Bankruptcy Code.

110. "***Professional***" means any Person employed or to be compensated pursuant to sections 327, 328, 330, 331, 503(b), or 1103 of the Bankruptcy Code.

111. "***Qualified Settlement Fund***" or "***QSF***" means a qualified settlement fund as defined by Treasury Regulation Section 1.468B-1 *et seq*.

112. "***Related***" means, with respect to an Asbestos Claim, all Asbestos Claims based on a particular injured party's injury (such as Claims by the injured party, his or her estate, and family members with loss of consortium, wrongful death, or similar related Claims).

113. "***Released Claims***" mean (a) any and all claims that are or would have been property of any Debtor's Estate against any Released Party,

including, without limitation, pursuant to Chapter 5 of the Bankruptcy Code, any one or more of 11 U.S.C. §§ 502, 510, 541, 542, 543, 544, 545, 547, 548, 549, 550, 551, or 553; (b) any and all claims that are or would have been property of any Debtor's Estate against any Released Party arising under any non-bankruptcy law relating to allegedly preferential or fraudulent transfers or relating to any allegedly unlawful payments or transfers or distributions of property to such Released Party; (c) any and all claims that are or would have been property of any Debtor's Estate, regardless of the legal theory upon which such claim may be predicated, by which any Released Party is asserted to be or have been derivatively liable for any Claim, including, without limitation, any Asbestos Claim including, without limitation, any claim arising under a theory that (i) any Released Party is a successor to any Debtor, (ii) any Debtor's separate corporate existence should be disregarded, or (iii) any Released Party is an alter ego of any Debtor, and (d) any and all claims in (a)-(c) above where, in the absence of the Debtors' Chapter 11 Cases, such claims might, under substantive law of any jurisdiction, have been treated as claims maintainable not only by the Debtors or the Debtors' Estates themselves, but by Creditors of or Claimants against the Debtors. For the avoidance of doubt, the Debtors do not intend or purport to release or bar any claim against any Released Party that is (a) based upon such Released Party's independent liability to any Person and (b) would not be an Asbestos Claim in these Chapter 11 Cases if it were to be asserted directly against one or more Debtors; *provided*, *however*, that Released Claims do not include claims and obligations to the extent preserved under the Plan, the CRP or the CMO.

114. "***Released Party***" means any of the following:

(a) the Reorganized Debtors;

(b) if Lehigh Hanson supports the Plan and makes the Lehigh Hanson Contribution, Lehigh Hanson and its current and former Affiliates (other than the Reorganized Debtors and their subsidiaries);

(c) the Settlement Facility;

(d) the FCR;

(e) Truck;

(f) the Participating Non-Truck Asbestos Insurers;

(g) any Person that, pursuant to the Plan or otherwise on or after the Effective Date, becomes a direct or indirect transferee of, or successor to, any of the Debtors, the Reorganized Debtors, the Affiliates of the Debtors (if Lehigh Hanson supports the Plan and makes the Lehigh Hanson Contribution) or Reorganized Debtors, or any of their respective assets, to the extent that any liability on account of Asbestos Claims is asserted to exist as a result of its becoming such a transferee or successor;

(h) if Lehigh Hanson supports the Plan and makes the Lehigh Hanson Contribution, any Person that is alleged to be directly or indirectly liable for an Asbestos Claim by reason of such Person's (i) ownership of a financial interest in a Debtor, a past or present Affiliate of a Debtor, or a predecessor in interest of a Debtor, or (ii) involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of a Debtor or a related party within the meaning of section 524(g)(4)(A)(iii) of the Bankruptcy Code;

(i) if Lehigh Hanson supports the Plan and makes the Lehigh Hanson Contribution, any Person that is alleged to be directly or indirectly liable for an Asbestos Claim by reason of such Person's involvement in the management of a Debtor or a predecessor in interest of a Debtor, or service as an officer, director or employee of a Debtor or a related party within the meaning of section 524(g)(4)(A)(iii) of the Bankruptcy Code;

(j) any Person that makes a loan to any of the Reorganized Debtors, their Affiliates, the Asbestos Trust, or to a successor to, or transferee of any of the respective assets of, the Debtors, the Reorganized Debtors, their Affiliates, or the Asbestos Trust, to the extent that any liability is asserted to exist as a result of its becoming such a lender or to the extent that any Encumbrance of assets made in connection with such a loan is sought to be invalidated, upset, or impaired, in whole or in part, as a result of its being such a lender;

(k) each future Affiliate of each of the Reorganized Debtors (but, in any case, only to the extent that any liability is asserted to exist as a result of its being or becoming such an Affiliate); and

(*l*) the Representatives of each of the foregoing, respectively, but only to the extent that any liability is asserted to exist as a result of the Representative being, or acting in the capacity as, a Representative of one or more of the aforementioned Persons.

115. "***Reorganized Debtors***" means Reorganized Kaiser and Reorganized HPCI.

116. "***Reorganized HPCI***" means HPCI from and after the Effective Date.

117. "***Reorganized Kaiser***" means Kaiser from and after the Effective Date.

118. "***Representatives***" means, (a) with respect to any Entity, the past, present, or future managers, directors, members, trustees, officers, employees, accountants (including independent registered public accountants), advisors, attorneys, consultants, or other agents, representatives, or professionals of that Entity, but only in their capacities as such, and (b) the firms or other Entities, other than the Debtors and their Non-Debtor Affiliates, with whom the Representatives identified in part (a) are employed or associated, but only in such firms' or Entities' respective capacities as such.

119. "***Retained Causes of Action***" means the actual and potential Causes of Action that the Reorganized Debtors shall retain, on and after the Effective Date, on behalf of the Debtors, to commence and pursue, as appropriate, in any court or other tribunal including, without limitation, in an adversary proceeding filed in one or more of the Chapter 11 Cases, whether such causes of action accrued before or after the Petition Date, including, without limitation, any actions that may be listed in the Plan Supplement.

120. "***Schedules***" means the Schedules of Assets and Liabilities and Statement of Financial Affairs Filed by the Debtors with the clerk of the Bankruptcy Court pursuant to Bankruptcy Rule 1007, as they have been or may be amended or supplemented from time to time in accordance with Bankruptcy Rule 1009.

121. "***Secured Claim***" means a Claim that is secured (a) by a Lien that is valid, perfected, and enforceable under the Bankruptcy Code or applicable

non-bankruptcy law or by reason of a Final Order, or (b) as a result of rights of setoff under section 553 of the Bankruptcy Code, but in any event only to the extent of the value, determined in accordance with section 506(a) of the Bankruptcy Code, of the Holder's interest in the Estate's interest in such property (unless an election has been made under section 1111(b) of the Bankruptcy Code on or prior to the Confirmation Date) or to the extent of the amount subject to such setoff, as applicable.

122. "***Settled Asbestos Claim***" means an Asbestos Claim that, as of the Petition Date, was subject to a settlement agreement enforceable under applicable law between a Debtor and the Holder of such Asbestos Claim, or for which a judgment has become a Final Order.

123. "***Settlement Facility***" means the trust to be established in accordance with this Plan and the Settlement Facility Agreement that will, among other things, process, review, and pay Allowed Asbestos Claims.

124. "***Settlement Facility Agreement***" means the agreement, a copy of which will be included with the Plan Supplement, pursuant to which the Settlement Facility shall be established and governed, and process and pay Allowed Asbestos Claims and certain Litigation Expenses related to Litigation Option Claims.

125. "***Settlement Facility Contributions***" means (a) the Truck Contribution; (b) if Lehigh Hanson supports the Plan and makes the Lehigh Hanson Contribution, the Lehigh Hanson Contribution; and (c) for any Participating Non-Truck Asbestos Insurer that supports the Plan and makes the Non-Truck

Asbestos Insurer Contribution, the Non-Truck Asbestos Insurer Contribution made by such Participating Non-Truck Asbestos Insurer.

126. "***Settlement Facility Expenses***" means the administrative and other expenses incurred by the Settlement Facility in performing its obligations under this Plan and the Settlement Facility Agreement.

127. "***Settlement Facility Limit***" means:

(a) For any Litigation Option Claim settled by the Settlement Facility before judgment (if the Settlement Facility has not tendered defense against such Asbestos Claim to the Non-Truck Asbestos Insurers, or such defense has been tendered but the Non-Truck Asbestos Insurers have not accepted such defense), the greater of (x) Basic Review CRP Amount or (y) Comprehensive Review CRP Amount.

(b) For any Litigation Option Claim settled by the Non-Truck Asbestos Insurers after the Settlement Facility has tendered defense against such Asbestos Claim to the Non-Truck Asbestos Insurers and such defense has been accepted, the lesser of (x) the amount of any settlement with the Litigation Option Claimant and (y) the Lowest Truck Policy Limit.

(c) For any Litigation Option Claim settled by the Settlement Facility after judgment, the amount of the judgment, including any interest and costs awarded.

128. "***Settlement Option***" means the option of each Holder of a Current Asbestos Claim, Future Asbestos Claim, and Pre-Petition Judgment Asbestos Claim to elect to have his or her Claim evaluated by the Settlement Facility under the processes and procedures established by the CRP.

129. "***Settlement Option Claim***" means a Current Asbestos Claim, Future Asbestos Claim, or Pre-Petition Judgment Asbestos Claim whose Holder elects the Settlement Option, and which will therefore be processed and (if Allowed) paid by the Settlement Facility.

130. "***Settlement Option Claimant***" means the Holder of a Settlement Option Claim.

131. "***Settlement Option Release***" means the release that must be executed by a Settlement Option Claimant prior to receiving a payment from the Settlement Facility. The Settlement Option Release shall be a full release of the Claimant's Asbestos Claim, as well as a full release from any family members or similar parties for Claims derivative of the Asbestos Claim. Such release shall comply with applicable state or other law and shall acknowledge that the settlement payment extinguishes the Asbestos Claim and all derivative claims against the Reorganized Debtors and any Released Party, and shall relinquish such Claimant's and all Related Claimants' right to pursue a remedy from the Reorganized Debtors and any Released Party on account of such Asbestos Claim and any derivative claims. The Settlement Option Release shall be in a form that protects the Reorganized Debtors and any Released Party from any contribution or other third-party claims by other asbestos defendants under applicable law. Settlement Option Claimants whose Claims are based on non-malignant conditions shall not, however, be required to release Asbestos Claims based on future asbestos-related cancer. The protection afforded by the Settlement Option Release is supplemental to, and does not derogate from or imply any deficiency in, the protection

provided by the Discharge Injunction and the Contribution Injunction.

132. "***Truck***" means Truck Insurance Exchange.

133. "***Truck Asbestos Insurance Polices***" means all Asbestos Insurance Policies issued by Truck to any of the Debtors.

134. "***Truck Contribution***" means the contribution in Cash by Truck to the Settlement Facility of the following amounts on the dates set forth: (a) on the Effective Date, the sum of (i) Cash in the amount of the Truck Litigation Fund Contribution; (ii) Cash in the amount of [$_____] less (iii) the amount of any other Settlement Facility Contribution to be made on the Effective Date; and (b) on each of the next nineteen anniversaries of the Effective Date, the sum of (i) Cash in the amount set forth in the Truck Contribution schedule filed with the Plan Supplement, less (ii) the amount of any other Settlement Facility Contribution to be made on the Effective Date, (iii) less the amount of any recovery received by the Reorganized Debtors or the Settlement Facility during the preceding year from any Non-Truck Asbestos Insurer that is not a Participating Non-Truck Asbestos Insurer.

135. "***Truck Litigation Fund Contribution***" means Cash in the amount [$_____], which Cash, when paid to the Settlement Facility on the Effective Date, shall be segregated by the Settlement Fund and used to pay all Litigation Expenses with respect to Litigation Option Claims defended by the Settlement Facility.

136. "***Truck Third Party Release***" means the release granted by Holders Claims pursuant to Section 7.5 of the Plan.

137. "***Trustee***" means the trustee or trustees of the Settlement Facility; the initial Trustee shall be designated in the Plan Supplement and approved by the Confirmation Order, and successors shall be designated and appointed as provided in the Settlement Facility Agreement.

138. "***Unimpaired***" means, with respect to a Class of Claims or Interests, a Class of Claims or Interests that is unimpaired within the meaning of section 1124 of the Bankruptcy Code.

139. "***Unknown Causes of Action***" means any Retained Causes of Action of which the Debtors are unaware at the time any schedule of Retained Causes of Action is filed as an exhibit in the Plan Supplement, and are therefore not listed on that exhibit.

140. "***Unsecured Creditors' Committee***" means the Official Committee of Unsecured Creditors appointed by the Court, pursuant to the Office of the United States Bankruptcy Administrator on October 14, 2016 in the Chapter 11 Cases in accordance with section 1102 of the Bankruptcy Code, as the composition of such Committee may be altered from time to time.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: KAISER GYPSUM COMPANY, INC., Debtor,	Case No. 16-31602 Chapter 11 Charlotte, North Carolina Thursday, May 10, 2018 9:31 a.m.
KAISER GYPSUM COMPANY, INC., ET AL., Plaintiffs, v. THOSE PARTIES LISTED ON APPENDIX A TO COMPLAINT AND JOHN AND JANE DOES 1-1000, Defendants.	AP 16-03313

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. CRAIG WHITLEY,
UNITED STATES BANKRUPTCY JUDGE

* * *

[40] addressed those.

This idea that we've abandoned a global resolution and now that, now Truck has picked up the mantle that we set aside to pursue a global resolution, that's, that's just wrong. We have a global resolution. I mean—and Truck, obviously, can't say it's picked up the mantle of pursuing a global resolution when their concept of a global resolution is to force a liquidation—I'm sorry—to force a litigation down on all the estate parties.

So that's not a resolution. That's just litigation that no estate party is interested in entertaining.

(Pause)

MR. GORDON: I'm going to try to accelerate this, Your Honor.

THE COURT: Take a moment.

MR. GORDON: And then, Your Honor, again, I, I know that I pointed this out before, but just to reiterate 'cause it's so important. It's not the debtors that have been inconsistent here. It's Truck. And I'm not accusatory. I don't intend to be accusatory about that 'cause they have the right to change their mind, but, you know, the case can't be run that way where they're interested in a resolution, then they're not interested in a resolution and they can't do a resolution, and then they're terribly interested in a resolution so then we're supposed to drop everything, walk away **[41]** from an agreement, and allow them to force a litigation down the throats of all the parties. We obviously can't do that. Truck has no right to do that and that shouldn't be sanctioned by the Court.

But again, Your Honor, the good news is that Truck's not foreclosed from negotiating a policy

buyback at any time. Indeed, the plan agreement contemplates that they can do that.

And one other point I haven't made—and—and I—and I've been reluctant to, to discuss it and we didn't raise it in our pleadings—is this, you know, there's a lot said about fraud and, you know, there's an effort to use statements that we've made as counsel for a different, you know, for the Bestwall Company on fraud and the suggestion that we're being inconsistent. And I'm reluctant to address this because it's, it's sort of inviting us, I think, to the incendiary in a way that's not helpful, given that we have an agreement, we reached an agreement.

But I, but I will say this, that do the debtors think they, they were fairly treated in the tort system? No. Do the debtors—are the debtors suspicious that maybe they were the subject of misconduct in the tort system? Yes. But the—the—but the important point is, Your Honor, that we've negotiated an agreement. All our views were taken into account in that agreement and we're satisfied with the agreement. We think it's a good agreement and it's an agreement, in our view, **[42]** that paves the way for us to emerge from bankruptcy.

So, you know, a lot can be said about fraud, a lot, lot of references can be made to Garlock and the like, but the point is there's nothing inconsistent in that regard. We didn't think we were treated fairly, either. It is what it is. We've settled and this agreement takes the debtors out of the tort system. And that's the only—the—the only point that matters from an estate perspective.

I guess two other points I'll touch on briefly, Your Honor. I'm sorry. This, this is going on longer than I thought.

We did receive—we—we did receive informal comments from the Unsecured Creditors' Committee. So I wanted Your Honor to know about that. And I—I—you know, I, I think the Unsecured Creditors' Committee handled this in a very professional way and I, I appreciate their willing, willingness to work with us. Their concern was they didn't want this lifting of the stay to occur in a way that could potentially impact the insurance coverage that's available to pay environmental claims. That was a fair concern. We had a discussion with them. We got our insurance experts on the phone, ours, the Committee and FCR's expert, the Unsecured Creditors' Committee's expert. They all talked their insurance language that we barely—

THE COURT: Uh-huh (indicating an affirmative

* * *

[55] Your Honor, would impose upon the claimants, essentially, an artificial impairment in terms of making them go through a claims resolution procedure, etc., and then would still potentially involve all of those cases being litigated here and in the Western District of North Carolina, which would be an incredible burden on those courts, Your Honor, and not one that any case law would support.

It is also clear, Your Honor, that when you look at judicial economy you look at, among other things, whether it's appropriate to have the cases proceed here. And here, they can't. Numerous cases that are in our briefs make clear that the bankruptcy court cannot adjudicate personal injury claims and, and

liquidation or estimation of those claims are not core proceedings.

So cases such as Nifong and Horn, for example, make clear that under those circumstances that's a strong reason to think judicial economy is not served by maintenance of the stay.

Truck talks in their brief—and I don't want to talk about this too much, Your Honor, because I, frankly, view it as a complete diversion and an inappropriate sidebar—but they talk about how they're not happy with the tort system. They think the tort system is, contains fraudulent claims. And, Your Honor, with respect to that, besides the fact that such an argument has never been successful in the state context, or **[56]** really anywhere, Your Honor is a bankruptcy court judge with a fairly well-defined set of roles and as we've suggested in our briefs, we do not believe it would be appropriate for this bankruptcy court to pass judgment on, essentially, every other federal and state court in the country and say they're not adequately policing their dockets and that, therefore, this court's going to fix that perceived problem. We don't think this Court has the jurisdiction to do that. We have cited some legal precedent in our papers, Your Honor, for example, the United, the Fifth Circuit said 105 doesn't give a bankruptcy court, you know, the power to become a "roving commission to do equity."

Obviously, another relevant issue, Your Honor, is that state law governs the, the claims that we're talking about and not federal bankruptcy law. But to make a long story short, the legal premise that they would have Your Honor adopt is that if you decide unilaterally that the entirety of the federal and state court tort system has fraud in it, that you're entitled

to fix that problem. We don't think that's a valid legal principle.

And we also would note, Your Honor, that when Garlock filed their plan, which had some similarities to the plan that you've been presented with here, between the time of the filing of that plan and the ultimate confirmation order that was entered 5-1/2 years passed of heavy litigation. That's the **[57]** invitation that Truck is making here. Let's go down a heavily litigated path where no matter what happens will take many years, a whole lot of money, and given the debtors' obvious reluctance to fund (indiscernible) these cases, it's not even clear if it could happen, anyway. The cases might just be dismissed, or something. Who knows? I don't mean to speculate about what would happen. All I'm saying, Your Honor, is that the path that they would have you follow is a path of extreme antagonistic litigation that would take many years and, at the end of the day, wouldn't accomplish anything, we believe, because it's legally inappropriate. There's no legal basis, as Mr. Gordon said, to, to accept the premise that's been presented to you by Truck.

I will also note, Your Honor, that, ironically, some of the things Truck says about judicial economy actually support doing what the plan proponents have agreed to do. Because they say that judicial economy is served by forcing a buyback of, of their policies and not letting claims go into the tort system, but under their own proposal, Your Honor, claims still go back into the tort system. They're just forced to jump through a bunch of hoops first.

So they're not actually solving the problem that they complain about; whereas, under the consensual 524(g) plan proposed by the debtors, Lehigh Hanson,

the ACC, and the FCR the trust will be able to settle with insurers so that the same **[58]** result that Truck seeks in, in, you know, its proposal could occur but without the years and years of litigation and, and delay in the bankruptcy court. And that's the definition of judicial economy, Your Honor. And, in fact, for example, the McCullough case, 495 B.R. 692, 698, said, "[P]roviding relief from the automatic stay will promote judicial efficiency, as well as minimize interference with the bankruptcy case because the relief minimizes the litigation required in bankruptcy court." That's exactly what the proposed term sheet does, Your Honor. It minimizes the litigation required in bankruptcy court. The alternative would maximize that litigation. Again, judicial efficiency goes with respect to the term sheet, Your Honor, and the proposal you've been presented.

I'll also note, Your Honor, that it's a little bit odd to have Truck talk about this as a term of leverage. We're not seeking right now, Your Honor, to settle with Truck. We're not seeking leverage in those discussions. In fact, one of the reasons why Truck's paper was so troubling, Your Honor, is that we understand that Truck doesn't want to pay out the claims they contractually agreed to pay out. It has what we'd term, Your Honor, colloquially at least, as a payment holiday and that incentivizes it to disrupt the progress of this case and delay as long as possible the ultimate confirmation to extend that payment holiday; whereas, lifting the automatic stay, as all parties at interest want you to do, Your Honor, all the **[59]** estate parties, removes that perverse incentive and we think that would be a benefit to the case.

Your Honor, if it comes up, I'll be prepared to rebut, but, again, there's really no argument about the

adequacy of insurance. We have it under oath from Truck, itself

And now, of course, we come to the standing point, Your Honor. As I noted at the beginning of my remarks, many cases have lifted the stay to pursue insurance. No case that's been cited to Your Honor has ever allowed an insurance company to interfere with that process and numerous of those cases have actually expressly addressed an insurance company's standing to do so and they have uniformly said, Your Honor, you can't do it.

In the Grace case we have the following quote, "Where a plaintiff seeks relief from the stay to pursue a claim in another forum, the interests or desires of the insurance company which provides coverage of the claims are not considered in determining whether the stay should be lifted." And that makes perfect sense, Your Honor, because the purpose of the stay is to protect the debtors and to protect the recoveries of the creditors and to maximize the estate. And that's exactly what lifting the stay here does and what Truck is positing it has, doesn't have that effect at all. They are seeking to reduce the assets of the estate, contrary to both the purposes of bankruptcy and the purposes of the bankruptcy * * *

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE KAISER GYPSUM COMPANY, INC., ET AL., Debtors.	Case No. 16-31602 Chapter 11 Charlotte, North Carolina Wednesday, September 4, 2019 9:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. CRAIG WHITLEY,
UNITED STATES BANKRUPTCY JUDGE

* * *

[25] talk to the clerk to identify that by number so that we'll have a, a record that's clear. That's the first part.

The second part of this is an apology. I'm sorry we had to continue from August, although I needed the time, frankly. We continued these hearings once to—for—because the arguments and the research was, took more time than I had anticipated. The second time we had to continue because of the building. Some of you hear the buzzing in the background. We've been dancing around because the construction crew needed to tie into our building with the annex and that meant cutting into the, to the framework up in the ceiling and we had been warned that it would be extremely loud and up on the second floor, potentially dangerous.

So we moved. They weren't on time. We could have done it then and we've been dancing around with this. So far, the noise hasn't been a problem. I suspect my, in the middle of these remarks they'll start cutting into the concrete. Just the way it works.

But in any event, my apologies for that. We didn't want to hold you up.

And that brings me to the third part of this, which is how to address these rulings. I had hoped that I would be in a position to have written, detailed opinions ready for you at this point in time. However, the number of the objections and the level of detail involved in those, to say nothing among the **[26]** rest of my caseload, has made that impossible. We're about 70 percent on that.

So I am proposing, instead, to announce detailed, verbal findings and conclusions and then doing summary orders so as not to delay you any further. We've

been talking about these two motions for, in one form or another, for the better part of a year. So I don't want to delay it any longer than possible.

Let me just say a few prefatory remarks here before I get to what the rulings are going to be. I'm going to tell you what I think overall and then I'm going to take them and talk first about the joint plan and what I think about the details of that and the second part, the Truck plan. And no magic there, but first I'd like to say a few things about the, the standards and the like that we are looking at.

There are many, many objections. There were adequacy of information disclosure statement objections and, in keeping with law, I have also invited patently confirmable objections. We got a lot more of those than I would have guessed, but they're serious questions and, and we all know how expensive it is to go to a confirmation process. So as many of those that could be treated in advance might save everyone some money. You have extensively briefed this and in a lot, in large measure, the standards aren't in question, at least as to what is adequate information and what is patently unconfirmable. I **[26]** won't try to get into the details of those.

But, in general, "patently unconfirmable" means that a, the defects in a plan can't be overcome by voting and they concern matters in which all material facts are undisputed or have been fully developed at the disclosure statement hearing. That comes from the American Capital Equipment case out of the Third Circuit, 688 F.3d 145.

The bottom line is that as these are material items I've opted—the Court has discretion to hear those and to rule on them at the disclosure statement level and

I'm opting for a go-slow method there. If it is patently and obviously unconfirmable, then I'm going to rule now. If it's questionable or if it could hinge on facts that have yet to be developed or evidence that I've yet to hear, I'm going the other way. I approach this with a little bit of modesty. I've been doing chapter 11 work for quite a long time, but this is only my second asbestos case, whereas all of you are experts.

So the bottom line is that unless it is clearly and patently unconfirmable, I'm holding off to a confirmation hearing on some of these issues and even if I decline to rule on them today, I'll tell you a little bit about what I, I'm thinking currently for your benefit and then you can argue them all at, at a confirmation hearing.

Just nailing down what all the objections are on the two plans has been a bit of a challenge since we've been **[27]** through multiple iterations of the plans and multiple iterations of objections, amendments, and further briefing. I've tried to get all the ones that are still live and in some instances, that's been a little bit of a challenge because there's been a little bit of changing, getting an objection in, changing the terms of your plan, and then accusing the other side of misleading the Court by making their objection. That is not something I would encourage going forward. I'm not calling names at this point in time, but the bottom line is that we're going to read everything you've got, we're going to cite check your cases, and it only makes you look bad if you, if you're basically accusing your opponent of things that they didn't do based on, on an amended plan that you didn't have at the time they objected. So enough about that.

Also, generally, I want to say that we've got two competing plans. Both sides have extensively made

comparisons between those plans. Mine's better because yours is worse. Yours is unfair. Mine is, is, you know, on the side of angels. That's all fair game if both plans are out for solicitation to the voting parties, but we're at the disclosure statement stage, for the most part. And that means I need to evaluate the sufficiency of a plan on a standalone, not a comparative basis, but it also means that if one plan goes on to solicitation and a confirmation hearing and the other doesn't, generally, in a disclosure statement you can only put in **[29]** information that describes plans that have been approved. If you've got a plan that has not been approved, comparing the plan that is out for voting to one that, that has not been approved isn't, isn't appropriate. And there are cases cited in the briefs. Apex Oil was one of them. Century Glove v. American, First American Bank from the Third Circuit was another. There were a number of cites. That's pretty much black letter law.

But—so the bottom line is I'm looking individually today as to the plans.

The next general observation was we had a number of standing objections, both as to disclosure statements and both as to the, to the proposed plans. I'm not telling anyone anything new in saying that standing is always complex to decide, particularly in bankruptcy where we have, in addition to the constitutional standing, we also have 1109(b) and definitions of parties in interest and how that breaks and even then, standing is not dispensed in bulk. You may have standing as a party in interest to argue one thing, one issue in a case, and not another. No one would say that an unsecured creditor could argue for a lack of adequate protection on behalf of a secured creditor. You got to assert your own rights.

When it comes to standing of insurers to participate in an asbestos bankruptcy case, things get even more rarified. Generally speaking, insurers have standing to object to **[30]** confirmation, at least to the extent of arguing that the plan is not insurance neutral in that it impairs or affects their rights adversely, but generally, they are not considered to have standing in most other issues and I don't want to put too fine a point of it. The Combustion Engineering case out of the Third Circuit, 391 F.3d 190, talks about that as does PWS Holdings, 228 F.3d 248.

The bottom line is that it gets a little bit complicated when you're talking about an insurer in bankruptcy, particularly as to objections to disclosure statements. The disclosure statements are supposed to inform voting and you generally can only inform voting within the class within which you exist. Insurers are not, in and of themselves, entitled to object to disclosures. And in our case, the matter's made even more rarified by the fact that we've got a divergence in some instances between the legal status that affords standing to participate and the parties' actual primary interest in these two plans. And without calling any names—it's not something to be offended by—Truck's nominally a creditor for deductibles, but most of its objections to the joint plan and the theme of its own plan aren't really focused on those sums. They're primarily talking about creating a trust, directing all the asbestos claims to that trust, mandating some disclosures, and presiding for a way to treat those claims. Obviously, its interest is much more in the sense of an insurer in this **[31]** instance instead of one that is a general unsecured creditor.

Similarly, the U.S. is an environmental creditor, but the objections it has raised to the joint plan don't

really focus on the environmental claims, but again on the asbestos trust and how that is to be set up, what disclosures are made, the return of the claims prospectively to the tort system, and fraudulent claims against the trust. It's interesting to note that a lot of those arguments are the same ones I've been reading that the U.S. Trustee makes in other Districts. However, this is a BA state. The U.S. Trustee doesn't exist in this particular state and the Bankruptcy Administrator has not made those objections.

So in that sense, I see DOJ as primarily a unsecured creditor and not in a position to be arguing matters related to asbestos claims. I don't think the, the interests are close enough there to, to be constitutionally protected interests. And in any event, some of what DOJ has argued in its Statement of Intent would probably be better addressed to Congress' proposals for, for legislative enactments as opposed to arguing existing law.

So basically, you can only object to disclosures relevant to the class in which you are, but the Court, obviously, can raise these objections on its own and I'm going to do so and talk about them. But I want to tell you, basically, for today's purposes I'm take—and the last one I **[32]** forgot was Truck as a plan proponent obviously has standing to advocate for its plan and its disclosure statement.

But for today's purposes, I'm taking the position that, generally speaking, unless it's a general creditor issue the insurers and the U.S. don't really have a stake in the disclosures to the asbestos class. But because we are also doing this on patently unconfirmable arguments, for today's purposes only I'm going to assume standing by Truck and the excess insurers. As to the U.S., I assume standing as to matters that

pertain to an unsecured creditor. At any subsequent confirmation hearing, we're going to revisit all of that and I'll let you argue some more with a finer point on it as to where there is standing, but that's the standard I'm working under today. Okay.

If we were in a different circuit at this point in time, I might at this point just make very summary remarks. I hate to disappoint, but as presently constituted I don't think either plan is ready to move on into solicitation. The joint plan needs some work. We've got a couple of key disclosure statement infirmities that I'll address in a few minutes and we've got a couple of concerns that may be serious concerns at confirmation, but which do not show up to a, to a, the level of patently unconfirmable. They may be fact driven. They may be matters that I'm concerned about and it may be discretionary for the Court, but they're not as a matter of law matters we **[33]** can decide today. In short, and it may be possible with additional disclosures that the proponents could get their disclosure statement approved and then we would go on to confirmation as the—the confirmation questions would, would be something that we would have to deal with on evidence and after further argument.

However, the Truck plan has similar, several disclosure statement deficiencies, which are also fixable, and, generally, which Truck has agreed to fix, but I hadn't seen yet. My problem is I think the fundamental problem here is the Truck plan is patently unconfirmable for several reasons argued by its opponents. In short, not proposed in good faith, doesn't meet the 524(g) standards, but affords substantially the same relief. I don't think Truck qualifies for a Behrmann third party release and injunction and even if it did, I

don't think you can use that under Section 105 in derogation of Section 524. I don't believe the plan is feasible, in part, on a practical basis—I'll mention that in a moment—and it doesn't permit impaired claims to vote in violation of 1126 and even if I use my discretion, the standard of voting wouldn't be the 524 standard. No supermajority, it'd be the two-thirds majority in number standard that applies to general cases.

Because of all that, I don't see how this particular plan could be remedied. I'm not foreclosing that, but the bottom line of today's ruling about the Truck plan is simply **[34]** that as long as you're trying to get 524(g) relief, meaning a third-party injunction and the ability to route all these claims to a trust, as to asbestos claims I think you got to comply with 524. So bottom line is this plan may need to be rewritten entirely or reconceived.

So that's where we are. I don't think I need to read to you the general precepts about adequacy of disclosure statement and who has the burden of proof. That's on the proponents. I think, generally speaking, it is—oh, excuse me. Let me, let me stop there before I get into those details. Let me say this.

I might at this point, given these rulings, ten years ago I might have stopped there and entered two summary orders and told you what the disclosure statement issues were that, that I was having difficulty approving and sent you back to the drawing board and we'd all be out of here. In recent years, the Fourth Circuit has joined those courts, however, that say at least as to a debtor's plan—and in a chapter 13 context, admittedly—that denial of confirmation may be appealable. The circuits are kind of split on that, but in the Gorman case, which is 721 F.3d 241, the suggestion is made—and it's not entirely clear of when

something is final and when it's not—but the door is open to treating a denial of, of a plan as being a final decision.

I don't know. I would assume that, that Truck would

* * *

[64] third-party insurer has rights by way of subrogation and that require adequate protection. And Manville, of course, preceded 524(g), which doesn't speak about it.

I thought a, a better case to what we have was Plant Insulation out of the Ninth Circuit, 734 F.3d 900. That question was answered in, in the negative where the Ninth Circuit held that neither 524(g) nor other, any Code provision required adequate protection to a reinsurer against a potential loss of contribution and equitable claims against the primary insurer. But even if it did, our joint plan has a mechanism to preserve that by the judgment reduction provision and substantially similar language to that has been held appropriate in Plant Insulation. So I think that is adequate for present purposes.

There's an argument also made about anti-fraud provisions and the necessity for those. And this one is not patently unconfirmable, but is of concern to me, given where we are sitting and what's transpired in Garlock, which I had the second half of that case where, where a variety of the trust procedures and mechanisms and standards and disclosure requirements ended up being agreed to by the parties. The argument is that there's a lack of oversight over the operations of the trust and notes that both Maremont refused to confirm a plan that failed to contain these anti-fraud provisions and that Garlock, well, it was

cited as having **[65]** refused, but I think what happened was it was agreed to.

But in any event, the DOJ thinks there's a lack of claim transparency, that the trust isn't allowed to disclose whether someone's filed a, a claim, the allegations for the claim, whether the claim was paid. It adopts some very broad confidentiality protections and that the debtors hadn't justified this.

Similarly, they, DOJ and Truck, like the Garlock claims mechanisms and the mandatory disclosures by claimants of exposures, releases, authorizing other trusts to disclose information about the claimant, and requiring those who submit claims to provide information about other claims they filed. The trust distribution procedures that are proposed here have no such obligation about informing about other exposures. There's also an argument about audit procedures and requiring the debtors to adopt an audit procedure and implement audits. This appears to be discretionary.

Debtor doesn't think these are necessary because most of the claims are going to be paid out of insurance and only a small part will be funded out of the trust. That sounds suspiciously, to me, like a little fraud's okay.

So I don't think, as I said, a federal court should approve a mechanism and a process that could lead to fraud, particularly in an area where the trusts have been subject to false claims and some have been rendered insolvent because of **[66]** present claims taking the money before future claims are paid. And it may not be a little money, in my opinion. The trust is responsible for deductibles and punitives. We've got 14,000 cases pending at the moment, could be many

more. Average deductible's 500 bucks. Well, that sounds like north of $7 million of deductibles, plus punitives. Could be real money.

This is one that I'm concerned about of whether the plan, ultimately, is confirmable based on this. Again, we are the Garlock court and without mandating what was consented to in that, I want to tell you that I'm concerned about this issue and whether the plan could be confirmed without something more like what Garlock and Maremont implemented. But I'm going to hold that until we get to confirmation.

There were a few other objections that I didn't think merited discussion, but, basically, are reserved.

But that's basically it with the debtors' plan.

We are now up at 11:00 and I propose we take a 15-minute break and then we'll talk about the Truck plan, okay?

All right. Pick up at—well, I'm showing five after—so 20 after. * * *

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re	**Case No. 16-31602**
KAISER GYPSUM COMPANY, INC., et al.,[1]	**Chapter 11**
Debtors.	(Jointly Administered)

TESTIMONIAL DECLARATION OF TRUCK INSURANCE EXCHANGE WITNESS CHARLES E. BATES, PhD

GIBSON, DUNN & CRUTCHER, LLP

Michael A. Rosenthal
Robert B. Krakow
Russell H. Falconer
Matthew G. Bouslog
Dylan S. Cassidy
2001 Ross Avenue,
Suite 2100
Dallas, TX 75201

GRIER WRIGHT MARTINEZ, PA

Michael L. Martinez
(N.C. Bar No. 39885)
521 E. Morehead St.,
Ste 440
Charlotte, NC 28202

Counsel for Truck Insurance Exchange

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Kaiser Gypsum Company, Inc. (0188); and Hanson Permanente Cement, Inc. (7313). The Debtors' address is 300 E. John Carpenter Freeway, Irving, Texas 75062.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re	**Case No. 16-31602**
KAISER GYPSUM COMPANY, INC., et al.[1]	**Chapter 11**
Debtors.	(Jointly Administered)

DECLARATION OF CHARLES E. BATES, PHD

Under 28 U.S.C. § 1746, I, Charles E. Bates, declare as follows:

1. My name is Charles E. Bates. I am over the age of 18 years and competent to make this declaration. The statements in this declaration are within my personal knowledge.

2. I am Chairman of Bates White, LLC, an economic consulting firm with its primary office in Washington, DC. I specialize in the application of statistics and computer modeling to economic and financial issues, and I have extensive experience working on asbestos-related claims and liability valuation issues. I have more than 25 years of experience in a wide variety of litigation and commercial consulting areas.

3. I received my PhD and MA in Economics from the University of Rochester and my BA in Economics

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Kaiser Gypsum Company, Inc. (0188) and Hanson Permanente Cement, Inc. (7313). The Debtors' address is 300 E. John Carpenter Freeway, Irving, TX 75062.

and Mathematics, with high honors, from the University of California, San Diego. I have taught courses in advanced statistical economic analysis and trade theory while on the faculty at Johns Hopkins University, and I have published papers on advanced topics in estimation theory in peer-reviewed journals.

4. Prior to founding Bates White, I was a Vice President at A.T. Kearney. Prior to that, I was the Partner in Charge of the Economic Analysis Group at KPMG.

5. I have been retained as an asbestos and tort claims valuation and estimation methodology expert in numerous bankruptcy and other proceedings, including Bestwall, DBMP, Garlock, SPHC (a.k.a. Bondex), Motors Liquidation (a.k.a. General Motors), National Gypsum Company, United States Gypsum Corporation, Federal Mogul Corp., GAF Corporation, Turner & Newall, Kaiser Aluminum Corp., Congoleum Corporation, ASARCO LLC, Plibrico Company, The Babcock & Wilcox Company, W.R. Grace and Company, Western MacArthur Company, and Owens Corning. A detailed and updated copy of my curriculum vitae is attached to this Declaration as Exhibit 1.

6. I was retained in the Kaiser bankruptcy to advise Truck Insurance Exchange regarding the Debtors' asbestos liabilities. For purposes of this confirmation hearing, I was asked to provide testimony with respect to two issues. The first issue was to evaluate whether the evidence presented in the *Garlock* estimation proceeding demonstrated that the withholding of exposure evidence was a pervasive problem for

asbestos cases against Garlock. As I detail in my report[2] and in testimony here, the evidence presented in *Garlock* strongly supports the findings by the *Garlock* Court of a widespread practice of withholding information regarding asbestos plaintiffs' alleged exposures to asbestos-containing products manufactured or sold by companies that exited the tort system. The second issue was to analyze Kaiser's claims data to assess whether and to what extent Kaiser has faced the same exposure evidence withholding practices uncovered and demonstrated in *Garlock*. As I detail in my Report and in my testimony here, the data strongly support the conclusion that claimants against Kaiser have also engaged in the same withholding of information observed from Garlock claimants. I attach to this Declaration as Exhibit 2 the Report I prepared at the request of Truck's counsel, which provides the details that underlie the opinions summarized in this Declaration.

7. My knowledge of the withholding of exposure information revealed in the *Garlock* estimation proceeding arises from the work I performed for that proceeding. I was retained as an expert for the debtors to estimate Garlock's liability to present and future mesothelioma claimants. The *Garlock* Court found that Garlock's settlement values were inflated by the practice of certain asbestos plaintiffs' lawyers to withhold exposure evidence from Garlock. My Report shows that the pervasive pattern of exposure omissions and the resulting misrepresentations of

---

[2] Expert Report of Charles E. Bates, PhD, *In re Kaiser Gypsum Company, Inc.,* No. 16-31602 (Bankr. W.D.N.C., Feb. 20, 2020), Doc 2072-3 (hereinafter, the Report).

exposure evidence against Garlock found by the *Garlock* Court applies to Kaiser as well.

8. Critical to my opinion that Kaiser has experienced similar exposure information-withholding practices is a detailed understanding of the evidence presented in *Garlock* and the *Garlock* Court's findings based on that evidence. *Garlock,* to my knowledge, was the first case where a court authorized discovery from plaintiff law firms and other sources on cases previously resolved in the tort system to determine whether exposure evidence had been suppressed systematically. The *Garlock* Court allowed full discovery (including permission to depose plaintiff attorneys on their settlement practices) on 15 cases in which Garlock paid large amounts to plaintiffs represented by 5 major law firms.

9. In addition to the 15 cases for which full discovery was allowed, the *Garlock* Court granted discovery of certain asbestos bankruptcy ballot filings and a subpoena to the Delaware Claims Processing Facility ("DCPF") which, at the time, processed trust filings for 10 of the most prominent trusts among the 40 asbestos trusts then in operation. Thus, evidence from thousands of settled cases was presented, not merely from the 15 cases often cited by those who seek to downplay the significance of the *Garlock* Court's findings. Further, the testimony of plaintiffs' lawyers in the 15 full discovery cases made clear that the practice of withholding exposure information from defendants was not limited to those claims.

10. Garlock's experience was not unique; rather, this was how those law firms routinely litigated asbestos cases. Culminating in the Bankruptcy Wave of the late 1990s and early 2000s, virtually all the dozens of high-dose defendants had filed for bankruptcy

reorganization and exited the tort system. Following the Bankruptcy Wave, attorneys for asbestos plaintiffs shifted their focus from the traditional high-dose defendants toward many low-dose defendants of convenience, which included previously peripheral defendants and other new low-dose defendants of convenience that sold asbestos-containing items such as gaskets (Garlock), automotive friction products (Motors Liquidation), and residential construction products (Kaiser, Bondex, and Bestwall). Such defendants had little or no asbestos tort risk prior to the bankruptcy filing of the defendants because their products caused little, if any, asbestos health risks, which was obvious when the plaintiffs explained in their litigations their exposure to high-risk asbestos products. However, post-Bankruptcy Wave, these low-dose defendants saw a significant increase in the number of lawsuits in which they were named, as well as the frequency with which their products and operations were identified as sources of asbestos exposure during tort discovery. Simultaneously, plaintiffs stopped affirmatively asserting their exposures to many of the high-risk asbestos products and activities associated with defendants that had filed for bankruptcy. As a result, the litigation pressure on peripheral (such as Kaiser) and new defendants increased.

11. In the Kaiser bankruptcy proceedings, there have been incorrect statements made to the Court regarding how applicable the *Garlock* Court's findings are to the bulk of Garlock claims and to other asbestos defendants, such as Kaiser. In particular, counsel for the Asbestos Claimants Committee ("ACC") stated at a June 13, 2019 hearing that "the fact that a cherry-picked selection of 15 cases out of 600,000 or more [. . .] really demonstrates the opposite, your Honor. It demonstrates there really isn't a widespread fraud

problem with the benefit of a vast database of collected information . . . .” This statement and others that convey the same message are incorrect.

12. First, the ACC’s counsel’s statement is directly contradicted by the *Garlock* Court’s finding of a “widespread” and “startling pattern of misrepresentation.” Paragraph 66 of the *Garlock* Court’s Order Estimating Aggregate Liability (the Garlock Estimation Order) states:

> These fifteen cases are just a minute portion of the thousands that were resolved by Garlock in the tort system. And they are not purported to be a random or representative sample. But, the fact that *each and curry one of them* contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those cases appears to have been sufficiently widespread to have a significant impact on Garlock’s settlement practices and results. Garlock identified 205 additional cases where the plaintiff’s discovery responses conflicted with one of the Trust claim processing facilities or balloting in bankruptcy cases. Garlock’s corporate parent’s general counsel identified 161 cases during the relevant period where Garlock paid recoveries of $250,000 or more. The limited discovery allowed by the court demonstrated that almost *half* of those cases involved misrepresentation of exposure evidence. It appears certain that more extensive discovery would show more extensive abuse. But that is not necessary because the startling pattern of

misrepresentation that has been shown is sufficiently persuasive.

13. Second, the ACC's counsel misrepresented the basis of the *Garlock* Court's findings, portraying them as being based only on 15 "cherry-picked" cases. Although the *Garlock* Court recognized that the 15 cases with full discovery were not a random sample, it is also dear that the *Garlock* Court recognized that many other cases were analyzed; the Court cites 205 other cases that confirmed the pervasive pattern of the exposure omissions in cases litigated against Garlock.

14. Third, the ACC's counsel's comparison to the 600,000 Garlock historical claims is further misleading and incorrect. The 15 cases cited are unlike the vast majority of the 600,000 cases to which the ACC's counsel refers. The largest group of these 600,000 claims was comprised of more than 540,000 cases alleging non-malignant diseases or for which the disease category was not known to Garlock. These were part of the veritable avalanche of cases filed against Garlock and others starting from the late 1980s through the early 2000s. By the beginning of the 2000s, Garlock was receiving tens of thousands of such non-malignant claims that are now known to be fraudulent. These claims, which were recruited *en masse* for litigation purposes and had no real medical diagnoses, flooded the courts. They also overwhelmed the ability of dozens of companies to defend against the onslaught of lawsuits, which resulted in the Bankruptcy Wave of the late 1990s and early 2000s. Until the mid-2000s, Garlock resolved these cases for an average of $1,400 each. By the time of Garlock's petition date in 2010, it was well known that such claims had no merit; by that date, Garlock resolved such claims

for less than $300 on average, if at all. Such claims were not the subject of inquiry to which the Garlock Estimation Order referred.

15. The second largest group of claims in the 600,000 cases to which the ACC's counsel refers were also not relevant for the Garlock mesothelioma estimation trial. They were comprised of almost 38,000 claims that alleged lung and other cancer diseases, of which all but 18 cases (99.95%) were resolved at an average of less than $4,000 each, because of the competing factors that cause those diseases (such as smoking) and the tenuous scientific relationship between those diseases and asbestos exposure. Such claims were also not the subject of inquiry to which the Garlock Estimation Order referred.

16. This leaves 23,000 resolved Garlock mesothelioma claims of which 7,000 were resolved prior to 2000. These earlier mesothelioma claims were also not the subject of inquiry to which the Garlock Estimation Order referred because during that time claimants were pursuing and willingly espousing exposures to high-dose asbestos products as part of their tort litigation. Of the remaining 16,000 mesothelioma cases, only a few hundred were cases for which Garlock had sought discovery in their tort system litigation. The rest were settled to avoid litigation costs, including the costs of discovery.

17. Thus, there are only a few hundred cases that can provide the basis for any analysis of information-withholding practices by claimants, as only the cases that the claimants litigate through discovery can be cases where any information-withholding practices will be codified in the record created. That is, we can only evaluate the prevalence of claimants' exposure omission practices by using claims for which discovery

was sought and for which files with discovery are available. The more than 200 cases cited by the *Garlock* Court are a large portion of the relevant cases of any such enquiry. As I explained in detail in my Report in this matter, I used all the data from available claim files and discovery in *Garlock* to test the conclusions derived from the 15 cases with the most extensive discovery. I found that both the 15 exemplar cases and the more than 200 additional cases cited by the *Garlock* Court are a good representation of the of claimants' exposure omission practices that Garlock faced while in the tort system.

18. Moreover, testimony given in *Garlock* made clear that the practice of withholding evidence of exposure to the products of reorganizing defendants had become a regular feature of asbestos litigation and was not limited to cases against Garlock. Depositions taken of the lawyers who filed the 15 fully-discovered cases showed that delaying or concealing trust disclosures in the tort system was a routine practice. One lawyer testified that "we file trust claims after the completion of the tort litigation" and added that "[m]y duty to these clients is to maximize their recovery, okay, and the best way for me to maximize their recovery is to proceed against solvent viable non-bankrupt defendants first, and then, if appropriate, to proceed against bankrupt companies." Another testified that "if in my judgment it would benefit the litigation case to delay the filing of a [trust] claim, and it was lawful to delay filing the claim, we would do that." The *Garlock* Court thus found it "was a regular practice by many plaintiffs' firms to delay filing Trust claims for their clients so that the tort system defendants would not have that information."

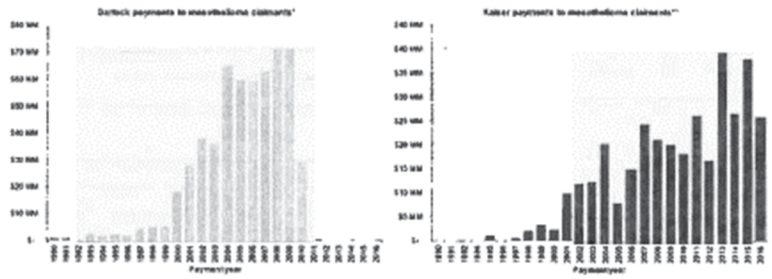
19. Unlike in *Garlock,* there has been no discovery taken with respect to paid cases resolved by Kaiser. Nevertheless, the substantial overlap between claims against Kaiser and claims against Garlock allows me to conclude that Kaiser, too, was impacted by the strategic withholding of exposure information by plaintiffs. This is not surprising. Kaiser, like Garlock, was a manufacturer of products containing low doses of chrysotile asbestos. Both Garlock and Kaiser were peripheral asbestos defendants before the Bankruptcy Wave. Both were defendants of convenience after that Bankruptcy Wave, companies with identifiable brands and easy to accuse.

20. Most important, both Garlock and Kaiser had their costs of defense increase dramatically after their high-dose codefendants exited the tort system via bankruptcy reorganization. The plaintiffs who sued them told a different story regarding their asbestos exposure than did similarly situated plaintiffs of previous years, a story of asbestos exposure that did not include the names of the asbestos products of many of the formerly prominent codefendants. As the discovery in *Garlock* revealed, the asbestos exposure patterns of plaintiffs did not change significantly after the Bankruptcy Wave, just the elaboration of those exposures by the plaintiffs.

21. Kaiser, like Garlock, saw a large increase in the number of claims it faced and in the payments it had to make to plaintiffs once claimants began to target it in the late 1990s. For both defendants, mesothelioma filings increased rapidly in the late 1990s, as prominent asbestos defendants started to file for bankruptcy protection. The pattern of mesothelioma claims filed against Garlock and Kaiser from 2000 to Garlock's petition date in 2010 are substantially the

same. Figure 1 shows the profile of payments to mesothelioma claimants by Garlock (left) and Kaiser (right) starting in 1990. This figure further shows the similarities in experience for Garlock and Kaiser after the Bankruptcy Wave of the early 2000s. As the top-tier asbestos defendants abandoned the tort system, the cost to defend for peripheral defendants increased as those peripheral defendants sought ways to establish the full extent of plaintiffs' asbestos exposure from plaintiffs who no longer willingly espoused their exposure to high-dose asbestos products as plaintiffs had done in prior years. As I testified to the *Garlock* Court, a rapid rise in defense costs resulted in a rapid and dramatic increase in the amounts Garlock paid to resolve claims. Figure 1 shows that the amount Kaiser paid to plaintiffs also rose dramatically after the Bankruptcy Wave, just as it did for Garlock.

Figure 1: Payments to mesothelioma claimants against Garlock and Kaiser by year of payment

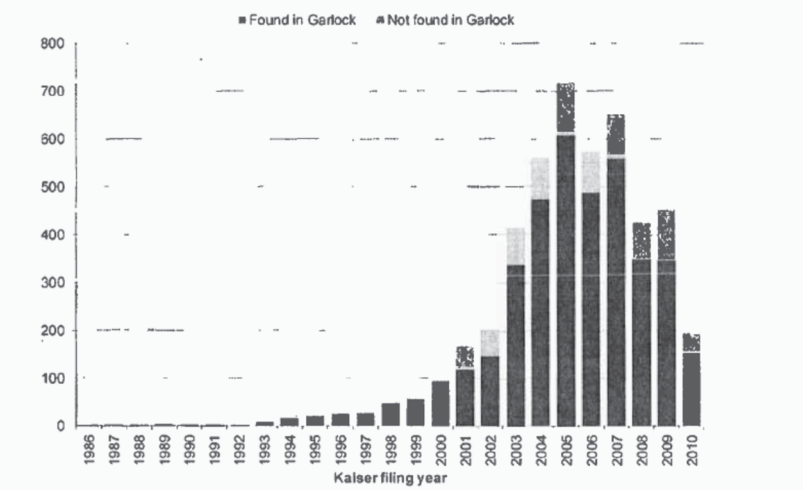


* Includes claims through Garlock's petition date of June 5, 2010
** Includes claims through Kaiser's Petition Date of September 30, 2016
Figure 1 appears in my Report as Figure 4.

22. As part of my analysis, using standard computer algorithms, I joined the publicly available Garlock Analytical Database and Kaiser's claims database to determine the overlap between the two claiming populations. My analysis shows that 80% of the Kaiser mesothelioma claims filed before Garlock's petition date of June 5, 2010 were also found in the

Garlock Analytical Database. As mesothelioma filings rose against Kaiser in the mid-2000s, the overlap in claims with Garlock increased to a peak of 85%. This is a remarkably large overlap in claimants, given that Garlock produced asbestos gaskets and packing in high-temperature industrial settings (environments where high-temperature asbestos insulation was used) while Kaiser produced joint compound used in construction projects. Figure 2 below shows both the dramatic increase in mesothelioma cases filed against Garlock and Kaiser following the Bankruptcy Wave of the early 2000s and the substantial overlap of claims between Kaiser and Garlock over time. Given the large overlap of claim filings, the exposure data attained through discovery in Garlock are germane to the instant matter.

Figure 2: Overlap of Kaiser mesothelioma claims with Garlock claims through June 5, 2010



23. In the rebuttal report I submitted in *Garlock* and in my court testimony, I presented several analyses that showed the significant effect that the withholding of information had on Garlock's litigation

experience. While the data to estimate and calculate more precise statistics are not available in the instant matter because the extensive discovery of trusts' data, plaintiff questionnaires, and access to full claim files for Kaiser claims authorized in *Garlock* has not taken place in the Kaiser bankruptcy, the substantial overlap between the *Garlock* Analytical Database and the Kaiser claims database enables me to compare the results of the *Garlock* omission analyses and the overlapping Kaiser claims. The results of that comparison show the same patterns between Kaiser claims that appear in the Garlock Analytical Database and the Garlock claims analyses that I presented in the *Garlock* estimation proceeding. Further, the overlap of claims and the similarity of the patterns provide sufficient foundation for the opinions I have been asked to render in this case.

24. As I mentioned earlier, DCPF trusts data and bankruptcy ballots were provided as part of the discovery record in *Garlock*. Although they are not a complete record of all trust claims and ballots that plaintiffs may have asserted, with the information available, I compared the product exposures that claimants identified in depositions and interrogatories in the tort system with the ballots they cast and trust claims they tiled. In this analysis, I classified a defendant as omitted from a claimant's testimony if such defendant's name or products were not identified as sources of asbestos exposure in the tort claim file materials but the claimant voted in such defendant's bankruptcy or filed a trust claim in that defendant's asbestos trust. Because the discovery in *Garlock* was obtained several years after the resolution of many Garlock claims, those data are useful to evaluate the extent to which claimants' exposures to prior

prominent codefendants were not revealed to active tort system defendants such as Garlock or Kaiser.

25. There are 205 Kaiser claims that overlap Garlock claims and for which Garlock discovery data were available. As shown in Table 1, in these 205 cases, 63% of the exposures to asbestos defendants represented in the DCPF trusts or in the available ballots were omitted by plaintiffs in their tort discovery after the Bankruptcy Wave.

Table 1: Proportion of exposures identified or omitted in tort discovery against Kaiser

Exposure identification	Filed 2000-2010
Exposure Identified	37%
Exposure omitted	63%
Total	100%

Table 1 also appears in my Report as Table 1.

26. My Report at Section VII.A includes additional statistical analyses that show further substantial similarities between Kaiser and Garlock as to the withholding of evidence of exposures to the products of companies that had sought bankruptcy relief and established trusts, including former insulation defendants. Table 2 below shows the stark difference between the numbers of exposure identifications in tort discovery made in the 205 claims brought against both Kaiser and Garlock and the number of times claimants asserted trust claims or filed bankruptcy ballots identifying such asbestos exposures.

Table 2: Former codefendant with available ballots and trust claims information for Kaiser claims filed after 1999

Company	Number of exposure IDs	Number of ballots trust claims filed
ABB Lummus	4	22
AC&S	20	109
AP Green	27	19
Antra	14	57
Asarco	23	83
AW	80	157
Babcock & Wilcox	76	163
Bums & Roe	6	18
Combustion Engineering	47	62
Congoleum	19	69
Federal Mogul Prod.	23	49
Ferodo	3	40
Fibreboard	61	170
Flexitallic	48	86
Flintkote	37	102
GAF	39	40
Halliburton	66	131
Harbison Walker	30	91

Kaiser Alum. & Chem.	54	63
Leslie Controls	24	23
Narco	17	29
Owens Corning	77	168
Pittsburgh Corning	25	112
Quigley	24	85
Shook & Fletcher	1	14
THAN	15	89
Turner & Newell	23	66
US Gypsum	71	164
US Mineral Products	11	21
WR Grace	34	49
Total	999	2,351

Table 2 appears in my Report as Table 3.

27. Thus, for example, in the 205 overlapping claims against Kaiser and Garlock, 168 of the 205 plaintiffs asserted trust claims or submitted bankruptcy ballots due to claimed exposure to Owens Corning asbestos-containing products, but only 77 of those 205 plaintiffs identified exposure to Owens Corning asbestos-containing products in their tort system discovery. Only 61 of the 205 identified Fibreboard in the tort system, even though 170 asserted trust claims or submitted bankruptcy ballots.

28. I also analyzed the group of 210 cases identified by the *Garlock* Court as demonstrative of the practice of plaintiffs' withholding of exposure

information. In these 210 cases, the plaintiff's tort discovery responses conflicted with one of the trust claim processing facilities or the balloting in bankruptcy cases. As detailed in Section VII.C of my Report, Garlock included those cases in lists provided to the *Garlock* Court, which became known as the "RFA Lists." Using my overlapping analysis of the Kaiser and Garlock data, I found that 48 of the claims included in the Garlock RFA Lists were also filed against Kaiser; 16 of those cases resolved with Kaiser fora total of $3.2 million, 3 cases remained open, and the remaining 29 were dismissed.

29. Of particular relevance in this matter is identification of the law firms that represented the claimants on the RFA Lists because the evidence presented in *Garlock* suggests that they were among the firms withholding exposure evidence. Thus, I further analyzed the extent to which these law firms (the "RFA Law Firms") have also represented plaintiffs asserting claims against Kaiser, beyond the 48 overlapping RFA Lists claims. The data in Table 3 show that the RFA Law Firms filed approximately 53% of the mesothelioma claims against Kaiser and recovered approximately 58% of Kaiser's payments on mesothelioma claims. In addition, although the Brayton Purcell law firm was not one of the RFA Law Firms, Kaiser has paid over $20 million to resolve nearly 100 mesothelioma claims that this law firm handled, and this firm was prohibited from continuing to practice in Judge Hannah's court in the Kananian lawsuit due to its

misrepresentations, as described at length in Professor Brickman's report in this matter.[3]

Table 3: Summary of RFA and non-RFA law firms for Kaiser mesothelioma claims

Law firm	Claims resolved with payment	Total payments to claimants	Pending records
Baron & Budd	32	$9,741,504	26
Peter Angelos	37	$25,615,000	109
Simon Greenstone Panatier	68	$19,090,000	5
Waters, Kraus & Paul	82	$25,801,503	6
Williams Kherkher	1	$225,000	0
Shein Law	19	$3,615,000	1
Belluck & Fox	62	$20,777,000	54
Other RFA law firms	475	$95,042,848	725
Total RFA law firms	*776*	*$199,907,855*	*926*

[3] *See* Expert Report of Lester Brickman, Esq, *In re Kaiser Gypsum Company, Inc., No. 16-31602* (Bankr. W.D.N.C., Feb. 20, 2020), Doc 2072-2, at ¶¶ 32–34.

Weitz & Luxenberg	100	$27,055,000	131
Brayton Purcell	98	$23,690,000	15
Other non-RFA law firms	557	$95,629,700	676
Total non-RFA law firms	*755*	*$146,374,700*	*822*
Total	1,531	$346,282,555	1,748

Table 3 appears in my Report as Table 5.

30. As is also shown in Table 3, the RFA Law Firms represent approximately 53% of the claimants with unresolved mesothelioma claims in the Kaiser claims database. Stated simply, the plaintiffs in more than half of the unresolved mesothelioma asbestos claims against Kaiser are represented by law firms that were identified in *Garlock* as having handled cases where exposure evidence was withheld. The firm that handled the Kananian lawsuit, though not an RFA Law Firm, also represents current mesothelioma claimants. I also identify separately the Weitz & Luxenberg law firm in Table 3 because this law firm files claims mainly in New York City, where the rules of scheduling cases for trial allow it to impose high costs on defendants in cases that Weitz & Luxenberg would not pursue through trial.

31. In summary, there is strong evidence that Kaiser has been impacted by the same practice of plaintiffs' withholding of information that affected asbestos claims against Garlock, and that the pending

asbestos claims in this matter are likely similarly affected by such practices, absent measures that prevent their withholding of exposure information.

32. I declare under penalty of perjury that the foregoing is true and correct. Executed on July 1, 2020.

Respectfully submitted,

By: /s/ Charles E. Bates, Phd
Charles E. Bates, PhD
Bates White, LLC
2001 K Street NW
North Building, Suite 500
Washington, DC 20006
Telephone: (202) 408-6110
Facsimile: (202) 408-7838

Exhibit 2

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re: KAISER GYPSUM COMPANY, INC., et al[1] Debtors	Chapter 11 Case No. 16-31602

EXPERT REPORT OF CHARLES E. BATES, PHD

February 20, 2020

* * *

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Kaiser Gypsum Company, Inc. (0188). and Hanson Permanente Cement, Inc. (7313). The Debtors' address is 300 E. John Carpenter Freeway, Irving, Texas 75062.

List of figures

List of tables

I. Summary of qualifications and experience

(1) I am Chairman of Bates White, LLC, which is an economic consulting firm with its primary office located in Washington, DC. I specialize in the application of statistics and computer modeling to economic and financial issues, and I have extensive experience working on asbestos-related claims and liability valuation issues. I have more than 25 years of experience in a wide range of litigation and commercial consulting areas.

(2) I received my PhD and MA in Economics from the University of Rochester, and my BA in Economics and Mathematics, with high honors, from the University of California, San Diego. I have taught courses in advanced statistical economic analysis and trade theory while on the faculty at Johns Hopkins University, and I have published papers on advanced topics in estimation theory in peer-reviewed journals.

(3) Prior to founding Bates White, I was a Vice President. at A.T. Kearney. Prior to that, I was the Partner in Charge of the Economic Analysis Group at KPMG.

(4) I have been retained as an asbestos and tort claims valuation and estimation methodology expert; and as detailed in my curriculum vitae (attached to this Report as Appendix A), I have valued asbestos-related expenditures in numerous bankruptcy and other proceedings, including Bestwall, Garlock, SPHC (a.k.a. Bondex), Motors Liquidation (a.k.a. General Motors), National Gypsum Company, United States Gypsum Corporation, Federal Mogul Corp., GAF Corporation,

Turner & Newall, Kaiser Aluminum Corp., Congoleum Corporation, ASARCO LLC, Plibrico Company, The Babcock & Wilcox Company, W.R. Grace and Company, Western MacArthur Company, and Owens Corning. Some highlights of my previous involvement in asbestos-related matters include the following:

- Currently serving as art asbestos claims valuation and estimation methodology expert on behalf of the Debtors in Bestwall.
- Served as an expert in asbestos claims valuation for financial reporting purposes on behalf of certain Halliburton stockholders regarding Halliburton's financial disclosures of its asbestos liabilities after its acquisition of Dresser in 1998.
- Served as an expert in asbestos claims valuation, estimation methodology, and asbestos reinsurance billing on behalf of American Re-Insurance Company and Ace regarding the proper reinsurance bill associated with USF&G's reinsurance bill of its asbestos-related payments to Western MacArthur.
- Served as an asbestos claims valuation and estimation methodology expert on behalf of the Debtors in Garlock Sealing Technologies.
- Served as an asbestos claims valuation and estimation methodology expert on behalf of the Debtors in Specialty Products Holding Corp. and Bondex International, Inc.
- Served as an asbestos claims valuation and estimation methodology expert on behalf of the Official Committee of Unsecured

Creditors of ASARCO LLC in the ASARCO bankruptcy proceedings.

- Served as an asbestos claims valuation and estimation methodology expert on behalf of Liberty Mutual in the Plibrico bankruptcy proceedings.
- Conducted an analysis to determine whether asbestos trusts would have sufficient funds to pay future asbestos claimants.
- Conducted due diligence evaluations of asbestos liability in the context of mergers and acquisitions.
- Testified before the US Senate Judiciary Committee on the economic viability of the Trust Fund proposed under S.852, the Fairness in Asbestos Injury Resolution (FAIR) Act of 2005.
- Served as an asbestos claims valuation and estimation methodology expert in proceedings on behalf of the Insurers Joint Defense Group in Babcock & Wilcox's asbestos-related bankruptcy and developed a claims criteria evaluation framework for use in assessing asbestos liability forecasts and trust distribution procedures.
- Served as an asbestos claims valuation and estimation methodology expert on behalf of the Hartford Financial Services Group in the asbestos-related bankruptcy of MacArthur Company and Western MacArthur Company.
- Served as an asbestos claims valuation and estimation methodology expert on behalf of Sealed Air in the fraudulent conveyance

matter regarding the 1998 acquisition of Cryovac from W.R. Grace. This matter stemmed from Grace's asbestos-related bankruptcy.

- Served as an asbestos claims valuation and estimation methodology expert on behalf of CSX Transportation for arbitration proceedings of *CSX Transportation v. Lloyd's, London.*
- Served as an expert on asbestos claims and mathematics on behalf of the Center for Claims Resolution in the arbitration proceedings of *GAF v. Center for Claims Resolution.*

(5) In addition to other relevant experience, my vitae includes a listing of all of the publications I have authored within the past 10 years and all the cases in which I have testified, either at trial or deposition, within the past five years. Bates White is being paid $1,150 per hour for the time I bill to this matter. In addition to my time, I directed the work of other professionals on my staff in performing these analyses. Neither my compensation nor Bates White's compensation is contingent on the outcome of this matter.

II. Scope of charge

(6) Bates White has been retained by Truck Insurance Exchange ("Truck") in connection with the above-captioned restructuring proceeding. I submit this Expert Report at the request of Truck's counsel, Gibson Dunn, in connection with Truck's objections to the Debtors' Plan of Reorganization, and its related Confirmation Hearing.

(7) Truck's counsel requested me to perform and present the following:

- Evaluate and opine upon whether the evidence gathered and presented in the *Garlock* estimation proceeding demonstrated that the withholding of exposure evidence was a pervasive problem for asbestos cases against Garlock.
- Analyze Kaiser's claims data to assess whether and to what extent Kaiser has faced the same exposure evidence withholding practices uncovered and demonstrated in *Garlock*.

III. Introduction and Summary of opinions

(8) In the Garlock bankruptcy, Judge Hodges found that claimants' exposure omissions against Garlock were widespread and pervasive across claims that had potential for trial risk, which further infected the settlements of thousands of other claims, including those alleging mesothelioma and other diseases. Notably, Judge Hodges found that

> [t]he effect of withholding exposure evidence *extended well beyond the individual cases involved* because it was concentrated in high-dollar "driver" cases. Garlock's settlement of cases was not a series of isolated individual events, but rather a more unified practice developed over years of dealing with a finite group of plaintiffs' lawyers on a regular basis . . . thus, [the driver cases] impact was

> compounded well beyond the individual "driver" case itself.[2] [emphasis added]

(9) In the instant matter, there have been incorrect statements made to the Court regarding how applicable Judge Hodges' findings are to the bulk of Garlock claims and to other asbestos defendants such as Kaiser. In particular, Mr. Kevin Maclay, a representative of the Asbestos Claimants Committee (ACC), stated that "the fact that a cherry-picked selection of 15 cases out of 600,000 or more [. . .] really demonstrates the opposite, your Honor. It demonstrates there really isn't a widespread fraud problem with the benefit of a vast database of collected information . . . ."[3] This statement and others that convey the same message are incorrect.

(10) First, Mr. Maclay's statement contradicts Judge Hodges' findings. The following is paragraph 66 of Judge Hodges' Estimation Order.

---

[2] See Order Estimating Aggregate Liability. *In re Garlock Sealing Technologies. LLC*, No. 10.31607 (Bankr. W.D.N.C.. Jan. 10, 2014). at 97 (the "Estimation Order"), ¶ 70.

[3] Transcript of Proceedings before the Honorable J. Craig Whitely, *In re Kaiser Gypsum Company, Inc*., No. 16-31602 (Bankr. W.D.N.C., Jun. 13. 2019), at p. 239:23-240:6. In this Court participation. Mr. Maclay also states that the information collected in the Garlock matter cost "hundreds of millions of dollars" (240:6.9). That statement, like other statements cited in the text above by Mr. Maclay, is factually incorrect. Mr. Maclay is mistaken about the cost of the data collected in the Garlock matter by two orders of magnitude. First, Garlock did not spend "hundreds of millions of dollars" in its bankruptcy proceedings, as can be seen in EnPro's financial statements (*see* EnPro Form 10-Q, June 30, 2017). Second, most of the expense in the bankruptcy proceedings was for attorney and professional fees related to many other aspects of the case, not the data collection effort.

> These fifteen cases are just a minute portion of the thousands that were resolved by Garlock in the tort system. And they are not purported to be a random or representative sample. But, the fact that *each and every one of them* contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those cases appears to have been sufficiently widespread to have a significant impact on Garlock's settlement. practices and results. Garlock identified 205 additional cases where the plaintiff's discovery responses conflicted with one of the Trust claim processing facilities or balloting in bankruptcy cases. Garlock's corporate parent's general counsel identified 161 cases during the relevant period where Garlock paid recoveries of $250,000 or more. The limited discovery allowed by the court demonstrated that almost *half* of those cases involved misrepresentation of exposure evidence. **It appears certain that more extensive discovery would show more extensive abuse. But that is not necessary because the startling pattern of misrepresentation that has been shown is sufficiently persuasive**. [emphasis in bold added]

(11) Whereas Mr. Maclay asserts that the limitations on the number of cases for which discovery was granted by Judge Hodges "demonstrates there really isn't a widespread fraud problem," Judge Hodges' Estimation Order says the opposite.

Specifically, he says "that [additional discovery] is not necessary because the startling pattern of misrepresentation that has been shown is sufficiently persuasive."[4]

(12) Second, Mr. Maclay misrepresents the basis of Judge Hodges' order, portraying Judge Hodges conclusions as being based only on 15 "cherry-picked" cases. Clearly, Judge Hodges knew that the 15 cases were not a random sample. But, as is also clear in Judge Hodges' order, many more cases were analyzed (Judge Hodges cites to 205 others) that confirmed the pervasive pattern of exposure omissions found in the 15 cases.

(13) Third, Mr. Maclay's comparison to the 600,000 Garlock historical claims is further misleading and incorrect. The 15 cases cited are unlike the vast majority of the 600,000 cases to which Mr. Maclay refers. The largest group of these 600,000 claims was comprised of more than 540,000 cases alleging non-malignant diseases or for which the disease category was not known to Garlock. These were part of the veritable avalanche of cases filed against Garlock starting from the late 1980s through the early 2000s. By the beginning of the 2000s, Garlock was receiving tens of thousands of such nonmalignant claims that are now known to be fraudulent.[5]

---

[4] Estimation Order, ¶ 66

[5] U.S. District Court Judge Jack, in a 2005 hearing, found that the medical diagnoses of those claims "were driven neither by health nor justice: they were manufactured for money." *See* Janis Graham Jack, U.S. District Judge, *In re Silica Products Liability Ling.*, No. 1553 (S.D. Tex. June 30.2005).

These claims, which were recruited *en masse* for litigation purposes and had no real medical diagnoses,[6] flooded the courts. They also overwhelmed the ability of dozens of companies to defend against the onslaught of lawsuits, which resulted in the wave of asbestos-related bankruptcies between 2000 and 2002,[7] Until the mid-2000s Garlock resolved these cases for an average of $1,400 each. By the time of Garlock's petition date, it was well known that such claims had no merit; by that date, Garlock resolved such claims for less than $300 on average, if at all. Such claims were not the subject of inquiry related to the more than 200 claims to which Judge Hodges referred.

(14) The second largest group of claims in the 600,000 cases to which Mr. Maclay refers were also not a claim type of relevance for the Garlock Bankruptcy. They were comprised of almost 38,000 claims that alleged lung and other cancer diseases, of which all but 18 cases (99.95%) were resolved at an average of less than $4,000 each

---

[6] Following Judge Jack's decision in the silica MDL, several asbestos bankruptcy trusts issued letters suspending the acceptance of medical reports from doctors implicated in the silica fraud investigation (Memorandum re: Suspension or Acceptance of Medical Reports (Manville Trust), from David Austern—President of CRMC, Sept. 12, 2005); Notice of Trust Policy Regarding Acceptance of Medical Reports, *In re Celotex Asbestos Settlement Trust,* Oct. 18, 2005; Letter Regarding Claims Allowance and Qualified Physicians, *In re Eagle-Picher Personal Injury Settlement Trust,* Oct. 19, 2005,

[7] Charles Bates and Charles Mullin, "The Bankruptcy Wave of 2000: Companies Sunk by an Ocean of Recruited Asbestos Claims," *Mealey's Litigation Report: Asbestos* 21, no. 24 (2007): 39-44.

because of the competing factors that cause those diseases (such as smoking) and the tenuous scientific relationship between those diseases and asbestos exposure. Such claims were also not the subject of inquiry related to the more than 200 claims to which Judge Hodges referred.

(15) This leaves 23,000 resolved Garlock mesothelioma claims of which 7,000 were resolved prior to 2000. These earlier mesothelioma claims were also not the subject of inquiry related to the more than 200 claims to which Judge Hodges referred because claimants, during that time, were pursuing and willingly espousing exposures to high-dose asbestos products as part of their tort litigation. Of the remaining 16,000 mesothelioma cases, only a few hundred were cases for which Garlock had sought discovery in their tort system litigation. The rest were settled to avoid litigation costs, including the costs of discovery.

(16) Thus, there are only a few hundred cases that can provide the basis for any analysis of information withholding practices by claimants, as only the cases that the claimants litigate through discovery can be cases where any information withholding practices will be codified in the record created. That is, we can only evaluate the prevalence of claimants' exposure omission practices by using claims for which discovery was sought and for which files with discovery are available. The more than 200 cases cited by Judge Hodges are a large portion of the relevant cases of any such enquiry. As I explain in detail in this Report, I used all of the data from available claim files and discovery in the Garlock matter to test the conclusions derived from the 15

cases with the most extensive discovery. I found that both the 15 exemplar cases and the more than 200 additional cases cited by Judge Hodges are a good representation of the prevalence of claimants' exposure omission practices that Garlock faced while in the tort system.

(17) The relevance of the analysis of the cases with discovery data for cases without such information available is that the amount Garlock (or any other defendant, including Kaiser) paid is driven in large part by its expected costs to litigate. The information withholding practices revealed by the cases with discovery drive up those expected costs, directly raising the settlement amounts claimants extract from a defendant so that a defendant can avoid further defense costs on cases.

(18) My analysis in this Report shows that the pervasive pattern of exposure omissions and the resulting misrepresentation of exposure evidence found by Judge Hodges against Garlock applies to Kaiser as well. This is not surprising. Kaiser and Garlock are both low-dose defendants of convenience whose cost to defend and settle rose dramatically through and after the bankruptcy wave of asbestos defendants from the late 1990s into the early 2000s. Though their asbestos products were very different and were used in different settings, they were sued by many of the same plaintiffs represented by the same law firms; fully 80%, and up to 85% by the mid-2000s, of the Kaiser mesothelioma claims filed before June 5, 2010 were found in the Garlock Analytical Database. Such a large overlap would not be surprising if the actual cause of mesothelioma for many

of these claimants were high-temperature insulation, as Garlock's gaskets were often used in steam fittings surrounded by high-temperature asbestos insulation.

(19) There were 205 Kaiser claims overlapping with the Garlock claims for which Garlock had conducted both discovery in the tort system and, several years later, discovery in its bankruptcy proceedings on asbestos trust filings and bankruptcy ballots for those same claimants. Fully 63% of these claimants exposures to the products of Kaiser's former codefendants that exited the tort system through bankruptcy reorganization were not disclosed in tort litigation. Though each of these 205 claimants typically identified 26 defendants on average in their tort discovery, predominantly other low-dose product manufacturers, they omitted 11 additional exposure sources on average from former codefendants that exited the tort system through bankruptcy reorganization, of which at least 5 were associated with high-dose asbestos thermal insulation products.

(20) This pattern of exposure omissions frustrated Kaiser's defenses and increased its costs to defend. This had the direct effect of increasing Kaiser's settlements, as it dealt with the new litigation environment where claimants were no longer actively espousing their exposures to the prior codefendants' asbestos products, particularly thermal insulation, like similarly situated claimants had done just a few years before. The increase was dramatic. In the two decades prior to 1998 (the year Owens Corning, the most prominent and active litigating defendant in the tort system at the time and producer of Kaylo

asbestos insulation, launched its National Settlement Program), Kaiser paid claimants less than $10 million in total to resolve over 5,000 claims. That situation changed dramatically with the bankruptcy wave of asbestos defendants over the next few years with Kaiser's settlement costs raising to tens of millions of dollars per year by the mid-2000s.

(21) The value of even some of the omitted exposure information is apparent by a comparison of the costs for Kaiser to resolve claims with and without that information. A natural experiment that reveals some of that value was created in the mid-2000s when a number of the Delaware Claims Processing Facilities (DCPF) trust entities started paying claims after 2005. There are 857 Kaiser mesothelioma claims resolved after 2005, which are part of the overlapping claims in which Garlock received discovery from the DCPF trusts. Approximately half of those claims were resolved by Kaiser before the claimant filed claims with a DCPF trust. The remaining claimants filed afterward. Those that filed with a DCPF trust after resolving their Kaiser claim received on average 60% more than claimants who filed with DCPF trusts before resolving their Kaiser claim.

(22) The impact of the claimant's exposure omission practices on Kaiser revealed by my analysis of Kaiser's claims that overlap with Garlock claims that have sufficient discovery from both the tort system and from its bankruptcy proceedings extends far beyond the cases studied. The law firms that represent the claimants with sufficient discovery account for more than half of the

mesothelioma claims filed against Kaiser, and those law firms have received more than half of Kaiser's total payments to plaintiffs. Furthermore, including a certain prominent law firm against Kaiser (which has been found withholding information in asbestos matters and sanctioned) results in that more than 65% of Kaiser's total payments to plaintiffs were made to law firms that have demonstratively engaged in strategic withholding of exposure information. These practices raise Kaiser's costs to defend cases and hence raise its costs to settle all cases that are resolved for the purpose of avoiding further litigation costs. Kaiser's costs to resolve claims would be greatly reduced if claimants were required to disclose all their exposure sources, their claims to asbestos trusts, and their claims in asbestos bankruptcies before resolving their case with Kaiser.

(23) My opinions in this Report are based on decades of study of asbestos litigation and on my direct participation in the Garlock case as the asbestos claims valuation expert for the Debtors in the matter. In Section V, I explain how the testimony presented to Judge Hodges was based on hundreds of claims (not on only 15 claims) and testimony about how these hundreds of claims affected the settlement amounts of thousands of other cases against Garlock. In Section VI, I describe the similarities between Garlock's asbestos claims history and Kaiser's asbestos claims history and demonstrate that both claiming populations overlapped significantly when both defendants were in the tort system. In Section VII, using the overlapping claims between Garlock and Kaiser and the publicly available data from

the Garlock matter, I recreate several of the analyses that I presented in the Garlock matter to show the extent and effect of plaintiffs' withholding of exposure histories from defendants.

(24) For ease of exposition in this Report, I use the term "Kaiser" to refer to both Debtors in the present matter: Kaiser Gypsum Company and Hanson Permanente Cement Inc.

IV. Kaiser's asbestos litigation background and history

(25) Prior to the 2000s, asbestos claimants focused on the top-tier asbestos defendants mainly associated with high-dose asbestos containing products, such as thermal insulation, which represented the vast majority of asbestos exposure health risks.[8] Culminating in the "Bankruptcy Wave" of the late 1990s and early 2000s. virtually all of the dozens of high-dose defendants had filed for bankruptcy reorganization and exited the tort system.[9] This Bankruptcy Wave resulted in one of the most significant changes to the asbestos litigation environment.

---

[8] For example, this includes Johns-Manville, Owens-Corning, Fibreboard, and Pittsburgh Corning.

[9] The companies that filed for Chapter II protection during the Bankruptcy Wave included AC&S, Armstrong World Industries, USG, Owens Corning/Fibreboard, Federal-Mogul, G-I Holdings, Combustion Engineering, etc. For a detailed list of all the Bankruptcy Wave debtors, see Mark D. Plevin, Paul W. Kalish, and Kelly R. Cusick, "Commentary: Where Are They Now. Part Four: A Continuing History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims," *Mealey's Asbestos Bankruptcy Report,* 6, no. 7 (2007): 1-41.

(26) Following the Bankruptcy Wave, plaintiff attorneys shifted their focus from the traditional high-dose defendants toward low-dose defendants of convenience, which included previously peripheral defendants and other new low-dose defendants.[10] Such defendants had little or no asbestos tort risk prior to the bankruptcy filing of the defendants because their products caused little, if any, asbestos health risks, which was obvious when the plaintiffs explained in their litigations their exposure to high-risk asbestos products. However, these low-dose defendants saw a significant increase in the number of lawsuits in which they were named, as well as the frequency with which their products and operations were identified during discovery as sources of asbestos exposure. Simultaneously, plaintiffs stopped affirmatively asserting their exposures to many of the high exposure products and activities associated with defendants that had bankruptcy filing protection. Notably, asbestos claimants asserting they had claims against the reorganizing companies were not required to identify themselves publicly while the companies were reorganizing.[11] As a result, the litigation pressure on peripheral and new defendants increased.

(27) Kaiser was a peripheral defendant in the first decades of the asbestos litigation. Kaiser

---

[10] For example, products such as gaskets (Garlock), automotive friction products (Motors Liquidation), and residential construction products (Kaiser, Bondex, and Bestwall), among many others

[11] *In re Motions for Access of Garlock Sealing Technologies LLC,* No. 11-1130 (D. Del. 2013).

principally manufactured low-dose chrysotile cement products[12] and wallboard accessories[13]. Because of the types of asbestos-containing products it manufactured, Kaiser was not among the top-tier asbestos defendants when the asbestos litigation started in the late 1970s.

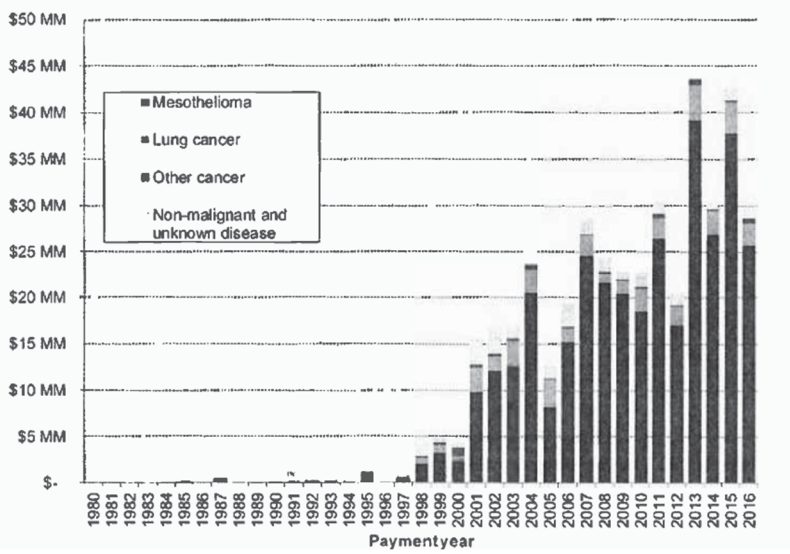
(28) However, because individuals who used Kaiser's asbestos-containing products also were exposed to other asbestos-containing products, Kaiser was named in and had to defend asbestos cases starting in the mid-1980s. Prior to 1998, Kaiser paid claimants less than $10 million in total to resolve over 5,000 claims. This situation changed dramatically with the Bankruptcy Wave. Kaiser began being targeted as if it were a primary source of many plaintiffs' asbestos exposure, increasing its expenditures to resolve asbestos claims to tens of millions of dollars per year by the mid 2000s. The following figure illustrates Kaiser's payments to plaintiffs from the onset of its involvement with asbestos litigation in 1978 to its bankruptcy filing in 2016.

---

[12] "'[M]asonry cement,' and 'plastic cement.'" Declaration of Charles E. McChesney II in Support of First Day Pleadings, *In re Kaiser Gypsum Company Inc.,* No 16-31602 (Bankr. WD.N.C., Sep. 30.2016) (the "McChesney Declaration"), ¶ 24.

[13] "[J]oint compounds, texture paints and other similar products used to laminate wallboard or cover radiant heat surfaces and cables." McChesney Decimation. ¶ 26.

Figure 1. Kaiser's payments to claimants by disease category



Note: Includes claims through Kaiser's Petition Date of September 30, 2016

(29) This sudden change was caused by the shifting litigation environment created by the bankruptcy filings of its most prominent codefendants. With the increasing pattern of plaintiff's failing to identify fully their exposures to high-dose products, Kaiser began to have its primary defenses on cases frustrated. As for other low-dose chrysotile defendants like Kaiser, in cases with some credible allegation of exposure to Kaiser's asbestos-containing products, Kaiser's best defense before the Bankruptcy Wave of the early 2000s was that Kaiser's relative contribution to plaintiffs' exposures was negligible and did not contribute to their disease. Historically, when top-tier defendants were an active part of the tort

case alongside Kaiser, plaintiffs effectively made Kaiser's and other low-dose defendants' case by simply describing in detail all of their exposures to those companies' asbestos-containing products.

(30) Following this Bankruptcy Wave, plaintiffs' practices increased the costs to Kaiser of establishing the full extent of the plaintiffs' exposures. This problem was particularly acute because, in many cases, the source of much of the exposure information was the plaintiff. As explained in Section V, Judge Hodges' Garlock Estimation Order discussed 15 examples of this situation, founded in extensive discovery about those cases.[14] Further. the debtor's informational brief in Bestwall's bankruptcy matter,[15] a close codefendant of Kaiser, discussed five case examples of the same situation (using the publicly available information from the Garlock matter). Notably, in at least two of the five Bestwall exemplars, Kaiser was a codefendant.[16]

(31) Approximately half of Kaiser's payments were to the more than 98% of plaintiffs whose claims resolved for no payment or at values up to $300,000, at an average resolution amount of $8,300. Although those posed little to no trial risk, if not settled, they had the potential of resulting in substantial additional defense expenses that would have significantly exceeded the settlement amounts. Prior to the Bankruptcy

---

[14] Estimation Order, ¶¶ 65-66.

[15] *See* Informational Brief of Bestwall filed Nov. 2, 2017, Doc. 12.

[16] *See* Informational Brief of Bestwall tiled Nov. 2. 2017, Doc. 12 pp. 28-34.

Wave, there was only one claim every few years that required a payment of more than $300,000. After 2001, the number of such claims jumped to 16 such high-value cases per year and then continued to increase over the next few years to about 34 such cases per year since 2010. These high value cases were resolved for an average payment to claimants of $570,000. They represent the cases for which Kaiser faced actual trial risk. These Kaiser cases embody the type of cases called "driver" cases by asbestos defendants.

(32) As I explain in Section V and as found by Judge Hodges in his Garlock Estimation Order[17], "driver" cases are cases resolved for high amounts that can have effects beyond the cases themselves. Such high-value cases can increase ("drive up") settlement amounts for other less risky cases in an environment in which the plaintiffs' lawyers have much more information about their clients than the defendants have (even after discovery is conducted). In some jurisdictions like New York City. the effect of the driver cases is further increased due to the rules in which cases are scheduled for trial. For example, in that jurisdiction cases are scheduled in groups, *ad seriatim,* which means that the defendant knows the name of the claimant and the potential trial order; however, the defendant does not know whether any of the scheduled cases will be withdrawn just before trial begins. Therefore, a defendant has to be prepared to defend at trial every case of the potentially many cases

[17] Estimation Order, ¶ 70.

scheduled for trial, but the plaintiff attorney only has to prepare the cases he knows he will pursue through trial. Then, it' a plaintiff's lawyer is able to convince a defendant through a driver case that he may have more cases with those characteristics in the upcoming trial docket, the defendant will have to prepare all cases for trial.

V. Judge Hodges' findings regarding exposure omissions were based on a large number Garlock claims

(33) In his Garlock Bankruptcy Estimation Order, Judge Hodges found that, after the exit of the front-line asbestos defendants during the Bankruptcy Wave. Garlock's defenses suffered due to "the fact that often the evidence of exposure to those insulation companies' products also 'disappeared.'"[18] The omission of exposure evidence "was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendant' asbestos trusts until after obtaining recoveries from Garlock."[19] This practice was not concentrated in a few cases—quite the contrary. A large amount of testimony was presented throughout the Mesothelioma Estimation Trial, which was the basis for Judge Hodges' Estimation Order. Below I describe several aspects and examples of such testimony.

(34) Deposition testimony taken in the Garlock bankruptcy from prominent plaintiff law firms

---

[18] Estimation Order, ¶ 58.

[19] Estimation Order, ¶ 58.

(against both Garlock and Kaiser) clearly indicates that delaying or concealing trust disclosures in the tort system was a regular business practice, instead of just an error in a few cases. Benjamin P. Shein stated that "we file trust claims after the completion of the tort litigation."[20] Mr. Shein further stated that "[m]y duty to these clients to maximize their recovery, okay, and the best way for me to maximize their recovery is to proceed against solvent viable non-bankrupt defendants first, and then, if appropriate, to proceed against bankrupt companies."[21] Peter A. Kraus stated that, "if in my judgment it would benefit the litigation case to delay the filing of a [trust] claim, and it was lawful to delay filing the claim, we would do that."[22] Judge Hodges provided additional examples such as the infamous Baron & Budd memorandum in which attorneys from that law firm were coaching claimants to provide inaccurate or incomplete exposure information to increase the value of their case against tort defendants.[23] Kaiser paid $41 million to resolve claims of approximately 550 plaintiffs represented by these three law firms since 2002.

---

[20] Garlock video deposition of Benjamin P. Shein, Jan. 16. 2013, "SHEIN 43-26TO 44-16.mpg"

[21] Garlock video deposition of Benjamin P. Shein, Jan. 16. 2013, "SHEIN 43.20 TO 44-16.mpg", and Estimation Order, ¶ 58,

[22] Garlock video deposition of Peter A. Kraus, Jan. 14. 2013, "KRAUS 41-05 TO 42-14.mpg".

[23] Estimation Order, ¶ 58.a: Expert Report of Lester Brickman, *In re Garlock Sealing Technologies. LLC,* No. 10-31607 (Bankr. W.D.N.C, Apr. 23. 2013), GST-0969_redacted, ¶¶ 8, 27, and 54 (the "Garlock Brickman Report").

Prior to the Bankruptcy Wave Kaiser never paid plaintiffs of these law firms, including the 65 claims filed by the Baron & Budd firm extending back to the 1980s.

(35) Judge Hodges further stated that "[i]t was a regular practice by many plaintiffs' firms to delay tiling Trust claims for their clients so that remaining tort system defendants would not have that information."[24] Some plaintiff law firms' practices exacerbated the problem in obtaining the plaintiffs' trust claim filing information by having trust claims handled by one law firm and tort claims handled by a separate trial specialist law firm that may not be informed of the plaintiffs' trust filings. For example, lawyers from the Brayton Purcell law firm were prohibited from further practicing law in Judge Hannah's Ohio Court for following this practice.[25] Kaiser paid over $50 million to resolve nearly 1,600 Brayton claims since 2002. Prior to the Bankruptcy Wave, Kaiser only paid $2.4 million to resolve over 430 Brayton claims.

(36) Further complicating and frustrating Kaiser's defenses (and other defendants'), this practice of strategically withholding trust claims has been enabled by the Asbestos Claimants Committees in other bankruptcies by including provisions in Trust Distribution Procedures (TDPs) that allowed claimants to delay the filing of their trust

---

[24] Estimation Order, ¶ 58.b.

[25] *See* Order and Opinion by Judge Harry A. Hanna, *In Re Kananian v. Lorillard Tobacco Co.,* Case No. CV442750 (Ohio Ct. Corn. Pl. Cuyahoga Cty, Jan. 18, 2007).

claims until after they had resolved their tort claims.[26] Further, these TDPs also explicitly allow claimants to deny exposure to the asbestos products covered by the trusts while resolving their tort claims and then to assert claims and collect from the trusts despite the contradictory claim information.[27]

(37) To investigate the extent of the withholding of exposure information, Garlock sought extensive discovery on hundreds of its settlements. Over the objections to any discovery by the asbestos plaintiffs, the Garlock Court allowed full discovery (including permission to depose plaintiff attorneys on their settlement practices) on only 15 closed cases represented by 5 major law firms (including those led by Messrs. Shein and Kraus, quoted above). Discovery on every one of those 15 cases confirmed Garlock's suspicions. In each, the Court found that important exposure evidence was withheld.[28] On average, these 15 plaintiffs disclosed exposure evidence for approximately 2 companies but *did not* disclose

---

[26] Amended and Restated Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures, Section 5.1(0)(2) Effect of Statutes of Limitations and Repose, 8 (2012).

[27] For example, "Similarly, failure to identify B&W products in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the PI Trust, provided the claimant otherwise satisfies the medical and exposure requirements of this TDP." The Babcock & Wilcox Company Asbestos PI Settlement Trust Distribution Procedures, Section 5.7(b)(3) B&W Exposure, 48 (2011).

[28] Estimation Order, ¶ 65.

exposure evidence for approximately 19 companies. Judge Hodges noted that these cases were not "purported to be a random or representative sample" but that the "pattern exposed in those cases appears to have been sufficiently widespread."[29] The fact that the sample was not random means the quantification of evidence suppression in these 15 cases may not be representative of the actual average number of undisclosed exposures. However, the deposed plaintiff lawyers confirmed that to be their business practice, not examples of clerical mistakes, or a rare practice. Simply, exposure evidence omissions were not only limited to these 15 cases. Further discovery was employed in the Garlock matter to quantify more broadly the number of exposure omissions of typical cases.

(38) Based on partial discovery granted by Judge Hodges on additional cases and the limited number of cases where Garlock had obtained discovery in the underlying tort litigation of those individual cases, Garlock identified almost 200 additional cases (for a total of 210 cases) where plaintiffs' discovery responses conflicted with Trust claim filings or ballots filed in a bankruptcy.[30] Judge Hodges concluded that "more extensive discovery would show more extensive abuse . . .

---

[29] Estimation Order, ¶ 66.

[30] Garlock, as is typical with tort defendants including Kaiser, rarely obtained significant discovery in every case it settled. The primary purpose of the vast majority of settlements is avoiding the costs of obtaining that discovery.

the startling pattern of misrepresentation that has been shown is sufficiently persuasive."[31]

(39) It is important to explain three fundamental points about these cases. First, the 210 cases that withheld information mentioned by Judge Hodges, although not randomly selected, constituted the central part of Garlock's litigation after the Bankruptcy Wave. Though they do not represent a large fraction of the cases filed against Garlock, they do represent a large portion of cases for which Garlock was the primary trial target of plaintiffs. Second, these included the driver cases identified by Garlock's counsel. Thus, those cases had significant effect on the value of the other cases represented by those plaintiff law firms. Third, the partial discovery granted, limited to only some of the asbestos trusts, hindered the efforts to identify the full extent of the withholding of information in Garlock cases. Notwithstanding the discovery limitations, my analysis demonstrated reliably a widespread pattern of withholding of exposure information that significantly increased Garlock's settlement amounts and cost of defense. I expound on each of these points in what follows.

(40) The 210 cases cited by Judge Hodges in his Estimation Order, although not a random sample of all mesothelioma cases resolved with payment by Garlock, are exemplars of the information withholding practices of plaintiffs that Garlock faced after the Bankruptcy Wave. The 210 cases were selected through an iterative process described

---

[31] Estimation Order, ¶ 66

by Professor Brickman in his Garlock report.[32] The claims were selected because they had payment values above average, including the highest settlements paid by Garlock in its post-Bankruptcy Wave litigation experience. Those cases then were searched within the ballots and the DCPF discovery data.[33] Additionally, Garlock gathered all discovery it received in the tort litigation for the case that it had available. Bates White and Garlock's counsel compared the exposure allegations made by claimants in their tort discovery[34] to the ballots and DCPF trusts' data to identify discrepancies. Cases for which there was not sufficient information to determine if information was withheld could not be included in my analysis. In particular, there is no basis to determine if information was withheld for cases that did not appear within the DCPF discovery data, the ballots data, or for which Garlock was not able to collect key discovery documents. Likely, discovery from trusts beyond those managed by DCPF would have allowed the

---

[32] Garlock Brickman Report, ¶ 65.

[33] The Garlock Court granted trust discovery for settled cases only from DCP. In addition, the Garlock Court granted discovery on other bankruptcy ballots. *See* Appendix A.2.

[34] Bates White and Garlock's Counsel performed a detailed review of those claims' tort files to record all exposure allegations stated by the claimant or his attorney. in the documents available to Garlock. The documents reviewed included interrogatories, depositions, complaints, and other documents related with the case. *See* Expert Report of Dr. Jorge Gallardo-Garcia, *In re Garlock Sealing Technologies, LLC,* No. 10-31607 (Bankr. W.D.N.C. Feb. 15, 2013), GST-8004, ¶ 54 (the "Garlock Gallardo-Garcia Report").

identification of a larger number of claims with withholding of information from Garlock. As stated by Judge !lodges and cited above, "[M]ore extensive discovery would show more extensive abuse . . . the startling pattern of misrepresentation that has been shown is sufficiently persuasive.[35]

(41) The 210 claims identified through this process were included in a document from the Garlock matter titled "Supplemental RFA List #1, RFA List #2, and RFA List # 1.A to the Debtors' Amended Responses to Requests for Admission Nos. 1 and 2 of the Official Committee of Asbestos Claimants' First Set of Requests for Admission and Supplemental Interrogatory Responses and Document Requests Pursuant to Stipulation" (Jan. 16, 2013) (the "RFA Lists").[36]

(42) As mentioned before, although cases in the RFA Lists were not randomly selected and did not include all cases resolved for large amounts, they did include a large number of cases from the main law firms that Garlock faced in its litigation. Judge Hodges found (Estimation Order, ¶ 66) that of the 161 cases that paid more than $250,000 between 2006 and Garlock's petition date, almost half of the cases misrepresented exposure evidence.

(43) Judge Hodges also found that these high-value cases had an effect well beyond the cases

---

[35] Estimation order. ¶ 66

[36] For exposition, I refer to the RFA List # 1 as "RFA1" and to the RFA List #1.A as "RFA 1A." The claims in the RFA List #2 were included within the RFA1 and/or the RFA1A lists.

themselves. As Richard Magee[37] explained to the Garlock court, plaintiff lawyers used the high value cases to push for higher settlement amounts for their other cases. Mr. Magee called these the "driver" cases.[38] Judge Hodges agreed and adopted Mr. Magee's terminology:[39]

> The effect of withholding exposure evidence extended well beyond the individual cases involved because it was concentrated in high-dollar "driver" cases. Garlock's settlement of cases was not a series of isolated individual events, but rather a more unified practice developed over years of dealing with a finite group of plaintiffs' lawyers on a regular basis. Cases often were settled in groups for one sum that was to be divided among the group by the plaintiffs' lawyers without regard for a liability determination in any one case. But, cases of significant potential liability were often settled as part of such a group settlement. Such "driver" cases would be specifically negotiated with an additional amount to be spread among the rest of the group. Whether settled individually or with a group or tried to verdict, the cases of large potential liability had a significant effect on other

---

[37] Mr. Magee is EnPro's former General Counsel and has been principal manager of Garlock's asbestos litigation in the tort system for more than a decade leading to Garlock's bankruptcy petition.

[38] Magee Trial Testimony, "08-01-13_Garlock_Vo109_Confidential_redacted," 2590:15-2591:14.

[39] Estimation Order, ¶ 70.

pending and future cases. Thus, their impact was compounded well beyond the individual "driver" case itself.

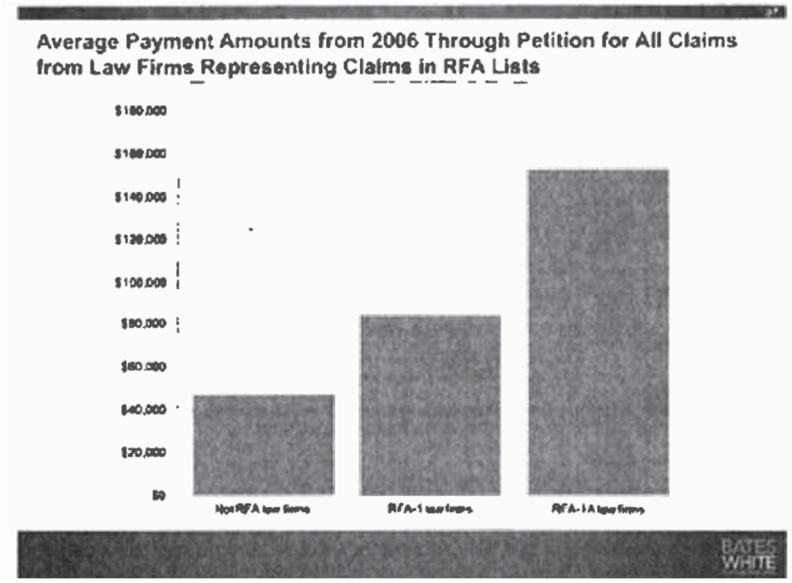
(44) The law firms representing the RFA claims included those representing the 15 cases in which full discovery was granted. These are the law firms led by the plaintiff attorneys who, as cited above, testified that their practice was to withhold information from defendants to maximize their clients' recoveries.

(45) My testimony in the Garlock Estimation Trial corroborates Mr. Magee and Judge Hodges' statements. The Garlock Analytical Database shows that the RFA law firms received higher average mesothelioma payments than non-RFA law firms. Figure 2 shows that non-RFA law firms received average amounts of about $45,000 per paid mesothelioma claim, whereas RFA1 law firms received more than $80,000 per paid claim and RFA1A law firms received more than $150,000 per paid claim. Furthermore, the RFA law firms not only received the higher amounts but also received almost 65% of Garlock's payments to mesothelioma claims historically.[40]

---

[40] These figures are based on my work matching the RFA Lists (Omissions in RFA-1 Cases Based on DCPF and Ballot Data Only, GST-8001_redacted, *In re Garlock Sealing Technologies, LLC*, No. 10-31607 (Bankr. W.D.N.C)) to the Garlock Analytical Database.

Figure 2. Comparison of average Garlock payment amounts to mesothelioma claimants for RFA and none RFA law firms[41]



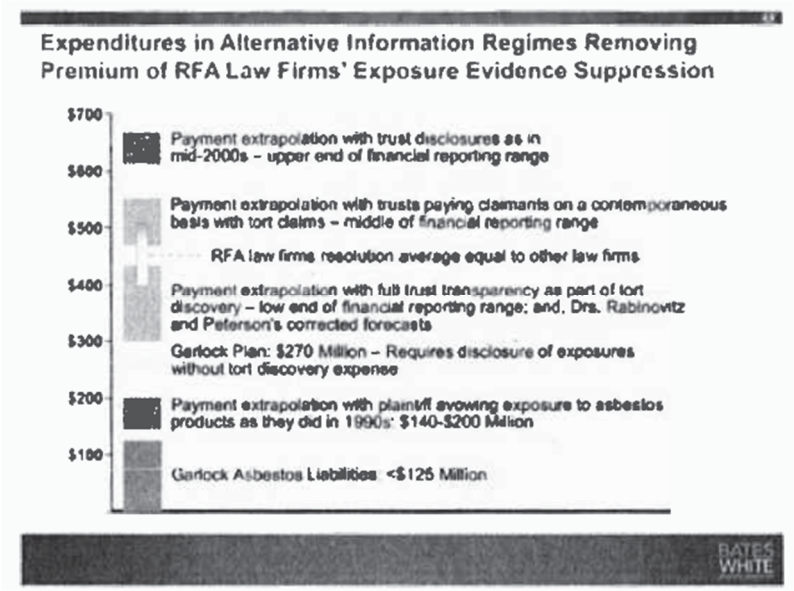
(46) Based on the data and the testimony provided in court, I further analyzed the effect of those higher RFA1 and RFA1A law firms on a tort system forecast that I presented to the Court as a correction to the forecasts presented by the ACC and Future Claimants Representative (FCR) experts. Figure 3 shows the range of Garlock future mesothelioma forecasts depending on the information regime determined by the disclosure of alternative sources of exposure. In particular, notice that a forecast based on the tort system conditions as of Garlock's petition date was more than $750 million in net present value, which

---

[41] Rebuttal Testimony of Dr. Charles E. Bates, *In re Garlock Sealing Technologies, LLC,* No. 10-31607 (Bankr. W.D.N.C., Aug. 22, 2013), GST-8026 (the "Garlock Rebuttal Testimony"), p. 37.

assumed that the RFA and other law firms would continue with their disclosure practices. However, assuming that the RFA law firms received the same average amounts as the non-RFA law firms resulted in a reduction of the forecast to a range between slightly above $400 million to slightly above $500 million, approximately a 30%-45% reduction. Figure 3 also shows a tort system forecast based on the assumption that no withholding of information would continue into the future, which resulted in a range between $140 million and $200 million net present value, about 25% of the forecast that assumed that the withholding of information against Garlock continued into the future.

Figure 3. Garlock forecasts based on different information regimes according to claimants' disclosure of exposures[42]



(47) In my Garlock Rebuttal Report, I performed several statistical analyses that showed exposure information withholding in cases well beyond those listed in the RFA Lists.[43] In Section VII, I explain those analyses and present the results using Garlock claims and Kaiser claims. The analyses consisted of comparing claimants' exposure allegations in their tort system discovery to the exposures alleged through filing trust claims and casting ballots in other bankruptcies: The

---

[42] Garlock Rebuttal Testimony, p. 44.

[43] Rebuttal Report of Dr. Charles Bates, *In re Garlock Sealing Technologies, LLC,* No. 10-31607 (Bankr. W.D.N.C., Apr. 23. 2013). GST-0997 (the "Garlock Rebuttal Report"), Sections 11.3.2.2-11.3.2.4.

results were striking. There were substantial numbers of companies (including insulation manufacturers and distributors) that were not disclosed by claimants in their tort system discovery responses. Because discovery included only 10[44] of the about 40 then operating asbestos trusts, those analyses were based on trust filings in only a subset of the operating trusts; the results, although remarkable, did not show the full extent of the claimants' withholding of information. This was demonstrated by the discovery granted in the Garlock matter for pending claims only (not settled claims). The Personal Injury Questionnaire (PIQ) responses regarding trust filings showed that claimants typically file about 22 trust claims.[45] Therefore, claimants not included in the DCPF trust discovery likely filed claims against other trusts and did not disclose such information to Garlock either. The 22 trust filings statistic was central in my estimation of Garlock's legal liability, as accepted by Judge Hodges in his Estimation Order.

(48) In summary, Judge Hodges' Estimation Order, testimony of Garlock representatives and prominent plaintiff lawyers, and my own testimony demonstrated that the withholding of information in cases against Garlock had an effect

---

[44] Per Garlock Court's discovery order, claims data were provided for 10 of the II DCPF trusts as part of the discovery in the Garlock matter. *See* Garlock Rebuttal Report ¶ 147.

[45] *See* Expert Report of Dr. Charles Bates. *In re Garlock Sealing Technologies. LLC.* No. 10-31607 (Bankr. W.D.N.C. Feb. 15. 2013). GST-0996 (the "Garlock Report"), ¶ 200: Estimation Order, ¶¶ 101-02.

well beyond the IS full discovery cases and even beyond the 210 cases included in the RFA Lists.

VI. Analysis of the overlap between Garlock's asbestos claims history and Kaiser's asbestos claims history

(49) Unlike in *Garlock,* there has been no discovery taken with respect to paid cases resolved by Kaiser. Nevertheless, and as shown in this section below, the substantial overlap between claims against Kaiser and claims against Garlock allows me to rely upon the Garlock discovery to reach conclusions with respect to the claims against Kaiser. As detailed above, discovery in the Garlock matter showed the large effect of the strategic withholding of exposure information by plaintiffs. As I show in Section VII, discovery from the Garlock matter on the overlapping claims reveals that Kaiser too was greatly impacted by the strategic withholding of exposure information by plaintiffs. This is not surprising. Kaiser, like Garlock, was a manufacturer of low-dose chrysotile asbestos-containing products.[46] And both Garlock and Kaiser were peripheral asbestos defendants, well known to asbestos plaintiff law firms for many years before the Bankruptcy Wave. Both were defendants of convenience after that Bankruptcy Wave, companies with identifiable brands and easy to accuse. Most importantly, both had their cost of defense increase dramatically, as the plaintiffs that sued them after their high-dose codefendants exited the tort system via bankruptcy reorganization filing told

---

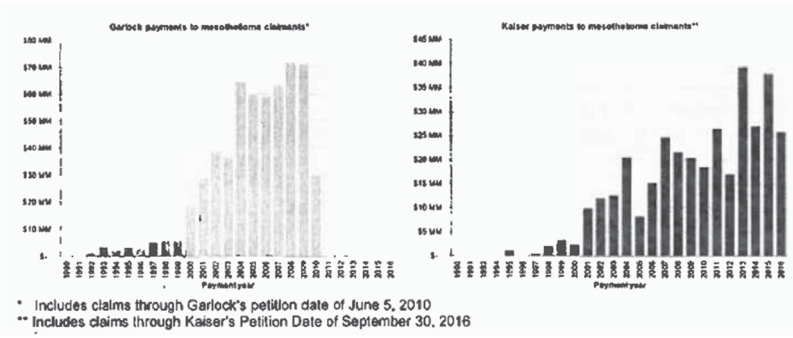
[46] *See* Estimation Order, ¶ 10; McChesney Declaration, ¶¶ 24 and 26.

a different story regarding their asbestos exposure than did similarly situated plaintiffs of previous years. a story of asbestos exposure that did not include the names of the asbestos products of many of the formerly common codefendants. As the discovery in the Garlock matter revealed, the asbestos exposure patterns of plaintiffs did not change significantly through the Bankruptcy Wave, just the elaboration of those exposures by the plaintiffs.

(50) Garlock, like Kaiser, saw a large increase in the number of claims it faced and in the payments to plaintiffs it had to make once claimants began to target it in the late 1990s. For both defendants, mesothelioma filings increased rapidly in the late 1990s, as prominent asbestos defendants started to file for bankruptcy protection. Importantly, the pattern of mesothelioma claims filed against Garlock and Kaiser from 2000 to Garlock's Petition Date are substantially the same. Figure 4 shows the profile of payments to mesothelioma claimants by Garlock (left) and Kaiser (right) starting in 1990. This figure further shows the similarities in experience for Garlock and Kaiser after the Bankruptcy Wave of the early 2000s. As the top-tier asbestos defendants abandoned the tort system, the cost to defend for peripheral defendants increased as peripheral defendants sought ways to establish the full extent of plaintiffs' asbestos exposure from plaintiffs who no longer willingly espoused their exposure to high-dose asbestos products as plaintiffs had done in prior years. As I testified to the Garlock court, a rapid rise in defense costs resulted in a rapid and dramatic increase in the amounts Garlock paid to resolve claims. Figure 4 shows

that the amount Kaiser paid to plaintiffs also rose dramatically after the Bankruptcy Wave, just as it did for Garlock. Like Garlock, Kaiser's costs to defend cases rose through the Bankruptcy Wave as it also sought ways to establish the full extent of its plaintiffs' asbestos exposures.

Figure 4. Payments to mesothelioma claimants against Garlock and Kaiser by year of payment



(51) As part of my analysis, using standard computer algorithms,[47] I joined the publicly available Garlock Analytical Database[48] and Kaiser's claims database[49] to determine the overlap between the two claiming populations. My analysis shows that 80% of the Kaiser mesothelioma claims filed before June 5, 2010, were found in the Garlock Analytical Database. As mesothelioma filings rose against Kaiser in the mid 2000s, the overlap in claims with Garlock increased to a peak of 85%. Figure 5 below shows the overlap of claims between Kaiser and Garlock over time. Given

---

[47] *See* Appendix A.3.

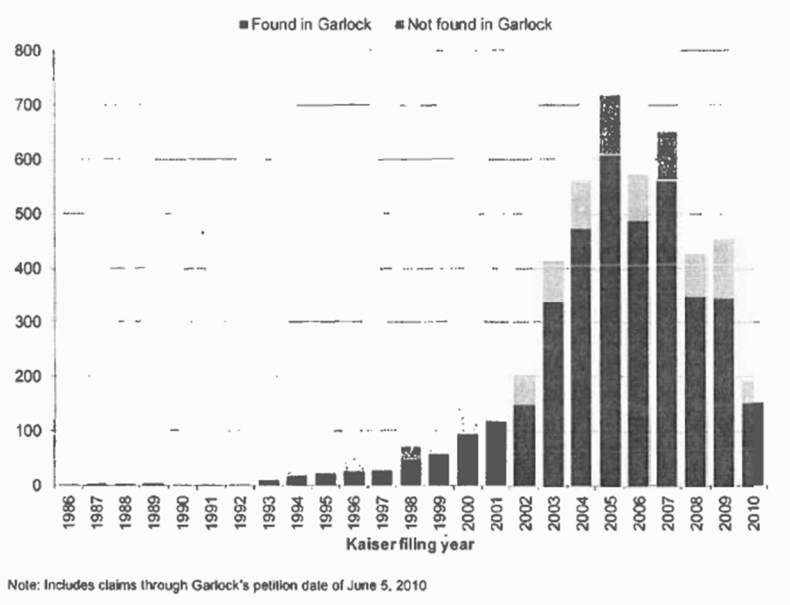
[48] *See* Appendix A.2.

[49] *See* Appendix A.1.

the large overlap of claim filings, the exposure data attained through discovery in the Garlock matter is germane to the instant matter.

(52) This is a remarkably large overlap in claimants given that Garlock produced asbestos gaskets and packing in high-temperature industrial settings (environments where high-temperature asbestos insulation was used) and Kaiser produced joint compound used in construction projects. It is, however, the pattern I would expect to see if the actual cause of mesothelioma for Kaiser claimants was high-dose asbestos insulations. Individuals who had both Kaiser joint compound exposure (low-dose asbestos) and exposure from high-temperature insulation (high-dose asbestos) would also have been in the presence of gaskets that were used in high-temperature steam fittings. As the manufacturers of asbestos insulation exited the tort system, Kaiser and Garlock are both defendants of convenience for the same individual with mesothelioma caused by his exposure to high-temperature asbestos insulation. It is natural that Garlock was named by claimants for whom the cause of their mesotheliomas is actually high-temperature asbestos insulation because Garlock's products were used in the same environments as high-temperature insulation; therefore, Kaiser claims alleging mesothelioma that overlap with Garlock claims are likely the result of exposure to high-temperature insulation, not the result of exposure to low-dose chrysotile asbestos-containing products.

Figure 5. Overlap of mesothelioma claims between Kaiser and Garlock through June 5, 2010



(53) In Section VII, I present several analyses using the overlap between Kaiser and Garlock claims. In particular, I show that many of the Kaiser claims are among those mentioned by Judge Hodges in his Garlock Estimation Order regarding withholding of information from Garlock.[50] Further, many other Kaiser claims overlapped with Garlock claims for which asbestos trusts' discovery and other available information was provided in the Garlock case; I use that information in my analysis.

---

[50] *See* Estimation Order, ¶ 66.

VII. Analysis of the effect of exposure omissions in Kaiser claims using publicly available data

(54) As I discussed in Section V, exposure omissions were widespread across Garlock claims. A combination of the changing tort environment as a result of the Bankruptcy Wave, the rules written into the TDPs, and the withholding practices by plaintiff law firms all contributed. In the rebuttal report I submitted in the Garlock matter[51] and in my court testimony,[52] I presented several analyses that showed the significant effect that the withholding of information had on Garlock's litigation experience. In this section, I use the overlap analysis from Section VI to compare the results of the Garlock omission analyses and the overlapping Kaiser claims. The analyses presented in this section are an approximation based on the overlap between the Garlock Analytical Database and the Kaiser claims database. The data to estimate and calculate more precise statistics are not available in the instant matter because the extensive discovery of trusts' data, plaintiff questionnaires, and access to full claim files for Kaiser claims authorized in *Garlock* has not taken place in the Kaiser bankruptcy. However, the results below show the same patterns between Kaiser claims that appear in the Garlock Analytical Database and the Garlock claims analyses that I presented in the Garlock Estimation Trial. Further, the overlap of claims and the similarity of the patterns provide sufficient

---

[51] Garlock Rebuttal Report, Sections 11.3.2.2-11.3.2.4.

[52] Garlock Rebuttal Testimony, pp. 36-38, 44.

foundation for the opinions I have been asked to render in this case.

VII.A. Analysis of exposure omissions by Kaiser claimants using available trust claims and ballots data

(55) DCPF trusts data and bankruptcy ballots were provided as part of the discovery record in the Garlock matter.[53] I compared the parties that claimants identified in depositions and interrogatories with the ballots they cast and trust claims they filed. I classify a defendant as omitted from a claimant's testimony if such defendant's name or products were not identified as sources of asbestos exposure in the claim file materials but the claimant voted in such defendant's bankruptcy or filed a trust claim in that defendant's asbestos trust. Because the trust and bankruptcy discovery in Garlock was granted and obtained several years after the resolution of many Garlock claims, that data are useful to evaluate the extent to which claimants' exposures to prior prominent codefendants were not revealed to active tort system defendants such as Garlock or Kaiser. Table I shows that, for the 205 overlapping Kaiser claims for which Garlock discovery data were available, 63% of the exposures to asbestos defendants represented in the DCPF trusts or in the available ballots were omitted by plaintiffs in their tort discovery after the bankruptcy wave (2000-2010).

---

[53] In addition, the Garlock Court allowed a Personal Injury Questionnaire that collected information about trust filings for pending Garlock claims *See* Appendix A.2.

Table 1: Proportion of exposures Identified or omitted in tort discovery against Kaiser

Exposure identification	Filed 2000-2010
Exposure identified	37%
Exposure omitted	63%
Total	100%

(56) Table 2 shows summary statistics about exposures disclosed and withheld by claimants listed in the RFA List[54], using the DCPF trust claims' filings and bankruptcy ballots.[55] The table compares the results I presented in my Garlock Rebuttal Report and the results for Kaiser claims that appeared in the RFA Lists. The first column shows the number of identified[56] to the DCPF former defendants or the defendants for which ballots were available by RFA claimants in their testimony.[57] The second column shows the number of votes in those defendants' bankruptcies or DCPF trust claims filed by the RFA claimants. Comparing these two columns shows that the number of trust claims and ballots is three times

---

[54] "Supplemental RFA List #1, RFA List #2, and RFA List #1.A to the Debtors' Amended Responses to Requests for Admission Nos. 1 and 2 of the Official Committee of Asbestos Claimants' First Set of Requests for Admission and Supplemental Interrogatory Responses and Document Requests Pursuant to Stipulation" (Jan. 16, 2013) (Trial exhibit ACC-535) (hereinafter the "RFA Lists").

[55] Garlock Rebuttal Report, ¶ 140.

[56] Limited to one exposure identification per defendant for each claimant.

[57] The defendants are listed in Table 3.

the number of exposure identifications of those companies during tort discovery, both for all Garlock RFA Lists claims and for the Kaiser claims that appear in the RFA Lists. The third, fourth, and fifth columns pertain to the claimants who identified exposures to companies' products through tort discovery, ballots, or trust claims: the average number of defendants identified by such claimants in their tort discovery, the average number of defendants (within the DCPF and ballots' entities) omitted by those claimants in their tort discovery, and the average number of thermal insulation defendants (within the DCPF and ballots' entities) omitted by those claimants in their tort discovery. Comparing the top row of the third, fourth, and fifth columns shows that although Garlock claimants identified about 22 defendants on average in their tort discovery, claimants omitted about 9 DCPF and ballot defendants on average, of which at least 4 were associated with thermal insulation products. The same comparison for the bottom row shows that although the 41 Kaiser claimants for which information is available identified 24 defendants on average in their tort discovery, they omitted about I 1 DCPF and ballot defendants on average, of which at 5 were associated with thermal insulation products.

Table 2: Summary statistics for former codefendants with available ballots or trust claims Information for Garlock claims filed after 1999

Claim group	Garlock RFA Claims[58]	Kaiser claims found in RFA Lists
Number of exposure IDs	604	155
Number of ballot/trust claims filed	1,810	478
Average number of exposure companies' IDs	22	24
Average number of omitted companies' IDs	9	11
Average number of omitted insulation companies' IDs	4	5

(57) The omission results above are limited to the DCPF trusts' data and the ballots data obtained in discovery from the Garlock matter. Additional trust data would likely show higher percentages of omissions in the 2000s. This was observed in the results presented at the Garlock Estimation

[58] Garlock Rebuttal Report, Exhibit 31.

Trial for the 15 claims for which extensive trust claims discovery was obtained.[59]

(58) In my Garlock Rebuttal Report, I extended the analysis performed in Table 2 beyond the RFA Lists to a broader sample of claims: all claims for which a claim file review was performed, including all the resolved claims that were reviewed and all the PIQ claims for which a claim file review was performed.[60] The results showed essentially the same results for the broader sample of claims: the number of ballots and trust claims filed greatly exceed the number of instances in which the listed companies were identified in tort discovery.[61] Replicating that analysis on the 205 overlapping Kaiser/Garlock claims for which information is available yields the same results. Table 3 shows that, for the overlapping Kaiser claims, the number of ballots and trust claims filed greatly exceed the instances in which those companies were identified as sources of exposure in tort system discovery. An interesting example of the stark difference between disclosures and exposures is that of US Gypsum in Table 3: even when claimants named Kaiser, they disclosed exposures to US Gypsum (a prominent former Kaiser codefendant) less than half of the time. Furthermore, performing the analysis presented in Table 2 for the 205 Kaiser overlapping claims with available trusts and ballots information

---

[59] *See* Estimation Order, ¶ 58.c and Section V above. Also, *see* Memorandum of Robinson, Bradshaw & Hinson P.A., *In re Garlock Sealing Technologies, LLC,* Feb. 8, 2013.

[60] Garlock Rebuttal Report, ¶ 142

[61] Garlock Rebuttal Report, ¶ 142 and Exhibit 32

shows that, although those claimants identified 26 defendants on average in their tort discovery, they omitted about 11 DCPF and ballot defendants on average, of which 5 were associated with thermal insulation products.

Table 3: Former codefendants with available ballots and trust claims information for Kaiser claims filed after 1999

Company	Number of exposure IDs	Number of ballots/trust claims filed
ABB Lammas	4	22
AC&S	20	109
AP Green	27	19
Aura	14	57
Asarco	23	83
AW	80	157
Babcock & Wilcox	76	163
Burns & Roe	6	18
Combustion Engineering	47	62
Congoleum	19	69
Federal Mogul Prod.	23	49
Ferodo	3	40
Fibreboard	61	170
Flexitallic	48	86

Flintkote	37	102
GAF	39	40
Halliburton	66	131
Harbison Walker	30	91
Kaiser Alum. & Chem.	54	63
Leslie Controls	24	23
Narco	17	29
Owens Corning	77	168
Pittsburgh Corning	25	112
Quigley	24	85
Shook & Fletcher	1	14
THAN	15	89
Turner & Newell	23	66
US Gypsum	71	164
US Mineral Products	11	21
WR Grace	34	49
Total	**999**	**2,351**

(59) The analyses in this section show two main points. First, the omissions cited by Judge Hodges in his Estimation Order were applicable to a larger set of claims than just the 15 cases that people, without direct knowledge of the case,

often cite. Second, the omissions observed in Garlock claims are also observed in Kaiser claims, when the data are available.

VII.B. Effect of non-disclosure of trust claims on Kaiser settlement amounts paid to plaintiffs

(60) In the Garlock bankruptcy matter, I analyzed the difference on settlement amounts paid by Garlock between claimants who had filed trusts claims before and after settling their Garlock claim. On average, claimants who filed with DCPF trusts before resolving their Garlock claim settled with Garlock for just over half the amount that Garlock paid claimants who resolved their Garlock claim before their DCPF trust filings. That illustrates that when defendants do not have information about a claimant's alternative sources of exposure, the claimant will likely be able to extract a larger settlement.

(61) This result also applies to Kaiser's settlements for the overlapping claims. Table 4 compares the average resolution amount for 857 Kaiser mesothelioma claims resolved by Kaiser after 2005. Kaiser claimants who resolved their tort claims before filing against a DCPF trust, on average, extracted more than 60% higher amounts from Kaiser than those who resolved their Kaiser claims after tiling with DCPF trusts. As with the previous analyses, these results are limited by the data available for Kaiser claims and by the availability of DCPF trusts' data. Importantly, it is not possible to perform this analysis on claims that resolved with Kaiser after Garlock's petition date due to the lack of data.

Table 4: Kaiser resolution amounts for mesothelioma claims filed and resolved after DCPF trusts began paying claims

Trust filing/ Kaiser resolution order	Average resolution value	Count of claims
Kaiser claim resolved after	$27,000	425
Kaiser claim resolved before	$44,000	432
Combined average	535,000	857

VII.C. Analysis of claims and law firms withholding information in the Garlock matter

(62) As I discussed in Section V, Judge Hodges found exposure omissions in a significant group of claims that drove Garlock's litigation. The RFA Lists constructed by Garlock identified such claims.[62] Using my overlapping analysis of the Kaiser and Garlock data, I found that 48 of the RFA claims were also filed against Kaiser, 16 of those cases resolved with Kaiser for a total of $3.2 million, 3 cases remain open, and the remaining 29 were dismissed.

(63) Given that these cases were found to have exposure omissions, that plaintiff law firms are largely in control of the exposure evidence, and that, as described above in Section V, plaintiff lawyers follow similar practices regarding disclosure of exposure information for their cases, I

[62] *See* RFA Lists.

analyzed the extent to which the law firms representing the RFA claims also represented claims against Kaiser, beyond the 48 RFA claims identified above. Table 5 shows the prominence of the RFA law firms in Kaiser's tort history. The RFA law firms tiled approximately 37% of all claims and approximately 53% of mesothelioma claims against Kaiser. In terms of payments to plaintiffs, the RFA law firms represent approximately 51% of all payments and approximately 58% of payments to mesothelioma claims. In addition, these RFA law firms represent approximately 46% of all the unresolved claim records and approximately 53% of the unresolved mesothelioma claim records in the Kaiser claims database. Note that the Brayton Purcell law firm was not included within the Garlock RFA law firms; however, as I discussed in Section V, this law firm, as described by Judge Hanna, has withheld exposure information. Table 5 shows that the Brayton Purcell law firm received almost $24 million for mesothelioma claims from Kaiser. Thus, the mesothelioma payments to RFA law firms and Brayton Purcell together represent 65% of Kaiser payments for mesothelioma claims and 54% of Kaiser's unresolved mesothelioma claims as of its petition date. I also segregate the Weitz & Luxenberg law firm in Table 5 below because this law firm files claims mainly in New York City, where the rules of scheduling cases for trial allow it to impose high costs on defendants in cases that Weitz & Luxenberg would not pursue through trial.[63]

---

[63] *See* paragraph (32) above.

Table 5: Summary of RFA and non-RFA law firms for Kaiser mesothelioma claims

Law Firm	Claims resolved with payment	Total payments to claimants	Pending records
Baron & Budd	32	$9,741,504	26
Peter Angelos	37	$25,615,000	109
Simon Greenstone Panatier	68	$19,090,000	5
Waters, Kraus & Paul	82	$25,801,503	6
Williams Kherkher	1	$225,000	0
Skein Law	19	$3,615,000	1
Belluck & Fox	62	$20,777,000	54
Other RFA law firms	475	$95,042,848	725
Total RFA law firms	*776*	*$199,907,855*	*926*
Weitz & Luxenberg	100	$27,055,000	131
Brayton Purcell	98	$23,690,000	15
Other non-RFA law firms	557	$95,629,700	676
Total non-RFA law firms	*755*	*$146,374,700*	*822*
Total	1,531	$346,282,555	1,748

(64) These law firms' practice of withholding exposure information from defendants, including Kaiser, greatly increases the defense expenses in all cases because defendants have to attempt to substitute what would have been a plaintiffs admission with alternative testimony that may be expensive to develop without the plaintiff's cooperation. In many cases, even if the defendant is able to spend large amounts of money on trying to substitute the plaintiff's information about his exposures from indirect sources, such evidence is not as useful as the plaintiff himself espousing those alternative sources of exposure. Therefore, when plaintiff law firms withhold exposure information from defendants, both the cost of defending and the trial risk increase. As a consequence, defendants are willing to pay more to avoid the additional costs and risks, which results in higher settlement amounts for those law firms.

/s/ Charles E. Bates	February 20, 2020
Name	Date

Appendix A.
Asbestos claims databases used in the analysis

(65) My analysis discussed in Section VII relies on the combination of two data sources—Kaiser's historical claims data and the publicly available Garlock Analytical Database. This section describes each of those data sources and the process I used to combine the data for my analysis

A1. Kaiser's historical claims data

(66) I understand that Truck maintains a database of information about the asbestos litigation histories for Kaiser. Truck provided that data to Bates White in one MS Excel file *2017-0331 BiacReport.XLS* (the "BIAC Report"). I understand that Truck generated that report from a database it maintains about asbestos litigation against Kaiser.

(67) The BIAC Report includes 38,373 claim records with information about claimants and their claims against Kaiser. Among that information is claimant names, alleged disease, service date (filing date), law firm, state of filing, claim status, resolution date, and amount. The BIAC Report includes records with filing dates from 1978 through September 2016 and resolutions from July 1980 through December 2016.[64] Bates White processed the BIAC Report to generate the summary statistics and analyses presented in this Report.

(68) In particular, Bates White processed and standardized the BIAC Report by:

---

[64] There are 2 records with resolution dates in February 2017.

- Parsing the names of the claimants into first name, middle name (or middle initial), last name, and suffix (if available)
- Formatting birth, death, and filing/service dates
- Standardizing alleged diseases and claim status into categories
- Standardizing law firm names to match the law firm naming convention in the Garlock Analytical Database

(69) After standardizing the data, I analyzed it for potential duplicate records. Claimants could appear with multiple records for the same disease. I used standard computer algorithms along with combinations of the available personal identifying information (e.g., first and last names and birth and death dates) in the Kaiser data to identify potential duplicate records. After identifying potential duplicate records, I preserved only one record per claimant and alleged disease, by compiling the most complete available information across records and the most advanced status, as follows:

- Paid records were preserved over dismissed and pending records with the same alleged disease
- The most recent claim was preserved if there was more than one pending record with the same alleged disease
- If a pending and a dismissed record were present, the record with the most recent filing date was preserved

(70) Through this process, Bates White identified 761 duplicate records. Table 6 summarizes the alleged diseases and claim statuses for the processed Kaiser historical claims data.

Table 6: Kaiser historical claims by alleged disease and status

Disease	Dismissed	Pending	Settled
Mesothelioma	5,500	1,731	1,525
Lung cancer	3,460	2,636	622
Other cancer	560	738	109
Non-malignant	8,379	5,871	1,732
Unknown	3,501	1,216	4
Total	21,400	12,192	3,992

[Table 6 cont'd]

Disease	Defense verdict	Plaintiff verdict	Total
Mesothelioma	12	7	8,115
Lung cancer	2	3	6,723
Other cancer	0	0	1,407
Non-malignant	4	0	15,986
Unknown	0	0	4,721
Total	18	10	37,612

A.2. The Garlock Analytical Database

(71) The Garlock Analytical Database is the database that I used in my analysis for Garlock's

Mesothelioma Liability Estimation Trial.[65] Judge Hodges described the Garlock Analytical Database as "the most extensive database about asbestos claims and claimants that has been produced to date."[66] Judge Hodges made the database publicly available.[67]

(72) The Garlock Court allowed discovery to supplement Garlock's historical claims data. This included subpoenas to several balloting agencies for production of ballot records from a number of bankruptcy proceedings involving other asbestos defendants and trust records from DCPF. I highlight the key sources used in the construction of the Garlock Analytical Database below.

- **Garlock's historical claims data**. Electronic database that contains the most complete record available of claims filed against Garlock from the 1980's through the bankruptcy protection petition date of June 5, 2010.[68]
- **Mesothelioma Personal Injury Questionnaire**. The Garlock Court authorized Garlock to require claimants who had unresolved mesothelioma claims in the Garlock claims

---

[65] *See* Garlock Gallardo-Garcia Report for a detailed description of the construction and sources comprising the Garlock Analytical Database.

[66] Estimation Order, ¶ 97.

[67] Order on Motions to Seal Materials in Record of Estimation Proceeding and Protocol for Redaction of Record, *In re Garlock Sealing Technologies, LLC,* No. 10-31607 (Bankr. W.D.N.C. Oct. 31. 2014).

[68] Garlock Gallardo-Giucia Report, Section 11.3

database to answer a questionnaire with information regarding their identifying information, their exposure histories and their claims.[69]

- **Asbestos trusts' discovery data**. The Garlock Court ordered DCPF to provide Garlock with data related to mesothelioma claimants who settled with Garlock between 1999 and 2010 and who had filed trust claims with trusts managed by the DCPF.[70]
- **Historical Garlock claims claim file review**. Bates White drew a random sample of historically resolved mesothelioma claims from the Garlock claims database. Garlock gathered the claim files for those claims and Bates White recorded relevant exposure and work histories information, among other pieces of information, for analysis.[71]
- **Garlock's verdicts list**. A list of Garlock's cases that were resolved through plaintiff or defense verdict.[72]
- **Ballots and voting data from other bankruptcies**. The Garlock Court ordered several balloting agencies to provide ballot and voting records from 23 bankruptcy proceedings involving asbestos defendants.[73]

---

[69] Garlock Gallardo-Garcia Report, Section 11.2.

[70] Garlock Gallardo-Garcia Report, Section 11.4.

[71] Garlock Gallardo-Garcia Report, Section 11.5.

[72] Garlock Gallardo-Garcia Report, Section 11.6.

[73] Garlock Gallardo-Garcia Report, Section 11.7.

(73) The Garlock Analytical Database is a relational database composed of four separate tables: (1) a claim-level table; (2) an exposure-level table; (3) a party-level table; and (4) an expense-level table.[74]

A.3. Identification of the overlap between Kaiser and Garlock claims

(74) To match the Kaiser claims data with the Garlock Analytical Database, Bates White used a standard matching algorithm that relies on a sequential series of matching rounds that find records in both databases that share the same claimant and claim identifying information, according to some criteria or "rules," as described below.

(75) In total, Bates White used nine matching rules, based on various combinations of the claimant and claim identifying fields available in the Kaiser claims data. The information used in a given rule determines the strength of a match. For example, the highest matching rule included matching on a claimant's last name, first name, claimant lawyer, filing state, birth date, and death date. The lowest matching rule was a match only using the claimant's last and first names.

(76) Generally, the matching algorithm first identifies a potential match by comparing the identifying criteria across the data sets. Then a series of more restrictive tests evaluate the validity of the potential matches. This multistep process relies on a combination of computer code and expert

---

[74] Garlock Gallardo-Garcia Report, Section 111.1

judgment to ensure the reliability of matches. Within each matching round, the algorithm proceeds in three steps:

- Step 1: Identify potential matches by comparing a combination of the data fields considered across the two data sets. In this step, we only allow matches on records that have available information on all of the matching data fields considered in the matching round. For example, records that share the same state of filing/residency, last name, and birth year are considered a potential match. In this example, not including the first name allows us to identify potential matches with some first name variations such as Will and William, or if a spouse was filing on the claimant's behalf.
- Step 2: The algorithm compares additional fields to identify potential conflicts in other data fields. For instance, in this matching round, an algorithm that checks for conflicts in the death dates would confirm that the death dates in the Kaiser and Garlock data are reasonably close, e.g., within the same year. In this step, the computer algorithms reject potential matches identified in Step I by testing conflicts on other fields.
- Step 3: The algorithm identifies records that should be visually inspected to confirm or reject . matches. This step is part of the quality control process of the matching of data sets, and it is essential to ensure that most matching records are identified through the matching algorithm while minimizing the number of potential false positives.

(77) After the matching process is completed, the resulting database is a claims database that includes all claims included in the Garlock Analytical Database and the Kaiser claims database, with only one record per claimant and alleged disease combination. Then the "Combined Database" includes three groups of claims: (1) claims filed both against Kaiser and Garlock (the "overlapping claims"); (2) claims filed against Kaiser but not found in the Garlock Analytical Database; and (3) claims filed against Garlock but not found in Kaiser's claims database. The analyses I present in Sections VI and VII focus on the overlapping claims group.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re	**Case No. 16-31602**
KAISER GYPSUM COMPANY, INC., et al.,[1]	**Chapter 11**
Debtors.	(Jointly Administered)

TESTIMONIAL DECLARATION OF TRUCK INSURANCE EXCHANGE WITNESS LESTER BRICKMAN

GIBSON, DUNN & CRUTCHER, LLP
Michael A. Rosenthal
Robert B. Krakow
Russell H. Falconer
Matthew G. Bouslog
Dylan S. Cassidy
2001 Ross Avenue,
Suite 2100
Dallas, TX 75201

GRIER WRIGHT MARTINEZ, PA
Michael L. Martinez
(N.C. Bar No, 39885)
521 E. Morehead St.,
Ste 440
Charlotte, NC 28202

Counsel for Truck Insurance Exchange

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Kaiser Gypsum Company, Inc. (0188); and Hanson Permanente Cement, Inc. (7313). The Debtors' address is 300 E. John Carpenter Freeway, Irving, Texas 75062.

DECLARATION OF LESTER BRICKMAN

1. I am *emeritus* professor of law at the Benjamin N. Cardozo School of Law. I have been qualified by a number of courts as an expert on the history of asbestos litigation; fraudulent and deceptive practices of lawyers for plaintiffs in asbestos litigation; asbestos claim settlement practices; asbestos bankruptcy trusts; and the effect of trust distribution procedures on the litigation and valuation of asbestos claims. I testified as an expert in this Court during the *Garlock* estimation proceeding. I have written 11 articles on asbestos litigation which have been published in law reviews and widely cited and downloaded; testified before Congress on four occasions on the abuses prevalent in asbestos litigation and asbestos bankruptcy practices; and was one of two law professors "who have published and are well-known experts in the areas of asbestos litigation and bankruptcy trusts" consulted by the U.S. Government Accountability Office in preparing a report on asbestos trusts. In addition, I have researched, written about extensively, and taught courses and seminars on legal ethics and the legal profession for over 50 years, including a seminar on the ethics of legal fees and the impact on the tort system of contingency fee financing.

2. My descriptions of asbestos litigation practices have been extensively cited and have come to be widely accepted in the legal and academic communities. In 1991, I was asked by the Administrative Conference of the United States, an agency in the executive branch of the federal government, to draft a proposed administrative alternative to asbestos litigation and to organize a colloquy to consider that proposal. In addition, I have testified on four occasions before congressional committees on fraudulent practices in

asbestos litigation and bankruptcy issues. My qualifications to testify as an expert on the history of asbestos litigation have been challenged in three *Daubert* proceedings. Each time, the courts rejected the challenge.

3. In rejecting a challenge in the Armstrong World Industries bankruptcy in 2006, U.S. District Court Judge Eduardo Robreno (who subsequently presided over the asbestos multidistrict litigation *In re Asbestos Prod. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa.), where his rulings resulted in the dismissal of tens of thousands of asbestos claims because of invalid medical evidence) stated:

> "Dr. Brickman has been shown to be qualified as an expert in the history of asbestos litigation, he has been studying the subject for 15 years, he has published at least seven articles on the subject and has testified three times before congressional committees on asbestos litigation and asbestos bankruptcy and has been qualified by at least two federal judges as an expert on the history of asbestos litigation and he has supplied a full and complete written expert testimony in a third asbestos bankruptcy proceeding. Therefore, I think that under Rule 702, he is qualified by virtue of skill, education, experience to aid the Court in—in this case."

4. My testimony here is based upon the expert report 1 prepared in this matter, which is attached as Exhibit 1 hereto. Attached as Exhibit B to my report is a more complete statement of my qualifications with regard to asbestos litigation and bankruptcies. Attached as Exhibit C to my report is a copy of my curriculum vitae.

5. It is my conclusion, based upon the materials I have reviewed in this matter, evidence that I and others presented in the *Garlock* estimation proceeding and Judge Hodges's findings therein, and my scholarly research, that plaintiffs and their counsel have systematically and fraudulently suppressed the production of evidence of plaintiffs exposures to asbestos-containing products other than those manufactured by the entities against whom they are litigating in the tort system. The intended effect of this suppression of vital evidence is to significantly inflate asbestos defendants' claim resolution costs by driving up settlement and defense costs and increasing defendants' litigation risk.

6. In many cases, the suppression is of evidence relating to claimed exposure to products containing highly toxic forms of asbestos, as opposed to the far less toxic asbestos products distributed by companies such as Garlock, Bestwall, Kaiser and HPCI. In such cases, defendants can face substantial litigation risk even though they likely would be found to have little to no liability if provided with complete information regarding plaintiffs' claimed exposure to more toxic types of asbestos.

7. It is my further conclusion that because the Joint Plan proposes to resolve all insured asbestos bodily injury bankruptcy claims against the Debtors in the tort system, many of those claims are likely to be infected by the same improper evidence suppression scheme that has inflated the value of such claims for at least the better part of the past 20 years. Adoption of the Joint Plan, as currently proposed, would facilitate the fraudulent practices that I have identified in my published scholarship and in my testimony in the *Garlock* bankruptcy proceeding. Unless fraud prevention

measures similar to those agreed to in the *Garlock* and *Maremont* bankruptcies (and which have been included in the Joint Plan but only applicable to uninsured claims presented to the Kaiser Gypsum Asbestos Personal Injury Trust), are required for claimants who resolve their insured claims in the tort system, Truck and other insurers of those claims will continue to be victimized by the fraud.

8. The background to my conclusions is as follows. From 2000 to 2001, a "Bankruptcy Wave" took ten top-tier asbestos defendants—producers of thermal insulation and refractory products that had accounted for a substantial share of the compensation then being paid to asbestos claimants—out of the tort system. According to some analysts, top-tier companies were paying upwards of 80% of what plaintiffs were receiving as compensation in the tort system during the late 1990s. Although these bankruptcies would eventually lead to the formation of trusts that would pay the asbestos claims against the bankrupt entities, payments from the resulting trusts would not amount to substantial sums until 2006. Ultimately, approximately 100 asbestos defendants would file for bankruptcy relief and disappear from the tort system and, by 2011, approximately 60 bankruptcy trusts had been created with tens of billions of dollars of assets to satisfy asbestos claims.

9. Not surprisingly to those who have studied asbestos litigation, in the immediate aftermath of the Bankruptcy Wave, plaintiffs stopped identifying exposures to the asbestos-containing thermal insulation and refractory products of these top-tier companies. Continuing to name the top-tier companies that had gone bankrupt as defendants would have resulted not only in substantial delays in receiving payment, but also

much reduced recoveries from solvent defendants. Instead, asbestos plaintiffs' lawyers stepped up litigation efforts against formerly peripheral companies that prior to the Bankruptcy Wave were infrequently sued and, when they were sued, typically paid at most nominal amounts to settle the claims. These peripheral defendants were involved in the manufacture and distribution of such asbestos-containing products as gaskets, pumps, automotive friction products, and residential construction products, rather than the thermal insulation and refractory products that were the dominant sources of exposures alleged prior to the Bankruptcy Wave.

10. Prior to the Bankruptcy Wave, companies like Garlock, which sold gaskets, and Kaiser Gypsum and Bestwall, which were sellers of products used in residential construction and home repair projects, were peripheral asbestos defendants, likely because their products contained the far less toxic chrysotile asbestos fibers. According to data provided by Bates White, Kaiser was named as a defendant in mesothelioma lawsuits an average of 48 times per year from 1993-1999. However, following the Bankruptcy Wave and the disappearance from the tort system of the major insulation manufacturers and others whose products contained the far more toxic amphibole asbestos, lawsuits against companies like Garlock, Kaiser and Bestwall soared. From 2000-2009, the average number of mesothelioma lawsuits per year against Kaiser increased almost ten-fold over the prior decade, to 434 per year. From 2010-2016, the average further increased to 604 mesothelioma lawsuits per year.

11. Correspondingly of course, in the tort system cases, asbestos plaintiffs' testimony identifying the products that were alleged to have caused their

mesothelioma abruptly shifted from the manufacturers of insulation and other products containing amphibole asbestos to the distributors of products containing chrysotile asbestos such as Kaiser Gypsum, Bestwall and Garlock. In fact, and as revealed in the *Garlock* estimation findings of Judge Hodges, asbestos mesothelioma plaintiffs did not stop asserting that their fatal illness was caused by the amphibole manufacturers who had filed for bankruptcy. Rather, they and their lawyers pursued recoveries from the asbestos trusts, but suppressed the evidence of the amphibole exposures, and resulting trust claims, in the lawsuits brought against chrysotile manufacturers such as Garlock and Kaiser.

12. The explosion of asbestos bankruptcy trusts has created a dual compensation system for the satisfaction of asbestos liabilities: Asbestos claimants can seek recovery from solvent defendants in the tort system and from bankrupt entities through their trusts. The amount of money disbursed by the trusts has soared since 2004. Between 2004 and 2016, the number of active asbestos trusts increased from 14 to 58. In that period, the trusts paid out $24 billion to claimants. As of 2016, trusts' assets totaled $27 billion. An additional five asbestos Debtors, including Bestwall and Kaiser Gypsum, are currently going through the asbestos bankruptcy process.

13. Mesothelioma claimants typically qualify for payment from multiple trusts, depending upon the sources of their exposures to asbestos-containing products. If the products responsible for the exposures were distributed on a national basis for industrial or commercial use, then a substantial percentage of those mesothelioma claimants may be eligible for compensation from as many as 25 trusts invested with

assets provided by the reorganized companies that produced and distributed these products. Dr. Charles White of Bates White sampled over 1300 pending and resolved claims against Garlock and determined that the typical Garlock claimant had claims against 14 tort system defendants including Garlock, plus 22 trusts. In line with that testimony, I estimate that mesothelioma claimants with exposures to industrial and commercial asbestos-containing products distributed nationally will typically qualify for payment from 15 to 20 trusts.

14. When trust payments began to amount to substantial sums by 2004, it presented a quandary for certain asbestos plaintiffs' lawyers. Trust recoveries from 15 to 20 trusts for most claimants were too lucrative to pass up. However, submitting claims to these trusts and replying to discovery with disclosure of all trust claims filed or to be filed would substantially reduce the value of tort system claims against the remaining solvent asbestos defendants, particularly those defendants like Kaiser, Bestwall and Garlock that sold asbestos products that were far less toxic. As found in *Garlock,* as well as other cases, the solution for many plaintiffs' lawyers was to (1) have their clients falsely deny, under oath, their exposures to the asbestos products of reorganized companies and then argue to the juries that the defendants had failed to show that plaintiffs had been exposed to the highly toxic products of the companies that had succumbed to the Bankruptcy Wave; (2) use their control over the content of Trust Distribution Procedures ("TDPs") to enact measures to deny tort system defendants access to trust filings; and (3) delay filing claims with the bankruptcy trusts until all tort actions had been concluded.

15. Indeed, beginning around 2006, asbestos plaintiffs' lawyers, through their control of the asbestos trusts, began to implement and standardize trust confidentiality provisions designed to prevent tort system defendants from gaining access to trust filing information. The same baker's dozen or so law firms that represent the large majority of asbestos claimants in the tort system also represent the majority of claimants in asbestos-related bankruptcy proceedings. In most cases, these leading asbestos law firms largely control the asbestos bankruptcy process and the operation of the trusts created under § 524(g). In addition to their populating the asbestos claimants committees ("ACCs"), these plaintiffs' counsel effectively select the trustees to operate the § 524(g) bankruptcy trusts that will be created to actually pay the claims, the administrator of the trust, and also the future claims representative ("FCR") who is to represent the interests of future claimants. Finally, these plaintiffs' counsel also constitute the membership of trust advisory committees ("TACs"), which represent the interests of current asbestos claimants. While trustees have the authority to amend TDPs, that can only be done with the consent of the TAC and FCR. Essentially, it is the TAC that exercises effective control over the TDPs after they have been initially drafted by the ACC and adopted as part of the plan of reorganization.

16. In filing a trust claim, a "claimant must demonstrate meaningful and credible exposure" to the products of the company funding the trust. Thus, evidence of trust claim filings is critically important to a tort system defendant and highly relevant to the fair adjudication of a tort system case. However, plaintiffs' counsel, who have effective control over the creation and administration of asbestos bankruptcy trusts,

have used that power to include, amend, or add provisions to TDPs designed to limit, if not preclude entirely, the use of discovery to access evidence that a tort plaintiff has even filed trust claims. The great majority of asbestos trust TDPs also include provisions designed to prevent tort system defendants from discovering the exposure evidence and other vital information submitted by the claimants as part of their trust claims.

17. One such provision is a "confidentiality" provision, which generally states that all information submitted to trusts by an asbestos claimant is to be treated as made in the course of settlement negotiations and is intended to be confidential and protected by all applicable privileges. Additionally, trusts must take all available steps to defend that confidentiality, especially as against the efforts of tort defendants seeking to discover whether a plaintiff had filed a claim with that trust—claims that require "under penalty of perjury" averments that the claimant had "meaningful and credible exposure" to the products of the bankrupted companies that provided the assets to fund the trusts. Stated plainly, the object of the confidentiality clause is to provide armor-cladding for tort plaintiffs' false denials of exposure to the products of companies that have sought bankruptcy relief, created trusts to resolve their asbestos liabilities, and disappeared from the tort system.

18. Indeed, the trust procedures proposed by the Joint Plan proponents in the Kaiser Gypsum bankruptcy include a confidentiality provision typical and illustrative of what has been adopted by other asbestos trusts. Section 6.5 of the proposed trust procedures provides as follows:

> All submissions to the Asbestos Trust by a holder of an Asbestos Claim, including a claim form and materials related thereto, shall be treated as made in the course of settlement discussions between the holder and the Asbestos Trust, and intended by the parties to be confidential and to be protected by all applicable state and federal privileges and protections, including but not limited to those directly applicable to settlement discussions.

The confidentiality provision further provides that the trust "will preserve the confidentiality of the submissions" and shall disclose their contents only "with the permission" of the claimant or in response to a valid subpoena issued by the Bankruptcy Court, a Delaware state court, or the United States District Court for the District of Delaware. Moreover, if served with a subpoena from one of the specified courts, the trust is obligated "to take all necessary and appropriate steps to preserve such privileges" before said court and to provide the impacted claimants with notice of the subpoena. Thus, not only does this provision require a subpoena for production of claims information, it requires that the subpoena issue from courts other than the trial court where the asbestos claim is being litigated. This is intended to delay defendants' access to possibly vital information by having to run an additional gauntlet of bankruptcy judges or the Delaware courts, thus imposing increased costs on defendants and also running out the clock on the trial courts' timetable for conducting discovery.

19. In addition to confidentiality provisions, plaintiffs' counsel have also inserted into TDPs a provision that provides that evidence submitted to the trust is for the "sole benefit" of the trust, and claimants are not

required to list any other exposures in filing a claim except those for which the trust is responsible. In addition, if an asbestos plaintiff in a tort action fails to identify exposure to products of a reorganized company or fails to do so when filing claims with other trusts, then the plaintiff would not be precluded from recovering as an asbestos claimant from that trust. These "sole benefit" provisions appear intended to enable plaintiffs and their counsel to limit the exposure evidence they must provide in support of each trust claim, thus minimizing the breadth of exposure evidence possessed by any one asbestos trust. Accordingly, a tort system defendant seeking to obtain evidence of *all* trust claims submitted by the plaintiff would need to successfully subpoena *all* asbestos trusts. This provision also seeks to vitiate any consequences with regard to perjurious testimony in interrogatories, depositions, and at trial.

20. A third TDP provision that appears intended to suppress evidence of plaintiffs' exposures to the products of reorganized companies so as to inflate the value of tort claims involves the timing of trust claim filings. Most TDPs have a three-year statute of limitations requiring that trust claims be filed within three years of diagnosis of an asbestos-related disease or, if later, within three years after the "initial claims filing date" or the date of the asbestos-related death. This allows plaintiffs to file and resolve many tort actions before filing trust claims. In the event that plaintiffs are unable to resolve their tort claims within the allowed time period, most TDPs allow a claimant to file a trust claim to meet the applicable statute of limitations, and then to withdraw the claim at any time and file another claim subsequently without affecting the status of the claim for statute of limitations purposes. Thus, plaintiffs suing in the tort system can

have filed trust claims, then withdrawn or deferred them, completed the tort suits during which they testified that they had not filed any trust claims, and then immediately refile or revive the trust claims asserting product exposures that controvert their testimony in the tort action. These deferral provisions further facilitate plaintiffs' and their counsel's denials in the course of pretrial discovery that they had filed trust claims, despite their having done so.

21. The timing of the TDP changes is noteworthy. Starting around 2004, the number of asbestos trusts, and the trust assets available to pay asbestos claims, exploded, as did tort system filings against solvent, peripheral defendants such as Kaiser. Plaintiffs' lawyers came to understand that the value of their tort system claims against the peripheral defendants would be severely reduced if the trust filings were discovered. It can hardly be a coincidence that the "sole benefit" and "deferral" provisions were mostly added to TDPs during the years 2006 to 2010, soon after new trusts began to emerge, and that during this time period, the current version of the "confidentiality" provisions became standard.

22. It is my opinion that these TDP changes were designed by plaintiffs' counsel, who exercise effective control over the trusts, to prevent tort system defendants from accessing the evidence in proofs of claim filed with trusts, which access is essential to exposing false denials of exposure. If defendants were able to readily access evidence of plaintiffs' exposure to products of companies bankrupted in the Bankruptcy Wave and others, that could substantially reduce, and in some cases eliminate, defendants' liability in tort litigation. My opinion is supported by the findings in many cases, including but not limited to Garlock.

23. The first case to receive widespread attention for fraudulent testimony regarding asbestos exposure was the 2007 case of *Kananian v. Lorillard Tobacco Co.* One law firm filed a claim to one trust, saying Kananian had worked in a World War II shipyard and was exposed to insulation containing asbestos. It also filed a claim to another trust saying Kananian had been a shipyard welder. A third claim, to another trust, said he had unloaded asbestos off ships in Japan. And a fourth claim said that he had worked with "tools of asbestos" before the war. Two more claims were submitted to two further trusts, with still different stories about how he was exposed to asbestos. The firm then sued Lorillard Tobacco, this time claiming Kananian had become sick from smoking Kent cigarettes, whose filters contained asbestos for several years in the 1950s.

24. As Presiding Judge Harry Hanna explained, the California law firm of Brayton Purcell filed a claim with the Manville Trust which stated that Kananian was a shipyard laborer working in direct contact with Johns Manville products. However, there was no evidence that he had ever worked with those products. When the court ordered counsel to produce the Manville Trust filing, which he essentially refused to do, the firm was forced to produce internal e-mails including one acknowledging that the filings were rife with outright fabrications. Nonetheless, prior thereto, counsel lied to the court, stating that the claim form was "entirely accurate." To delete the inaccurate filing, counsel then submitted an amended claim form to the Manville Trust but repeatedly denied doing so to the court. According to Judge Hanna, counsel "continued the deceit in its amended answers to Lorillard's Interrogatories." Counsel also denied that claim forms had been filed with other trusts even though

Brayton Purcell and an associated firm had received monies on behalf of Kananian from multiple trusts. Counsel also lied when he stated that original claim forms had not been submitted to the bankruptcy trusts, claiming that the forms were unsigned. In fact, they were signed. Counsel also denied having any control over the law firm with which it was associated in representing Kananian and maintained ignorance about what that firm did with the amended claim form. However, Judge Hanna found that "[c]ommunications between Brayton Purcell and [the associated firm] prove otherwise." Counsel also filed a false privilege log to conceal his initial deception. It was, said Judge Hanna, "lies upon lies." Judge Hanna then revoked counsel's *pro hac vice* approval to appear in his court.

25. Striking a theme that would be reprised following *Garlock,* including during these bankruptcy proceedings, counsel for the ACC would later argue that *Kananian* was a one-off, an "isolated incident." However, it has become clear that *Kananian* is by no means an outlier. Rather, it was a harbinger of widespread revelations of fraudulent practices, including plaintiffs' outright lies about their exposures, facilitated by plaintiffs' counsel's suppression of defendants' ability to obtain evidence of plaintiffs' product exposures.

26. In *Warfield v. AC&S, Inc.,* the plaintiff failed to disclose nine trust claims, eight of which had been filed before he testified in the litigation. In *Bacon v. Ametek,* the plaintiff denied having filed trust claims despite having received payment of approximately $185,000 from five trusts and "deferring" fourteen other claims worth at least $313,000—a total of nineteen undisclosed filed claims. In *Edwards v. John Crane-Houdaille, Inc.,* the plaintiff amended his

discovery responses to reflect that he had only been exposed to asbestos-containing material made by the remaining solvent defendants. When finally compelled to produce trust claims materials two weeks before trial, it was revealed that the plaintiff had filed with sixteen trusts, many of which had been filed before his initial discovery responses. Similarly, in *Dunford v. Honeywell Corp.,* the plaintiff asserted throughout the litigation that his illness resulted solely from working in a gas station for two years and being exposed to such asbestos-containing friction products as brake-lining dust. Dunford had, in fact, filed numerous trust claims certifying exposure to products made by many of the traditional defendants and had already collected money from one building-products trust based on his claim that he was a construction worker. Judge Thomas D. Horne characterized Dunford's deception as the "most egregious case of a discovery abuse that I have ever seen [in 22 years on the bench] if not the worst."

27. In *Beverage v. AC and S, Inc.,* the plaintiff was asked to describe "all of the ways that you believe that you may have been exposed to asbestos in your lifetime." The plaintiffs answer was unclear, and his counsel then stated, "[w]e are not alleging asbestos exposure anywhere else than that which he has discussed already." Seven days after the jury returned a verdict in favor of the defendant CertainTeed, the plaintiff's counsel filed ten trust claims and thirteen more in the months that followed. In *Stoeckler v. Am. Oil Co.,* defendants discovered that the plaintiff had failed to disclose several trust claims only when trial counsel disclosed for the first time three days *after* commencement of trial that Stoeckler had filed trust claims against the Manville, Celotex, Eagle-Picher, and HK Porter Trusts. Despite deposing Stoeckler

twice, defendants—being unaware of the trust filings—never had the opportunity to question Stoeckler about the exposures asserted in the filings.

28. Judge Peggy Ableman, formerly the Delaware Superior Court judge responsible for all asbestos litigation in the State of Delaware, discussed abusive, if not fraudulent, practices in a pretrial hearing in *Montgomery v. American Steel & Wire Corp.* and in subsequent congressional testimony. The Delaware court had adopted a case management order which set forth mandatory disclosure obligations related to bankruptcy trust claims and specifically included "claims made to trusts for bankrupt asbestos litigation defendants." Nonetheless, the plaintiffs in *Montgomery* failed to identify twenty bankruptcy trusts to which they had submitted claims. In response to an interrogatory asking plaintiffs to identify all entities who were not defendants whose products plaintiff June Montgomery had been exposed, plaintiffs identified none of the trusts to which claims had been submitted. Indeed, counsel for plaintiffs stated that no bankruptcy submissions had been made and no monies received. Two days before a two-week trial was to commence, plaintiffs' counsel reported that his client had received two bankruptcy settlements of which he was previously unaware. The following day, the defendant learned that, in fact, twenty bankruptcy trust claims had been submitted. These included claims submitted to the trusts formed by Owens Corning, U.S. Gypsum, Armstrong World Industries, Babcock & Wilcox, Plibrico, and ASARCO, even though plaintiffs had, in fact, specifically denied submitting such claims. Compounding the deceit, although Mrs. Montgomery's claimed exposure was solely from the take-home fibers on her husband's clothing, trust claims materials established that she had worked with asbestos

products herself. Moreover, even though her husband was a career electrician exposed to a wide variety of asbestos products, Judge Ableman noted that "the impression garnered from the Complaint, the answers to written discovery, and Mr. Montgomery's sworn [deposition] testimony . . . was that the bulk of his work around asbestos occurred only during a short period at the Everglades Power Plant."

29. According to Judge Ableman, the fraudulent scheme was only exposed because one of the named defendants knew of other instances of plaintiffs' counsel submitting "conflicting work histories to multiple trusts [and] filed a motion in advance of trial requesting that the Court order disclosure of all pretrial settlements, including monies received from bankruptcy trusts." She called the failure to report those twenty trust claim filings examples of "dishonesty and disreputableness," stating, "[t]he core of this case has been fraudulent," adding "it happens a lot [in asbestos litigation]." In a 2013 congressional hearing, Judge Ableman strongly denounced the practice of plaintiffs denying exposures to the products of reorganized companies when, in fact, plaintiffs and their counsel had asserted just such substantial exposures in claims submitted to trusts. She testified as follows:

> In the final analysis, there can be no real justice or fairness if the law imposes any obstacles to ascertaining and determining the complete truth. From my perspective as a judge, it is not simply the sheer waste of resources that occurs when one conducts discovery or trials without knowledge of all of the facts. What is most significant is the fact that the very foundation and integrity of the judicial process is compromised by the withholding of

> information that is critical to the ultimate goal of all litigation, a search for, and discovery of, the truth.

30. I testified in the *Garlock* estimation proceeding before Judge Hodges, and I have carefully reviewed and written about his findings. As I have already detailed, Judge Hodges was hardly the first judge to find that asbestos exposure evidence was being wrongfully suppressed in the tort system. However, his ruling was of great significance due to the opportunity he afforded the parties to take discovery, the time he allowed for the presentation of factual and expert testimony, and the comprehensiveness of his written and published opinion. The discovery permitted included not only the normal discovery tools pursuant to the Federal Rules, but also multiple questionnaires directed at the claimants and their law firms that sought important information on work histories and exposure to Garlock's and other manufacturers' products.

31. The fundamental issue in *Garlock* was the proper method of estimating the debtor's asbestos liabilities. Dr. Charles Bates, the debtor's expert economist, employed an econometric analysis of pending and projected claims based largely upon data gleaned from the questionnaires. The experts for the ACC and the FCR, on the other hand, valued the claims based upon an extrapolation from Garlock's history of resolving mesothelioma claims in the tort system. The end product of the two approaches differed by about a billion dollars: Garlock's estimate was $125 million and the ACC/FCR estimates were $1-1.3 billion.

32. Judge Hodges rejected the ACC/FCR approach, finding "Garlock's evidence at the present hearing demonstrated that the last ten years of its

participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers. That tactic, though not uniform, had a profound impact on a number of Garlock's trials and many of its settlements such that the amounts recovered were inflated." He further found as follows:

> "[T]he settlement history data does not accurately reflect fair settlements because exposure evidence was withheld. While that practice was not uniform, it was widespread and significant enough to infect fatally the settlement process and historic data. It has rendered that data useless for fairly estimating Garlock's liability to present and future claimants."

33. I am aware that some have tried to downplay Judge Hodges' findings, suggesting that they were based on just 15 cases out of hundreds of thousands. Indeed, counsel for the ACC—from the same law firm that described the *Kananian* case as an "isolated incident"—has in this proceeding not only tried to downplay the scope of wrongdoing found by Judge Hodges, but has even attempted to argue that the *Garlock* findings show that there really is no fraud problem in asbestos litigation. Counsel's exact statement was "the fact that a cherry-picked selection of 15 cases out of 600,000 or more [asbestos claims filed against Garlock] has been viewed as problematic . . . demonstrates there really isn't a widespread fraud problem . . ." This statement is more than a distortion of Judge Hodges's findings. It is a perversion of what he found.

34. To be clear, Judge Hodges heard specific testimony regarding 15 closed cases for which he had permitted Garlock full discovery and which Garlock had settled for large sums. He found that exposure

evidence was withheld in each of the 15 cases. Specifically, on average, plaintiffs disclosed only 2 exposures to bankrupt companies' products, but after settling with Garlock they filed trust claims against 19 such companies. The factual discussion set forth in Judge Hodges' opinion reveals egregious, unethical and dishonest conduct.

35. However, Judge Hodges made clear that the wrongdoing extended far beyond the 15 cases. He first noted that although the 15 cases were not purported to be a random or representative sample,

> "the fact that *each and every one of them* contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those cases appears to have been sufficiently widespread to have a significant impact on Garlock's settlement practices and results."

36. Although not afforded full discovery in other cases, Garlock was able to obtain discovery from one of the major trust claims processing facilities, as well as balloting records of certain asbestos bankruptcies. As found by Judge Hodges, Garlock identified 205 additional cases where the plaintiff's discovery responses conflicted with one of the Trust claim processing facilities or balloting in bankruptcy cases. He also noted that Garlock identified 161 cases during the relevant period where it paid recoveries of $250,000 or more, and that almost half of those cases involved misrepresentation of exposure evidence. Judge Hodges then found:

> "It appears certain that more extensive discovery would show more extensive abuse. But that is not necessary because the startling

> pattern of misrepresentation that has been shown is sufficiently persuasive."

37. Moreover, the very fact that Judge Hodges valued the claims at $125 million, and rejected the ACC/FRC estimates of $1-1.3 billion based on tort system settlements, shows that he was persuaded the scheme went far beyond a small number of cases. Thus, any suggestion that *Garlock* involved merely a small number of cherry-picked cases is completely belied by the evidentiary record and Judge Hodges' findings.

38. The proponents of the Joint Plan have also suggested that any concerns Truck may have with respect to fraud in the tort system can be addressed in the tort system, and that since the insured claims are to be resolved in the tort system, there is no need for the bankruptcy court to address fraud prevention as to such claims. Whatever surface appeal this argument might have is belied by practical realities.

39. To begin with, as Judge Hodges observed, the "30 to 40 year latency period between exposure and onset of disease means that a plaintiff may have had many exposures over a long period of time, many of which were in the distant past," and thus "the plaintiff may not be able to specifically identify the responsible tortfeasors . . . . Consequently, in many instances, the exposure evidence is under the control of the plaintiffs' lawyer rather than the plaintiff." Judge Hodges further noted that the "disappearance" in the tort system of evidence of exposure to insulation products is abetted by the unscrupulous practices of certain plaintiffs' law firms to instruct their clients as to which asbestos manufacturers they should identify.

40. In addition, and as I previously detailed, the TDPs of most asbestos trusts are specifically designed to

facilitate fraud by preventing tort system defendants from gaining access to trust filing information. A tort system defendant seeking to learn whether the plaintiff had filed claims with any of the 60+ asbestos trusts would need to go to each of the bankruptcy courts from which those trusts were created, or courts in Delaware, and convince those courts, over the objections of the trusts and the plaintiff, that the trust secrecy provisions previously authorized by those same courts should not be applied to deny the plaintiff access to information the trust may have with respect to that plaintiff. Furthermore, there is evidence that plaintiffs and their counsel often simply ignore the requirement in case management orders and standing orders of courts that plaintiffs provide defendants with a statement of any and all claims that may exist against asbestos trusts.

41. Moreover, even assuming Truck took on the cost and time burden required to seek this information in each case from each trust, and even if Truck was successful in obtaining the information sought in each and every case from each and every trust, it would still be exposed to fraud. As detailed in Judge Hodges's *Garlock* ruling, a key component of the fraudulent scheme is to delay the filing of trust claims until after the tort system claims are resolved so that the tort system defendants would not have that information when defending the claims. Judge Hodges specifically noted that one plaintiffs' lawyer even defended this practice "as seemingly some perverted ethical duty." In the 15 cases where full discovery was allowed in *Garlock,* on average 19 of 21 claims were asserted after the tort system case had been resolved. Thus, in any given lawsuit, even successful efforts to subpoena trust records will not reveal any trust claims that have not yet been filed. A plaintiff and his lawyer,

during the duration of the trials in the tort system, can rest assured that evidence contradicting denial of exposures will be far beyond the reach of defendants.

42. It is noteworthy that seventeen states have enacted what are commonly referred to as trust transparency statutes. Although the statutes vary somewhat from state to state, they all mandate that asbestos plaintiffs must disclose all filed and potential asbestos trust claims. The very fact that these statutes have been enacted is a recognition that the tort system cannot address the problem of withheld exposure evidence, and is a welcome development in the fight for exposure evidence transparency.

43. Yet, even the passage of these statutes, while certainly welcome, is not enough by itself to defeat the scheme. Disclosures mandated by trust transparency statutes can be ignored by the unscrupulous, just as they ignore discovery requests seeking, or case management orders requiring, the same information, without concern that defendants will be able to obtain trust filing evidence to the contrary. And trust transparency statutes are likewise ill-equipped to counter the scheme to delay trust filings.

44. Beyond all of that, the fact that only slightly more than one-third of the states have enacted trust transparency statutes, plus the fact that some of those statutes only apply to claims brought after the statute was enacted, means that these statutes are insufficient to ensure that most of the alleged 14,000 pending Kaiser asbestos claims will not be fraudulently inflated in the tort system. Indeed, according to Truck data, only approximately 300 pending lawsuits of the many thousands were filed in states that have enacted transparency statutes. Moreover, of the 890 cases that had been filed or reactivated following the lifting of the

automatic stay and as of the time I prepared my expert report, only five are in states with transparency statutes. Stated otherwise, 99.4% of the activated or newly-filed asbestos cases against the Debtors are in states that have not adopted transparency statutes. This strongly suggests that plaintiffs' lawyers have little interest in litigating the cases in states where full disclosures are mandated.

45. Thankfully, however, there is a simple and effective way to prevent the Debtors' asbestos claimants and their lawyers from engaging in fraudulent evidence suppression to inflate the value of their claims. This solution can be easily implemented and comes at no cost to the Debtors, the Kaiser Trust or any honest and ethical claimants or their counsel.

46. Provisions to promote transparency and prevent fraud in the resolution of asbestos claims against a bankrupt entity are a recent phenomenon that originated in this very court in the *Garlock* case at the behest of the FCR in that case, Joe Grier. Seeking to protect the interests of future claimants, Mr. Grier insisted upon claims resolution procedures that included fraud prevention requirements specifically designed to prevent a recurrence of the evidence suppression that had plagued the claims in the tort system.

47. Like many trusts, the Garlock claims resolution procedures give claimants two options for the resolution of their claims. The first is to seek "expedited review," which require less documentation and result in settlement offers at compensation levels that have baked into them the presumption that the claimant has been exposed to asbestos products of many companies.

48. The other option is to seek "extraordinary review," which can result in settlement offers five times greater than expedited review, if the claimant can demonstrate a history of extraordinary exposure to Garlock's products with little or no exposure to any other companies' products. It is the extraordinary review claims, like claims in the tort system, that are susceptible to fraud because their value is so connected to the totality of the claimants' asbestos exposures.

49. The Garlock claims resolution procedures appear to be specifically designed to prevent the abuses that have arisen out of the standard TDPs. Garlock trust claimants seeking Extraordinary Claim Review must identify all other asbestos-related claims they have asserted, and provide copies of any documents submitted to or served upon any entity containing information regarding the claimant's contact with or exposure to asbestos or asbestos-containing products, including claims forms submitted to other trusts, ballots submitted in any bankruptcy case and discovery responses served in tort litigation. Each claimant must also certify that, to the best of his knowledge at that time, with the exception of the other claims that been expressly disclosed and identified by the claimant, no other entity is known to the claimant to be potentially responsible for the alleged injuries that are the basis for the claims.

50. Additionally, and most significantly, the Garlock claimant seeking Extraordinary Claim Review must also execute a release of information in favor of the Garlock Settlement Facility authorizing all asbestos bankruptcy trusts against which the claimant has also filed a claim to release all information submitted to that trust and the status of any such claim and the

amount and date of any payment. This requirement ensures that the trust can receive information on all other trust filings, regardless of when made and regardless of whether the claimant himself makes a full disclosure.

51. Finally, the Garlock procedures provide that trustees shall develop methods for auditing the claims process in consultation with plaintiffs' representatives. This audit right allows the trust to review the accuracy of the disclosures even after payment has been made and makes it possible to take appropriate steps if it is subsequently determined that full and accurate information was not provided. This provision goes to the heart of the practice of delaying trust claim filings so that the claims cannot be discovered.

52. I am encouraged that there appears to be a growing recognition that the fraud prevention measures included in the Garlock claims resolution procedures are necessary and appropriate. In *In re Maremont Corporation,* Judge Kevin Carey of the United States Bankruptcy Court for the District of Delaware was presented with a plan of reorganization fully consented to by all parties in interest. The only objection to the plan was filed by the United States Trustee. Citing my scholarship regarding fraud and abuse in mesothelioma litigation, the Trustee raised concerns in light of the *Garlock* findings of exposure evidence suppression that the plan lacked adequate fraud prevention measures. Judge Carey remarked, "I don't know any reason why, under the circumstances, if, in fact, it's happened in some cases, looks to me from the Garlock opinion, that we shouldn't try to guard against it here." Judge Carey specifically asked why the bankruptcy claimants, as a condition of bringing a claim, should not be required to (1) disclose what other

claims they have made against other trusts and (2) offer a release in favor of the trust to share their information with other trusts.

53. Tellingly, the lawyer for the ACC in *Maremont* acknowledged the validity of Judge Carey's concern, stating: "I think the court is in line with the committee in terms of the Garlock decision. I think that our position is that it illustrates the possibility that there could be claims paid that should not be paid. And we acknowledge that that is a potential." However, the ACC argued that the existing TDPs were sufficient, and expressed concern that if the trust actually obtained full disclosure information, the trustees could be second guessed as to why they paid the claims and the trust would have to bear the cost of responding to discovery requests from defendants in the tort system for the exposure information. Judge Carey was unmoved and reiterated that he would not confirm the plan unless his concerns were addressed. Two months later, the parties filed amended TDPs that included fraud prevention measures for extraordinary claims substantially the same as those found in the *Garlock* claims resolution procedures.

54. Similarly in these cases, at the September 4, 2019 hearing on the disclosure statement motions, this Court questioned whether a "federal court should approve a mechanism and a process that could lead to fraud" and whether the Joint Plan "could be confirmed without something more like what Garlock and Maremont implemented." Although Your Honor said that you would hold this issue for confirmation, in apparent response to that concern, the Debtors, the ACC and the FCR did in fact amend the Kaiser trust procedures to include the types of fraud prevention measures adopted in *Garlock* and *Maremont*.

55. Unfortunately, this proposed solution to the fraud problem is no solution at all here. Rather, it is a transparent attempt to perpetuate fraud. The fraud prevention mechanisms only apply to asbestos bankruptcy claims against the Kaiser Trust, and the Trust is only authorized to resolve uninsured asbestos claims, of which there have been but a handful over the years. All insured claims must be resolved in the tort system, and not by the Trust. Thus, as to nearly all of the asbestos bankruptcy claims, no fraud prevention measures apply.

56. By limiting the fraud prevention measures to extraordinary uninsured claims to be resolved by the Trust, the plan proponents are proposing to give virtually all asbestos claimants free reign to continue the evidence suppression scheme. Indeed, this not only exposes Truck and other insurers to continued fraud, but also leaves the Kaiser Trust at least marginally exposed with respect to its obligation to pay up to $5,000 in deductibles on every insured claim.

57. I understand that Truck has proposed that all asbestos claimants who want to resolve their bankruptcy claims against the Debtors in the tort system be required, prior to and as a condition to proceeding with the litigation of their bankruptcy claims, to provide Truck with the same types of disclosures and authorizations required of trust claimants in *Garlock* and *Maremont,* and that are proposed to be required from uninsured Kaiser claimants seeking extraordinary review. And as with the other fraud prevention measures, Truck proposes that it be given the right to periodically audit the disclosures to be sure that claims are not later filed with trusts which were not identified by the claimants. Adoption of these minimal requirements would prevent the bankruptcy

claimants from receiving fraudulently elevated payments. Conversely, the failure to impose these types of requirements on claimants is almost certain to facilitate the payment of fraudulent bankruptcy claims.

58. While I cannot predict how many asbestos bankruptcy claims will be tainted by evidence suppression in the absence of fraud prevention measures, even one would be too many. The fact that members of the ACC include (1) many of the leading plaintiffs' asbestos firms in the country, (2) firms that handled several of the 15 claims in Garlock for which full discovery was permitted and widespread evidence suppression was established, (3) the firm excoriated by the court in the Kananian case, and (4) many of the firms with the largest recoveries from Kaiser (and which, according to Dr. Bates, were identified in Garlock as having represented plaintiffs in cases where exposure evidence was withheld), only heightens the concern over future wrongdoing.

59. I concur with the statement by Your Honor that "a federal court doesn't normally want to put its stamp of approval on any course that would naturally lead to sharp practices or fraud." The simple act of requiring *Garlock* and *Maremont*-type disclosures and authorizations, which were ultimately agreed to by the ACC and the FCR in those cases, would cost the bankruptcy estates and the Kaiser Trust nothing. Moreover, these requirements would in my opinion substantially reduce, if not eliminate altogether, the wrongful suppression of exposure evidence and promote the fair resolution of the asbestos bankruptcy claims against the Debtors.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 30, 2020.

/s/ Lester Brickman
Lester Brickman

Exhibit 1

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re KAISER GYPSUM COMPANY, INC., et al., Debtors.	Bankruptcy Case No. 16-31602 Chapter 11 (Jointly Administered)

EXPERT REPORT OF
LESTER BRICKMAN, ESQ.
BENJAMIN N. CARDOZO SCHOOL OF LAW

February 20, 2020

* * *

A. Credentials and Summary of Conclusions

1. I am an *emeritus* professor of law at the Benjamin N. Cardozo School of Law. I have been qualified by a number of courts as an expert on the history of asbestos litigation; fraudulent and deceptive practices of lawyers for plaintiffs in asbestos litigation; asbestos claim settlement practices; asbestos bankruptcy trusts; and the effect of trust distribution procedures on the litigation and valuation of asbestos claims. I have written 11 articles on asbestos litigation which have been published in law reviews and widely cited and downloaded.; testified before Congress on four occasions on the abuses prevalent in asbestos litigation and asbestos bankruptcy practices; and was one of two law professors "who have published and are well-known experts in the areas of asbestos litigation and bankruptcy trusts" consulted by the U.S. Government Accountability Office in preparing a report on asbestos trusts.[1] In addition, I have researched, written about extensively, and taught courses and seminars on legal ethics and the legal profession for over 50 years, including a seminar on the ethics of legal fees and the impact on the tort system of contingency fee financing.

2. I have been retained by counsel for Truck Insurance Exchange ("Truck") to prepare an expert report and provide expert testimony in connection with the Kaiser Gypsum bankruptcy. I have been asked to render an opinion, based upon my scholarly research and the materials I have examined in connection with

---

[1] U.S. Gov't Accountability Office, Report to the Chairman, Comm. on the Judiciary, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* at 5, GA0-11-819 (Sept. 2011) ("GAO Report").

this matter, as to (1) what would be the likely effect of adoption of the plan of reorganization ("Joint Plan") as negotiated between the Debtors Kaiser Gypsum Company, Inc. ("Kaiser") and Hanson Permanente Cement, Inc. ("HPCI"), the Asbestos Creditors Committee ("ACC") and the Future Claims Representative ("FCR") on the incidence of fraudulent tort claims brought against Kaiser or HPCI and insured by Truck; and (2) whether there are provisions which, if added to the Joint Plan, would significantly reduce the incidence of fraudulent claims. It is my opinion that adoption of the Joint Plan as currently proposed is likely to facilitate fraudulent claims and result in Truck bearing the burden of paying fraudulently inflated asbestos claims due to the concealment of material evidence of claimants' exposure to asbestos manufactured, distributed or sold by multiple entities other than Kaiser and HPCI. It is my further opinion that adding to the Joint Plan the fraud prevention measures included in both the *Maremont* and *Garlock* trust procedures, as well as in the proposed Kaiser trust procedures (but only for extraordinary *uninsured* claims, thus excluding Truck from this protection), would substantially reduce the likelihood of Truck and the Debtors' other insurers being the victim of the widespread exposure evidence suppression that is endemic in asbestos litigation which I further discuss below.

3. For my time in preparing this report, I am being paid a fee of $975 an hour. I attach as Brickman Exhibit A a list of materials that I have relied upon in the preparation of this report.

4. As I elaborate in Parts E and F of this report, it is my conclusion, based upon the materials I have reviewed in this matter, evidence that I and others

presented in the *Garlock* estimation proceeding and Judge Hodges's findings therein, and my scholarly research, that plaintiffs and their counsel have systematically and fraudulently suppressed the production of evidence of plaintiffs' exposures to asbestos-containing products other than those manufactured by the entities against whom they are litigating in the tort system. The intended effect of this suppression of vital evidence is to significantly inflate asbestos defendants' claim resolution costs by driving up settlement and defense costs and increasing defendants' litigation risk. In many cases, the suppression is of exposure to products containing highly toxic form's of asbestos, as opposed to the far less toxic asbestos products distributed by Kaiser and HPCI, thus putting Kaiser and HPCI at substantial risk in cases where they likely would be found to have little to no liability. It is my further conclusion that because the Joint Plan proposes to resolve all insured asbestos bodily injury claims against the Debtors in the tort system. many of those claims are likely to be infected by the same improper evidence suppression scheme that has inflated the value of such claims for at least the better part of the past 20 years. Adoption of the Joint Plan, as currently proposed, would facilitate the fraudulent practices that I have identified in my published scholarship and in my testimony in the *Garlock* bankruptcy proceeding. Unless fraud prevention measures similar to those agreed to in the *Garlock and Maremont* bankruptcies (and which have been included in the Joint Plan but only applicable to uninsured claims presented to the Kaiser Gypsum Asbestos Personal Injury Trust), are required for claimants who resolve their insured claims in the tort system, Truck and other insurers of those claims will continue to be victimized by the fraud. Indeed, given the content of the

Joint Plan and how the Joint Plan proposes to strip Truck of all protection being provided to the Debtors, it is likely that the incidence of fraudulent claims filed against Truck in the tort system will increase.

5. For the past 30 years, I have studied asbestos litigation and the unscrupulous practices of asbestos plaintiffs' lawyers motivated by the potential for billions of dollars in fees. For roughly the first 15 years of that period, the wrongdoing was centered on the use of unreliable medical evidence in support of hundreds of thousands of nonmalignant claims that were, in the words of U.S. District Court Judge Janis Jack, "manufactured for money." In the last 15 years or so, and since the "Bankruptcy Wave" that overtook the principal asbestos defendants in the early 2000s, the focus of the litigation has shifted to malignant mesothelioma litigation and the suppression of evidence in the tort system of exposure to asbestos products of companies that were bankrupted by asbestos litigation and therefore exited the tort system.

6. My descriptions of the asbestos litigation phenomenon have been extensively cited and have come to be widely accepted in the legal and academic communities. In 1991, I was asked by the Administrative Conference of the United States, an agency in the executive branch of the federal government, to draft a proposed administrative alternative to asbestos litigation and to organize a colloquy to consider that proposal. In addition, I have testified on four occasions before congressional committees on fraudulent practices in asbestos litigation and bankruptcy issues. My qualifications to testify as an expert on the history of asbestos litigation have been challenged in three

Daubert[2] proceedings. Each time, the courts rejected the challenge.[3] In rejecting a challenge in the Armstrong World Industries bankruptcy in 2006, U.S. District Court Judge Eduardo Robreno (who subsequently presided over the asbestos multidistrict litigation *In re Asbestos Prod. Liab. Litig.* (No. VI), MDL No. 875 (E.D. Pa.), where his rulings resulted in the dismissal of tens of thousands of asbestos claims because of invalid medical evidence) stated:

> Dr. Brickman has been shown to be qualified as an expert in the history of asbestos litigation, he has been studying the subject for 15 years, he has published at least seven articles on the subject and has testified three times before congressional committees on asbestos litigation and asbestos bankruptcy and has been qualified by at least two federal judges as an expert on the history of asbestos litigation and he has supplied a full and complete written expert testimony in a third asbestos bankruptcy proceeding. Therefore, I think that under Rule 702, he is qualified by virtue of skill, education, experience to aid the Court in—in this case. Secondly, the opinions rendered in the report appear to be reliable. Dr. Brickman relies on sources and data which are recently relied [on] by experts in his field and others

---

[2] *Dauber, v. Merrell Dow Pharms, Inc.,* 509 U.S. 579 (1993).

[3] In a fourth case, a *Dauber* challenge was raised as to my qualifications to testify about how the practices of a law firm and a doctor it hired to read over 20,000 x-rays were consistent with the entrepreneurial model I presented and constituted a scheme to generate false medical evidence. The challenge was dismissed as moot. *CSX Transp., Inc. v. Gilkison,* No. 5:05CV202, 2013 WL 85253 (N.D. W. Va. Jan. 7, 2013).

> have relied upon . . . his opinion. So . . I find his opinion to be reliable . . . [p]lacing the issues in this case . . . in the historical context of asbestos litigation and claim settlement, will provide the Court with a greater understanding of the debtor's future liability. A good deal of the testimony in this case has involved a change in the lay of the land in the last few years and how that will affect the debtor's future liability. And . . . I believe that the testimony of Professor Brickman will be helpful to the court and . . . that his testimony fits well with the facts of the case . . . .[4]

Attached hereto as Brickman Exhibit B is a more complete statement of my qualifications with regard to asbestos litigation and bankruptcies. Attached hereto as Brickman Exhibit C is a copy of my curriculum vitae. I have not presented any testimony in the past 4 years.

B. The Asbestos Litigation Phenomenon

7. Mesothelioma is a rare, aggressive, and mostly fatal cancer of the mesothelium, the protective covering surrounding many of the internal organs of the body. The most common locus of mesothelioma is the mesothelial cells lining the pleura (the lining around the lung), a condition called malignant pleural mesothelioma. The main cause of malignant pleural mesothelioma is exposure to manufactured asbestos-containing materials. Approximately 80% of those who develop pleural mesothelioma have a history of such asbestos exposure; the other 20% are considered idiopathic, that is, having no known cause. The

---

[4] Transcript of Hearing at 22:20-23:21, *In re Armstrong World Indus., Inc.,* No. 00-04471 (Bankr. D. Del. May 23, 2006).

latency period of the disease, the length of time from first exposure to manifestation, is mostly in the 20- to 40-year range but can be as much as 50 years.

8. Exposures to asbestos-containing materials, mostly in the 1940s and 1950s, and to a lesser extent in the 1960s and 1970s, have exacted and continue to exact an enormous toll on occupationally exposed industrial and construction workers. By 2047, when this scourge is expected to have mostly run its course, several hundred thousand deaths will have resulted from asbestos exposures. The litigation spawned by these exposures has no counterpart in our history. Over 10,000 corporations have been named as defendants, leading to over 100 bankruptcies (and counting).

C. The Entrepreneurial Model of Asbestos Litigation

9. In the following sections, I will discuss the Bankruptcy Wave of the early 2000s and its after-effects, which were fully exposed in the *Garlock* estimation proceedings. The suppression of exposure evidence in mesothelioma claims being litigated in the tort system is simply the latest manifestation of fraudulent practices by asbestos plaintiffs' lawyers that have plagued asbestos litigation for more than three decades. My study of asbestos litigation has led me to identify an "entrepreneurial model" for asbestos litigation. This model originated with the development of nonmalignant asbestos claims that began to emerge in the mid-to-late 1980s. Spurred on by enormous financial incentives—the billions of dollars in fees to be generated—lawyers transformed the basis for asbestos litigation from a traditional model of an injured worker seeking out a lawyer to sue for compensation to an illegitimate entrepreneurial model where screening enterprises working for lawyers

systematically recruited hundreds of thousands of workers who may have had occupational exposure to asbestos even though they had not manifested any asbestos-related disease. Evidence that I have set out in my published writings and in testimony before Congress shows that a high percentage of the hundreds of thousands of diagnoses were simply false.

10. One of the elements of the entrepreneurial model that is of great relevance to mesothelioma litigation, as well as other malignancy-based asbestos litigation, is plaintiffs' counsel's control over the production of evidence—control that can be used to manipulate evidence in order to inflate the value of tort claims. One manifestation of this control was the sea change that took place in the early 2000s. Litigation doctors changed their findings for the great majority of those screened from asbestosis to silicosis, leading to an eruption of silicosis claims of epidemic proportions from 2002 to 2004. In that period, approximately 20,000 silicosis claims were filed, mostly in state courts in Mississippi and Texas—an anomalous phenomenon in view of the fact that as a result of government regulation and industry practice there had been a 70% decline in the death rate from silicosis over the previous thirty years. The reason for this phantom epidemic was that the United States Senate looked poised to enact legislation to provide an industry-funded administrative alternative to asbestos litigation, which would, inter alia, limit attorneys' fees and also limit the recovery for nonmalignant, unimpaired asbestosis claims to medical monitoring expenses. Worried about the future of claim generation and concerned that the endgame had begun for asbestos litigation, some plaintiffs' lawyers went through their asbestos files and began directing the screening enterprises to reread the X-rays previously

determined to be "consistent with asbestosis" as instead indicating silicosis. These screening companies and the litigation doctors then shifted gears from ginning up phony asbestosis claims to ginning up phony silicosis claims. The massive fraud blew up when United States District Judge Janis Jack, who had extensive medical training, presided over a multidistrict litigation involving approximately 10,000 silicosis claims. Judge Jack saw the doctors' diagnoses as raising "great red flags of fraud," and allowed defendants to cross examine the doctors who rendered the diagnoses, which these doctors then abandoned.[5] Judge Jack found that the medical reports supporting the claims were "manufactured for money."[6]

11. Another example of plaintiffs' counsel's control over the production of evidence in asbestos litigation, which is also highly relevant to mesothelioma litigation, is the phenomenon of widespread changes in witness testimony concerning the products to which plaintiffs were exposed whenever a top-tier asbestos defendant is driven into bankruptcy. There is evidence that this phenomenon is attributable to plaintiffs counsel's use of witness preparation techniques to produce testimony that denies or minimizes plaintiffs' exposures to asbestos-containing products that were manufactured by top-tier companies that had filed for bankruptcy and instead identifies only or

---

[5] *Silicosis Ruling Could Revamp Legal Landscape,* NPR.org (Mar. 6, 2006), https://www.npr.org/templates/story/story.php?storyId=5244935.

[6] Order No. 29: Addressing Subject-Matter Jurisdiction, Expert Testimony, and Sanctions, *In re Silica Prods. Liab. Litig.,* 2:03-md-01553, Dkt. No. 1902, at 150 (S.D. Tex. June 30, 2005).

mostly the products manufactured by the defendants being sued in the tort system.

12. This practice first became evident in the aftermath of the bankruptcy of the Johns-Manville Corporation ("Manville") in 1982. Prior to 1982, the focus of asbestos litigation was on Manville, then the largest producer of asbestos-containing products. Plaintiffs and their witnesses regularly testified that the company produced the dominant share of the asbestos-containing construction materials encountered by claimants, and as a consequence, the company paid out the most funds to claimants. The 1982 bankruptcy of the company imposed an immediate stay on all asbestos litigation and payments to tort claimants, thus halting the main flow of revenue derived from asbestos litigation. Payments would not resume until 1988 when a "run on the bank" led by plaintiffs' lawyers quickly depleted the assets of the trust that was created to pay Manville's asbestos claims, resulting in a further delay in payments and a series of substantial reductions in the amounts paid out for each disease category. Accordingly, the more witnesses would continue to identify the company's products as dominating the list of asbestos-containing products to which claimants claimed exposure, the less funds would then be available to pay to claimants and their counsel. However, immediately after the Manville bankruptcy filing, witness testimony underwent a sea change.[7] Whereas testimony in the Philadelphia Navy Yard cases, for example, put Manville's share of asbestos-containing workplace products as high as

---

[7] *See* Andrew T. Berry, *Asbestos Personal Injury Compensation and the Tort System: Beyond "Fix It Cause It's Broke,"* 13 Cardozo L. Rev. 1949, 1951 n.9 (1992) (hereinafter, "Berry, *Beyond Fix It*").

80%, witnesses after bankruptcy testified that Manville products accounted for an increasingly declining percentage of asbestos-containing products used at work sites. Thus, in the Brooklyn Navy Yard cases, after hearing witness testimony, the jury apportioned only 9-11% of the overall liability to Manville.[8] A witness who was deposed just months after the Manville bankruptcy testified that only 25% of the asbestos-containing products used at a shipyard were manufactured by Manville. Earlier in that deposition, the witness had at first estimated that "basically, most of the [asbestos-containing] materials [were made by] Johns-Manville." Letting the cat out of the bag, he then added, "I wasn't supposed to mention that, was I?"[9]

13. The phenomenon of witness testimony switching from identifying exposures to companies that had subsequently entered bankruptcy to identifying products of solvent companies that had formerly been peripheral defendants, or simply not defendants at all, has become a salient feature in mesothelioma litigation.

14. A method by which plaintiffs' counsel have been able to bring about sea changes in witness testimony was revealed in an extensive series of reports in 1998 by newspaper reporters who investigated the litigation screening practices of Baron & Budd, one of the leading asbestos plaintiffs' law firms in the country. This investigation uncovered the extensiveness

---

[8] *In re E. & S. Districts Asbestos Litig.,* 772 F. Sup. 1380, 1398 (E.D.N.Y. 1991), *aff'd in part, rev'd in part sub nom. In re Brooklyn Navy Yard Asbestos Litig.,* 971 F.2d 831 (2d Cir. 1992).

[9] Berry, *Beyond Fix It,* at 1951 n.9.

of the practice of witness preparation that focused on implanting false memories in asbestos claimants.[10] In 1997, a novice lawyer at Baron & Budd inadvertently produced a twenty-page internal memo titled "Preparing for Your Deposition," which I have referred to as the "Script Memo."[11] Claimants were instructed to memorize the information that a paralegal had filled out for them on their Script Memos but to never mention it. The Script Memo included instructions for the client on how to prepare for their deposition including specific answers, however false, that were to be given regarding product exposure. The newspaper reported that former employees of Baron & Budd told them that in filling out the form "[w]orkers were routinely encouraged to remember seeing asbestos products on their jobs that they didn't truly recall," and where necessary, employees would "implant false memories."[12] One former paralegal explained that by the time she finished preparing a client, she had a product "ID for every manufacturer that we needed to get ID for."[13] Baron & Budd paralegals were also instructed to steer clients away from identifying the products of

---

[10] *See* Senate Rep. No. 108-118, at 89-95 (2003) (discussing investigative reporting series from the *Dallas Observer).*

[11] Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality,* 31 Pepp. L. Rev. 33, 142 (2003) (herineafter, "Brickman, *Asbestos Litigation*"); Senate Rep. No. 108-118, at 109 (2003) (copy of Baron & Budd memo as exhibit to Judiciary Committee Report).

[12] Brickman, *Asbestos Litigation,* at 139-40; Senate Rep. No. 108-118, at 89 (2003) (quoting investigative reporting series from the *Dallas Observer).*

[13] Brickman, *Asbestos Litigation,* at 139; Senate Rep. No. 108-118, at 89 (2003) (quoting investigative reporting series from the *Dallas Observer).*

bankrupt companies, such as Manville, and to "warn . . . [the client] not to say you were around [a certain product]—even if you were—after you knew it was dangerous" and "deny that they ever saw warning labels on product packages."[14] Finally, clients were assured that defense lawyers who questioned them in a deposition would have no way of knowing what products were actually used at relevant job sites, signaling that *anything* the client testified to could not be challenged.[15] Fred Baron, then the lead partner of Baron & Budd, justified the use of the Script Memo, arguing that there was nothing unethical or illegal about its contents. Indeed, he asserted that the way the firm prepared its asbestos clients to testify was how "'*any lawyer in the country that is worth a damn*' *works.*"[16] As I detail in the following sections, the practice of manipulating, and at times falsifying, exposure evidence became a common practice once the Bankruptcy Wave took the primary asbestos defendants out of the tort system.

D. The Bankruptcy Wave

15. From 2000 to 2001, a "Bankruptcy Wave" took ten top-tier defendants—producers of thermal insulation and refractory products that had accounted for a substantial share of the compensation then being paid

---

[14] Brickman, *Asbestos Litigation,* at 144, 152; Senate Rep. No. 108-118, at 92 (2003) (quoting investigative reporting series from the *Dallas Observer).*

[15] Brickman, *Asbestos Litigation,* at 144.

[16] *Toxic Justice,* Dallas Observer (Aug. 23, 1998) (emphasis added), https://www.dallasobserver.cominews/toxic-justice-6406744.

to defendants—out of the tort system.[17] Some analysts believe that top-tier companies were paying upwards of 80% of what plaintiffs were receiving as compensation in the tort system during the late 1990s.[18] Although these bankruptcies would eventually lead to the formation of trusts that would pay the asbestos claims against the bankrupt entities, payments from the resulting trusts would not amount to substantial sums until 2006. Ultimately, approximately 100 asbestos defendants would file for bankruptcy relief and disappear from the tort system and, by 2011, approximately 60 bankruptcy trusts had been created with tens of billions of dollars of assets to satisfy asbestos claims.[19]

16. Continuing to name the top-tier companies that had gone bankrupt as defendants would have resulted not only in substantial delays in receiving payment but also much reduced recoveries from solvent defendants. Not surprisingly to those who have studied asbestos litigation, in the immediate aftermath of the Bankruptcy Wave plaintiffs stopped identifying

---

[17] The Babcock & Wilcox Company, Pittsburgh Corning, Owens Corning, Owens-Corning Fiberglas Corporation, Armstrong World Industries, G-I Holdings, W.R. Grace, U.S. Gypsum Corporation, Federal Mogul, and Federal Mogul (Turner & Newall). There were ten additional bankruptcies filed from 2000 to 2001. Some date the Bankruptcy Wave to have extended from 2000 through 2002. Fifteen bankruptcies were filed in 2002. Lloyd Dixon *et al., Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts,* RAND Inst. for Civil Justice, 49-51 (2010).

[18] *Furthering Asbestos Claim Transparency (FACT) Act of 2012: Hearing on ER. 4369 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. 67, 76 (2012) (statement of Marc Scarcella).

[19] GAO Report at 2-3.

exposures to the asbestos-containing thermal insulation and refractory products of these top-tier companies. Instead, they stepped up litigation efforts against formerly peripheral companies that prior to the Bankruptcy Wave were infrequently sued and, when they were sued, typically paid at most nominal amounts to settle the claims. These peripheral defendants were involved in the manufacture and distribution of such asbestos-containing products as gaskets, pumps, automotive friction products, and residential construction products, rather than the thermal insulation and refractory products that were the dominant sources of exposures alleged prior to the Bankruptcy Wave. Garlock (gaskets), as well as companies like Kaiser Gypsum and Bestwall (residential construction and home repair projects) were formerly peripheral asbestos defendants that had sold products containing the far less toxic chrysotile asbestos fibers and against whom tort system filings exploded following the Bankruptcy Wave.[20] According to data provided by Bates White, Kaiser was named as a defendant in mesothelioma lawsuits an average of 48 times

---

[20] The asbestos products sold by Kaiser and HPCI generally contained small or minimal amounts of chrysotile asbestos fibers, as opposed to the amphibole asbestos products found in insulation. *See* Declaration of Charles E. McChesney II in Support of First Day Pleadings, Dkt. No. 13, ¶¶ 22-26. Garlock's asbestos products likewise almost exclusively involved chrysotile fibers. *See In re Garlock Sealing Techs., LLC,* 504 B.R. 71, 75-78 (Bankr. W.D.N.C. 2014) ("*Garlock*"). Noting that various studies had found that amphibole was far more toxic than chrysotile (one study labeling the relative toxicity ratio of amphibole to chrysotile as 900-2000:1) and that experts from Duke and Stanford had testified that there was no scientifically reliable connection between chrysotile exposure and mesothelioma, Judge Hodges found that "it is clear under any scenario that chrysotile is far less toxic than other forms of asbestos." *Id.* at 75-76.

per year from 1993-1999. From 2000-2009, this average number soared to 434 mesothelioma lawsuits per year, and further increased to 604 mesothelioma lawsuits per year from 2010-2016. Testimony identifying the products that were alleged to have caused plaintiffs' mesothelioma abruptly shifted from the manufacturers of insulation and other products containing amphibole asbestos, which had succumbed to the Bankruptcy Wave, and was replaced by testimony identifying formerly peripheral distributors of products containing chrysotile asbestos such as Kaiser Gypsum, Bestwall, Garlock and others as the principal suppliers of the asbestos products to which plaintiffs had been exposed and to which they attributed their mesothelioma. This abrupt shift in plaintiffs' exposure testimony is explained below.

E. The Dual Compensation System/Explosion of Trust Payments

17. The explosion of asbestos bankruptcy trusts has created a dual compensation system for the satisfaction of asbestos liabilities: Asbestos claimants can seek recovery from solvent defendants in the tort system and from bankrupt entities through their trusts. The amount of money disbursed by the trusts has soared since 2004. Between 2004 and 2016, the number of active asbestos trusts increased from 14 to 58. In that period, the trusts paid out $24 billion to claimants. As of 2016, trusts' assets totaled $27 billion. An additional five asbestos debtors (including Bestwall and Kaiser Gypsum) are currently going through the asbestos bankruptcy process.[21]

---

[21] Peter Kelso, "*The State of the Bankruptcy Trusts*," Nat'l Asbestos Litigation Conference (Oct. 1-3, 2018).

18. Asbestos claimants also seek compensation from defendants in the tort system, whose ranks have been considerably thinned by the more than 100 bankruptcies of companies that manufactured or distributed products containing asbestos. Notwithstanding the disappearance from the tort system of so many defendants, including the top-tier insulation manufacturers, and notwithstanding the payments by the trusts of tens of billions of dollars to mesothelioma victims since 2004, mesothelioma claim values in the tort system have actually risen in recent years. It is the formerly peripheral defendants such as Garlock, Kaiser and Bestwall that have borne the brunt of the post-2004 tort system liabilities.

19. Mesothelioma victims typically qualify for payment from multiple trusts, depending upon the sources of their exposures to asbestos-containing products. If the products responsible for the exposures were distributed on a national basis for industrial or commercial use, then a substantial percentage of those mesothelioma claimants may be eligible for compensation from as many as 25 trusts invested with assets provided by the reorganized companies that produced and distributed these products. I estimate that mesothelioma victims (and nonmalignant claimants) with exposures to industrial and commercial asbestos-containing products distributed nationally will typically qualify for payment from 15 to 20 trusts.[22]

---

[22] In the Garlock estimation proceeding, Judge Hodges relied on the testimony of an expert witness for the debtor, Dr. Charles E. Bates of Bates White, who sampled 1,300 pending and resolved Garlock claims and "determined that the typical claimant alleges exposure to products of 36 parties: 13 tort defendants (plus Garlock) and 22 Trusts. This number was derived from the actual claims against Garlock." *Garlock*, 504 B.R. at 95-96.

20. When trust payments began to amount to substantial sums by 2004, it presented a quandary for certain asbestos plaintiffs' lawyers. Trust recoveries from 15 to 20 trusts for most claimants were too lucrative to pass up. However, submitting claims to these trusts and replying to discovery with disclosure of all trust claims filed or to be filed would substantially reduce the value of tort system claims against the remaining solvent asbestos defendants, particularly those defendants like Kaiser, Bestwall and Garlock that sold asbestos products that were far less toxic. The solution for many plaintiffs' counsel was to (1) have their clients falsely deny, under oath. their exposures to the asbestos products of reorganized companies and then argue to the juries that the defendants had failed to show that plaintiffs had been exposed to the highly toxic products of the companies that had succumbed to the Bankruptcy Wave; (2) use their control over the content of Trust Distribution Procedures ("TDPs") to enact measures to deny tort system defendants access to trust filings; and (3) delay filing claims with the bankruptcy trusts until all tort actions had been concluded. Indeed, beginning around 2006, asbestos plaintiffs' lawyers, through their control of the asbestos trusts, began to implement and standardize trust confidentiality provisions designed to prevent tort system defendants from gaining access to trust filing information. Not coincidentally, a few judges soon became aware of manifestations of the scheme that Judge Hodges would later fully expose.

F. Plaintiffs Counsel's Control of Trusts/ Advent of Trust Secrecy Provisions

21. The same baker's dozen or so law firms that represent the large majority of asbestos claimants in

the tort system also represent the majority of claimants in asbestos-related bankruptcy proceedings. In most cases, these leading asbestos law firms largely control the asbestos bankruptcy process and the operation of the trusts created under § 524(g). In addition to their populating the asbestos claimants committees ("ACCs"), these plaintiffs' counsel effectively select the trustees to operate the § 524(g) bankruptcy trusts that will be created to actually pay the claims, the administrator of the trust, and also the future claims representative ("FCR") who is to represent the interests of future claimants. Finally, these plaintiffs' counsel also constitute the membership of trust advisory committees ("TACs"), which represent the interests of current asbestos claimants. While trustees have the authority to amend TDPs, it can only be done with the consent of the TAC and FCR. Essentially, it is the TACs that exercise effective control over the TDPs after they have been initially drafted by the ACCs and adopted as part of the plan of reorganization.

22. The plaintiffs' counsel who have effective control over the creation and administration of asbestos bankruptcy trusts have used that power to include, amend, or add provisions to TDPs designed to limit, if not preclude, tort system defendants' ability to use discovery to access evidence that a tort plaintiff has filed one or more trust claims. In filing a trust claim, a "claimant must demonstrate meaningful and credible exposure" to the products of the company funding the trust. The great majority of asbestos trust TDPs include provisions designed to allow claimants who are also suing defendants in the tort system to prevent tort defendants from accessing exposure evidence and other vital information submitted by the claimants as part of their trust claims.

23. One such provision is a "confidentiality" provision, which generally states that all information submitted to trusts by an asbestos claimant is to be treated as made in the course of settlement negotiations and is intended to be confidential and protected by all applicable privileges. Additionally, trusts must take all available steps to defend that confidentiality, especially as against the efforts of tort defendants seeking to discover whether a plaintiff had filed a claim with that trust alleging "under penalty of perjury" that the claimant had "meaningful and credible exposure" to the products of the very bankrupted companies that provided the assets to fund the trusts. Stated plainly: The object of the confidentiality clause is to provide armor-cladding for tort plaintiffs' false denials of exposure to the products of companies that have sought bankruptcy relief, created trusts to resolve their asbestos liabilities, and disappeared from the tort system. The confidentiality clause is a critical element of the scheme to prevent defendants from discovering the fact that plaintiffs have or will file trust claims where they represent that they had "meaningful and credible" exposure to the products of the bankrupt entities.

24. Indeed, the trust procedures proposed by the Joint Plan proponents in the Kaiser Gypsum bankruptcy include a confidentiality provision typical of what has been adopted by other asbestos trusts. Section 6.5 of the proposed trust procedures provides as follows:

> All submissions to the Asbestos Trust by a holder of an Asbestos Claim, including a claim form and materials related thereto, shall be treated as made in the course of settlement discussions between the holder and the

> Asbestos Trust, and intended by the parties to be confidential and to be protected by all applicable state and federal privileges and protections, including but not limited to those directly applicable to settlement discussions.[23]

The Kaiser confidentiality provision further provides that the Trust "will preserve the confidentiality of the submissions" and shall disclose their contents only "with the permission" of the claimant or in response to a valid subpoena issued by the Bankruptcy Court, a Delaware state court, or the United States District Court for the District of Delaware. Moreover, if served with a subpoena from one of the specified courts, the Trust is obligated "to take all necessary and appropriate steps to preserve such privileges" before said court and to provide the impacted claimants with notice of the subpoena. Thus, not only does this provision require a subpoena for production of claims information, it requires that the subpoena issue from courts other than the trial court where the asbestos claim is being litigated. This is intended to delay defendants' access to possibly vital information by having to run an additional gauntlet of bankruptcy judges or the Delaware courts, thus imposing increased costs on defendants and also running out the clock on the trial courts' timetable for conducting discovery.

25. In addition to "confidentiality" provisions, plaintiffs' counsel have also inserted into TDPs a provision that provides that evidence submitted to the trust is for the "sole benefit" of the trust, and claimants are not required to list any other exposures in

---

[23] Section 6.5, *Third Amended Joint Plan of Reorganization of Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc.,* Dkt. No. 1868, at 173 (TRUCK0000159, at -0000331).

filing a claim except those for which the trust is responsible. In addition, if an asbestos plaintiff in a tort action fails to identify exposure to products of a reorganized company or fails to do so when filing claims with other trusts, then the plaintiff would not be precluded from recovering as an asbestos claimant from that trust. Section 5.7(b)(3) of the Armstrong World Industries, Inc., TDP is a standard "sole benefit" provision in many trust TDPs:

> Evidence submitted to establish proof of exposure to AWI Products/Operations is for the sole benefit of the PI Trust, not third parties or defendants in the tort system. The PI Trust has no need for, and therefore claimants are not required to furnish the PI Trust with, evidence of exposure to specific asbestos products other than those for which AWI is responsible, except to the extent such evidence is required elsewhere in the TDP. Similarly, failure to identify AWI Products/Operations in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the PI Trust, provided the claimant otherwise satisfies the medical and exposure requirements of the TDP.[24]

26. These "sole benefit" provisions appear intended to enable plaintiffs and their counsel to limit the exposure evidence they must provide in support of

---

[24] Section 5.7(b)(3), Second Amended and Restated Armstrong World Industries Inc, Asbestos Personal Injury Settlement Trust Distribution Procedures (July 31, 2015), http://www.armstrongworldasbestostrust.com/wp-content/uploads/20 I 5/11/AW1-Second-Amended-and-Restated-Trust-Distribution-Procedures-TDP-as-of-July-31-2015.pdf.

each trust claim, thus minimizing the breadth of exposure evidence possessed by any one asbestos trust. Accordingly, a tort system defendant seeking to obtain evidence of *all* trust claims submitted by the plaintiff would need to successfully subpoena *all* asbestos trusts. This provision also seeks to vitiate any consequences with regard to perjurious testimony in interrogatories, depositions, and at trial.[25]

27. A third TDP provision that appears intended to suppress evidence of plaintiffs' exposures to the products of reorganized companies so as to inflate the value of tort claims involves the timing of trust claim

---

[25] The sole benefit provision in the Joint Plan deviates from the standard provision. Section 6.5 provides that there may be times when the Kaiser Trust will need to provide access to certain claim information to preserve, litigate, resolve or settle coverage, or to comply with an applicable obligation under any insurance policy or settlement agreement. In such an instance:

> the Asbestos Trust shall take any and all steps reasonably feasible in its judgment to preserve the further confidentiality of such information, documents and materials, and prior to the disclosure of such information, documents or materials to a third party, the Asbestos Trust shall receive from such third party a written agreement of confidentiality that (a) ensures that the information, documents and materials provided by the Asbestos Trust shall be used solely by the receiving party for the purpose stated in the agreement and (b) prohibits any other use or further dissemination of the information, documents and materials by the third party except as set forth in the written agreement of confidentiality.

Section 6.5, *Third Amended Joint Plan of Reorganization of Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc.,* Dkt. No. 1868, at 173-74 (TRUCK0000159, at -0000331-332).

filings. Most TDPs have a three-year statute of limitations requiring that trust claims be filed within three years of diagnosis of an asbestos-related disease or, if later, within three years after the "initial claims tiling date" or the date of the asbestos-related death. This allows plaintiffs to file and resolve many tort actions before filing trust claims. In the event that plaintiffs are unable to resolve their tort claims within the allowed time period, most TDPs allow a claimant to file a trust claim to meet the applicable statute of limitations first and then to withdraw the claim "at any time . . . and file another claim subsequently without affecting the status of the claim for statute of limitations purposes." These provisions typically further provide:

> A claimant can . . . request that the processing of his or her PI Trust Claim by the PI Trust be deferred for a period not to exceed three (3) years without affecting the, status of the claim for statute of limitations purposes, in which case the claimant shall also retain his or her original place in the FIFO Processing Queue.[26]

28. Thus, plaintiffs suing in the tort system can have filed trust claims, then withdrawn or deferred them, completed the tort suits during which they testified that they had not filed any trust claims, and

---

[26] Section 6.3, *Second Amended and Restated Armstrong World Industries Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures* (July 31, 2015). Section 6.3 of the proposed Joint Plan, titled "Withdrawal or Deferral of Claims," is substantially similar to the standard TDP provision but, by its terms, addresses only uninsured asbestos claims. *See* Section 6.3, *Third Amended Joint Plan of Reorganization of Kaiser Gypsum Company, Inc. and Hanson Permanente Cement,* Inc., Dkt. No. 1868, at 172 (TRUCK0000159, at -0000330).

then immediately refile or revive the trust claims asserting product exposures that controvert their testimony in the tort action. These deferral provisions further facilitate plaintiffs' and their counsel's denials in the course of pretrial discovery that they had filed trust claims, despite their having done so. Upon refiling or reviving the trust claims, plaintiffs and their counsel will almost certainly assert product exposures that are inconsistent with the claims of causation advanced in the tort litigation. The practice of using TDP deferral provisions for this purpose is laid bare in *Barnes & Crisafi v. Georgia-Pacific.*[27] There, plaintiffs' counsel justified plaintiffs' denial of filing any trust claims—when they had in fact filed at least four trust claims—on the grounds that the claims were deferral claims and therefore were not filed trust claims.[28] An irate judge emphatically rejected that excuse stating that her order required all trust claims to be disclosed, including "deferral claims," and that "[t]he defense is entitled to know that."[29] She then reopened discovery to permit the defendant to further investigate the plaintiffs' trust filings.[30]

29. The timing of the TDP changes is noteworthy. As I noted above in Section E, starting around 2004, the number of asbestos trusts, and the trust assets available to pay asbestos claims, exploded, as did tort

---

[27] Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation,* 88 Tul. L. Rev. 1071, I 106 (2014) (hereinafter, "Brickman, *Fraud and Abuse*") (citing Transcript of Pre-Trial Conference at 128-39, *Barnes & Crisafi v. Georgia-Pacific,* Nos. MID-L-5018-08(AS), MID-L-316-09(AS) (N.J. Super. Ct. Middlesex Cty. June 12, 2012)).

[28] *Id.*

[29] *Id.*

[30] *Id.*

system filings against solvent, peripheral defendants such as Kaiser. Plaintiffs' lawyers came to understand that the value of their tort system claims against the peripheral defendants would be severely reduced if the trust filings were discovered. It can hardly be a coincidence that the "sole benefit" and "deferral" provisions were mostly added to TDPs during the years 2006 to 2010, soon after new trusts began to emerge, and that during this time period, the current version of the "confidentiality" provisions became standard. And as I explain below, this was also the time when concerns about "double-dipping"—asserting trust claims with work histories and exposure claims that are inconsistent with plaintiffs' testimony in tort actions—were gaining national attention because of *Kananian v. Lorillard Tobacco Co.*[31]

30. It is my opinion that the TDP changes discussed above were designed by plaintiffs' counsel, who exercise effective control over the trusts, to prevent tort system defendants from accessing the evidence in proofs of claim filed with trusts, which access is essential to exposing false denials of exposure. If defendants were able to readily access evidence of plaintiffs' exposure to products of companies bankrupted in the Bankruptcy Wave and others, that could substantially reduce, and in some cases eliminate, formerly peripheral defendants' liability in tort litigation.

G. *Pre-Garlock* Judicial Findings and Statements Regarding Evidence Suppression and Other Malfeasance in Asbestos Litigation

31. The 2014 findings of Judge Hodges in the Garlock estimation proceeding have been widely

---

[31] *See infra* ¶ 32.

recognized for revealing the startling degree of exposure evidence suppression in asbestos litigation and the unfair outcomes that result from that practice. Judge Hodges found that this suppression had "infected" the reliability of the settlement values and therefore rejected the plaintiffs' bar representatives attempt to use these values as the basis for projecting future claim liability. I testified as an expert in that proceeding and will detail herein some of Judge Hodges's key findings, including those that unequivocally refute the false suggestion made to this Court that wrongdoing was only found as to 15 claims against Garlock. However, while the *Garlock* ruling has been the subject of much attention and comment, it was hardly the first time a court had found that asbestos plaintiffs' lawyers were wrongfully suppressing exposure evidence.

32. The first case to receive widespread attention for fraudulent testimony regarding asbestos exposure was the 2007 case of *Kananian v. Lorillard Tobacco Co*.[32] According to the presiding judge, the facts in *Kananian* reveal fraudulent conduct by plaintiffs' counsel on a massive scale. Harry Kananian died of mesothelioma in 2000 and was represented by two law firms. As described in a *Wall Street Journal* article:

> [One] law firm filed a claim to one trust, saying Kananian had worked in a World War II shipyard and was exposed to insulation containing asbestos. It also filed a claim to another trust saying he had been a shipyard welder. A third claim, to another trust, said he'd unloaded asbestos off ships in Japan. And a fourth claim said that he'd worked with

[32] No. CV 442750 (Ct. Comm. PI Cuyahoga Cty.).

> "tools of asbestos" before the war . . . . [T]wo more claims [were submitted] to two further trusts, with still different stories [about how he was exposed to asbestos]. [The firm then] sued Lorillard Tobacco, this time claiming its client had become sick from smoking Kent cigarettes, whose filters contained asbestos for several years in the 1950s.[33]

33. As Presiding Judge Harry Hanna explained, the California law firm of Brayton Purcell ("BP") filed a claim with the Manville Trust which stated that Kananian was a shipyard laborer working in direct contact with Johns Manville products.[34] However, there was no evidence that he had ever worked with those products. When the court ordered the BP counsel to produce the Manville Trust filing, which he essentially refused to do, the firm was forced to produce internal e-mails including one acknowledging that the filings were rife with outright fabrications. Nonetheless, prior thereto, BP counsel lied to the court, stating that the claim form was "entirely accurate." To delete the inaccurate filing, the BP counsel then submitted an amended claim form to the Manville Trust but repeatedly denied doing so to the court.[35] The BP counsel "continued the deceit in its amended answers to Lorillard's Interrogatories."[36] The BP counsel also denied that claim forms had been filed with other trusts even as BP and an associated firm had received

---

[33] Kimberly A. Strassel, Op-Ed., *Trusts Busted,* Wall St. J. (Dec. 5, 2006), https://www.wsj.com/articles/SB116527814374340591.

[34] Order & Opinion at 1-3, 15, *Kananian,* No. CV 442750 (Ct. Comm. Pl. Cuyahoga Cty., Ohio, Jan. 18, 2007).

[35] *Id.* at 5-7.

[36] *Id.* at 8.

monies on behalf of Kananian from multiple trusts. The BP counsel also lied when he stated that original claim forms had not been submitted to the bankruptcy trusts, claiming that the forms were unsigned. In fact, they were signed. The BP counsel also denied having any control over the law firm with which it was associated in representing Kananian and maintained ignorance about what that firm did with the amended claim form.[37] However, "[c]ommunications between Brayton Purcell and [the associated firm] prove otherwise."[38] The BP counsel also filed a false privilege log to conceal his initial deception.[39] It was, said Judge Hanna, "lies upon lies."[40] Judge Hanna then revoked counsel's *pro hac vice* approval to appear in his court.[41]

34. Judge Hanna's ruling received national attention for exposing "one of the darker corners of tort abuse" in asbestos litigation:[42] inconsistencies between allegations made in open court in tort cases and those submitted to trusts set up by bankrupt companies to pay asbestos-related claims. An editorial in the *Wall Street Journal* found this to be evidence of "rampant fraud inherent in asbestos trusts."[43] The

---

[37] *See id.* at 6, 11-12.

[38] *Id.* at 12.

[39] *Id.*

[40] James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit,* Cleveland Plain Dealer, at 131 (Jan. 25, 2007).

[41] Order & Opinion at 19, *Kananian,* No. CV 442750 (Ct. Comm. PI. Cuyahoga Cty., Ohio, Jan. 18, 2007).

[42] Editorial, *Cuyahoga Comeuppance*, Wall St. J. (Jan 22, 2007), https://www.wsj.com/articles/SB116942159908683141.

[43] *Id*.

Cleveland Plain Dealer reported that Judge Hanna's decision ordering the plaintiff to produce proof of claim forms "effectively opened a Pandora's box of deceit . . . reveal[ing] that [counsel] presented conflicting versions of how Kananian acquired his cancer."[44] As Judge Hanna would later say, "[i]n my 45 years of practicing law I never expected to see lawyers lie like this."[45]

35. Striking a theme that would be reprised following *Garlock,* a senior partner at Caplin & Drysdale, would later argue that *Kananian* was a one-off, an "isolated incident."[46] However, it has become clear that *Kananian* is by no means an outlier. Rather, it has been a harbinger of widespread revelations of fraudulent practices, including plaintiffs' outright lies about their exposures, facilitated by plaintiffs counsel's suppression of defendants' ability to obtain evidence of plaintiffs' product exposures.

36. In *Warfield v. AC&S, Inc.*,[47] the plaintiff failed to disclose nine trust claims, eight of which had

---

[44] James F. McCarty, Judge *Becomes National Legal Star, Bars Firm from Court Over Deceit,* Cleveland Plain Dealer, at BI (Jan. 25, 2007).

[45] *Id.*

[46] *See Furthering Asbestos Claim Transparency (FACT) Act of 2013: Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. 66 (2013) (prepared statement of Elihu Inselbuch, Member, Caplin & Drysdale) ("The *Kananian* case . . . was an isolated incident, remedied by a state court, involving inconsistent trust claims with respect to a single claimant, one of the millions who have filed claims with asbestos trusts.").

[47] No. 24X06000460, Consolidated Case No. 24X09000163 (Md. Cir. Ct. Baltimore Cty. Jan. 11, 2011).

been filed before he testified in the litigation.[48] In another case, the plaintiff denied having filed trust claims despite having received payment of approximately $185,000 from five trusts and "deferring" fourteen other claims worth at least $313,000—a total of nineteen undisclosed filed claims.[49] In *Edwards v. John Crane-Houdaille, Inc.*,[50] the plaintiff amended his discovery responses to reflect that he had only been exposed to asbestos-containing material made by the remaining solvent defendants. When finally compelled to produce trust claims materials two weeks before trial, it was revealed that the plaintiff had filed with sixteen trusts, many of which had been filed before his initial discovery responses.[51] Similarly, in *Dunford v. Honeywell Corp.*,[52] the plaintiff asserted throughout the litigation that his illness resulted solely from working in a gas station for two years and being exposed to such asbestos-containing friction products as brake-lining dust.[53] Dunford had, in fact,

---

[48] *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, I* 12th Cong. 10304 (2011) (statement of James L. Stengel, Orrick, Herrington & Sutcliffe LLP) (hereinafter, *"Stengel Statement").*

[49] Brickman, *Fraud and Abuse,* at 1116 (citing Memorandum in Support of Defendant CertainTeed Corp.'s Motion To Delay Trial Until After Plaintiff Completes Her Bankruptcy Trust Claims at 1, *Bacon v. Armtek, Inc.,* No. CJ-08-238 (Okla. Dist. Ct. McIntosh Cty. Jan. 22, 2008)).

[50] No. 24X08000351 (Md. Cir. Ct. Bait. City July 31, 2008).

[51] *Stengel Statement,* at 104.

[52] No. CL-25113 (Va. Cir. Ct. Loudoun Cty. Dec. 10, 2003).

[53] *Furthering Asbestos Claims Transparency (FACT) Act of 2012: Hearing on RR. 4369 &Are the Subcomm. on Courts, Commercial*

filed numerous trust claims certifying exposure to products made by many of the traditional defendants and had already collected money from one building-products trust based on his claim that he was a construction worker.[54] Judge Thomas D. Home characterized Dunford's deception as the "most egregious case of a discovery abuse that I have ever seen [in 22 years on the bench] if not the worst."[55]

37. In *Beverage v. AC and S, Inc.,* a particularly egregious illustration of this practice, the plaintiff was asked to describe "all of the ways that you believe that you may have been exposed to asbestos in your lifetime."[56] The plaintiff's answer was unclear, and his counsel then stated, "[w]e are not alleging asbestos exposure anywhere else than that which he has discussed already."[57] Seven days after the jury returned a verdict in favor of the defendant CertainTeed, the plaintiff's counsel filed ten trust claims and thirteen more in the months that followed.[58] In *Stoeckler v. Am. Oil Co.,* defendants discovered that the plaintiff had failed to disclose several trust claims only when

---

& Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 21-22 (2012) (testimony of Leigh Ann Schell).

[54] Daniel Fisher, *Double-Dippers,* Forbes (Aug. 19, 2006), https://www.forbes.com/free_forbes/2006/ 0904/136.html.

[55] Brickman, *Fraud and Abuse,* at 1117 (quoting Transcript of Motions Hearing at 105, *Dunford,* No. CL-25113 (Va. Cir. Ct. Loudoun Cty, Dec. 10, 2003)).

[56] *Id.* (quoting Defendant Certain-Teed Corp.'s Motion for Sanctions & Request for Hearing at 6, *Beverage v. AC and S, Inc. an re Bait. City Asbestos Litig.),* No. 24X08000439 (Md. Cir. Ct. Bait. City, Aug. 26, 2013)).

[57] *Id.*

[58] *Id.*

trial counsel disclosed for the first time three days *after* commencement of trial that Stoeckler had filed trust claims against the Manville, Celotex, Eagle-Picher, and HK Porter Trusts. Despite deposing Stoeckler twice, defendants—being unaware of the trust filings—never had the opportunity to question Stoeckler about the exposures asserted in the filings.[59]

38. Judge Peggy Ableman, formerly the Delaware Superior Court judge responsible for all asbestos litigation in the State of Delaware, discussed abusive, if not fraudulent, practices in a pretrial hearing in *Montgomery v. American Steel & Wire Corp.*[60] and in subsequent congressional testimony.[61] The Delaware court had adopted Standing Order No. 1, which set forth mandatory disclosure obligations related to bankruptcy trust claims and specifically included "claims made to trusts for bankrupt asbestos litigation defendants."[62] Nonetheless, the plaintiffs in

---

[59] *Id.* at 1119 (citing Transcript of Trial on the Merits at 19, 63, *Stoeckler v. Am. Oil Co.,* No. 23,451 (Tex. Dist. Ct. Angelina Cty. Jan. 28, 2004)). The Eagle-Picher Trust filing occurred almost two years earlier. *Id.* at 1119 n.213.

[60] *Furthering Asbestos Claims Transparency (FACT) Act of 2012: Hearing on RR. 4369 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. 140-73 (2012) (Pretrial Hearing Transcript, *In re Asbestos Litig. Ltd. to Montgomery,* No. 09C-11-217 ASB (Del. Super. Ct. Nov. 7, 2011)).

[61] *Furthering Asbestos Claim Transparency (FACT)Act of 2013: Hearing on H.R. 982 Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. 43-53 (2013) (statement of Judge Peggy L. Ableman (retired), Del. Super. Ct.) (hereinafter, *"Ableman Statement"*).

[62] Standing Order No. 1 ¶ 7(k), *In re Asbestos Litig.,* No. 77C-ASB-2 (Del. Super. Ct. Oct. 10, 2013).

Montgomery failed to identify twenty bankruptcy trusts to which they had submitted claims.[63] In response to an interrogatory asking plaintiffs to identify all entities who were not defendants whose products plaintiff June Montgomery had been exposed, plaintiffs identified none of the trusts to which claims had been submitted.[64] Indeed, counsel for plaintiffs stated that no bankruptcy submissions had been made and no monies received.[65] Two days before a two-week trial was to commence, plaintiffs' counsel reported that his client had received two bankruptcy settlements of which he was previously unaware.[66] The following day, the defendant learned that, in fact, twenty bankruptcy trust claims had been submitted.[67] These included claims submitted to the trusts formed by Owens Corning, U.S. Gypsum, Armstrong World Industries, Babcock & Wilcox, Plibrico, and ASARCO, even though plaintiffs had, in fact, specifically denied submitting such claims.[68] Compounding the deceit, although Mrs. Montgomery's claimed exposure was solely from the take-home fibers on her husband's clothing, trust claims materials established that she had worked with asbestos products herself.[69] Moreover, even though her husband was a career electrician exposed to a wide variety of asbestos products, "the impression garnered from the Complaint, the answers

---

[63] *Ableman Statement,* at 50

[64] *Id.* at 49.

[65] *Id.*

[66] *Id.* at 50.

[67] *Id.*

[68] *Id.* at 48-49.

[69] *Id.* at 44.

to written discovery, and Mr. Montgomery's sworn [deposition] testimony . . . was that the bulk of his work around asbestos occurred only during a short period at the Everglades Power Plant."[70]

39. According to Judge Ableman, the fraudulent scheme was only exposed because one of the named defendants knew of other instances of plaintiffs' counsel submitting "conflicting work histories to multiple trusts [and] filed a motion in advance of trial requesting that the Court order disclosure of all pretrial settlements, including monies received from bankruptcy trusts."[71] The court called the failure to report those twenty trust claim filings examples of "dishonesty and disreputableness,"[72] stating, "[T]he core of this case has been fraudulent."[73] "This is trying to defraud," the jurist stated.[74] "[I]t happens a lot [in asbestos litigation]."[75]

---

[70] *Id.* at 49.

[71] *Furthering Asbestos Claims Transparency (FACT) Act of 2012: Hearing on RR. 4369 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judicially,* 112th Cong. 160 (2012) (Pretrial Hearing Transcript at 23, *In re Asbestos Litig. Ltd. to Montgomery,* No. 09C-11-217 ASB (Del. Super. Ct. Nov. 7, 2011)).

[72] *Id.* at 162 (Pretrial Hearing Transcript at 25, *In re Asbestos Litig. Ltd. to Montgomery,* No. 09C-11-217 ASB (Del, Super, Ct. Nov. 7, 2011)).

[73] *Id.* at 144 (Pretrial Hearing Transcript at 7, *In re Asbestos Litig. Ltd. to Montgomery,* No, 09C-11-217 ASB (Del. Super. Ct. Nov. 7, 2011)).

[74] *Id.* at 144 (Pretrial Hearing Transcript at 7, *In re Asbestos Litig. Ltd. to Montgomery,* No, 09C-11-217 ASB (Del. Super. Ct. Nov. 7, 2011)).

[75] *Id.*

40. In a 2013 congressional hearing, Judge Ableman strongly denounced the practice of plaintiffs denying exposures to the products of reorganized companies when, in fact, plaintiffs and their counsel had asserted just such substantial exposures in claims submitted to trusts:

> In the final analysis, there can be no real justice or fairness if the law imposes any obstacles to ascertaining and determining the complete truth. From my perspective as a judge, it is not simply the sheer waste of resources that occurs when one conducts discovery or trials without knowledge of all of the facts. What is most significant is the fact that the very foundation and integrity of the judicial process is compromised by the withholding of information that is critical to the ultimate goal of all litigation, a search for, and discovery of, the truth.[76]

H. In *Garlock*, Judge Hodges Confirmed that the Scheme to Withhold and Suppress Exposure Evidence Was Indeed Common and Widespread

41. I testified in the *Garlock* estimation proceeding before Judge Hodges, and I have carefully reviewed and written about his findings. I am also aware that counsel for the ACC in this proceeding has argued with respect to Judge Hodges's ruling that "the fact that a cherry-picked selection of 15 cases out of 600,000 or More [asbestos claims filed against Garlock] has been viewed as problematic . . . demonstrates there really isn't a widespread fraud problem

---

[76] *Ableman Statement,* at 44.

. . .”[77] This statement is more than a distortion of Judge Hodges’s findings. It is a perversion of what he found.

42. While Judge Hodges was hardly the first judge to find that asbestos exposure evidence was being wrongfully suppressed, his ruling was of great significance due to the opportunity he afforded the parties to take discovery, the time he allowed for the presentation of factual and expert testimony, and the comprehensiveness of his written and published opinion. The discovery permitted included “not only the normal discovery tools pursuant to the Federal Rules, but also multiple questionnaires directed at the claimants (and their law firms) . . . [that] sought important information on work histories and exposure to Garlock’s and other manufacturers’ products.”[78]

43. The fundamental issue before the Court in *Garlock* was the proper method of estimating the debtor’s asbestos liabilities. Relying largely on the data collected from the questionnaires, the debtor’s expert economist, Dr. Charles Bates, employed an econometric analysis of pending and projected claims. The experts for the ACC and the FCR “offered a ‘settlement approach’ based upon an extrapolation from Garlock’s history of resolving mesothelioma claims in the tort system. The end product of the two approaches differ by about a billion dollars: Garlock’s

---

[77] June 13, 2019 Tr. (Dkt. No. 1742) at 239-40. The ACC is represented here by the same law firm that described the fraudulent withholding of exposure evidence in Kananian as an “isolated incident.”

[78] *Garlock,* 504 B.R. at 74.

estimate is $125 million and the ACC/FCR estimates are $1-1.3 billion."[79]

44. No serious reading of the *Garlock* opinion can possibly support the ACC's suggestion that Judge Hodges merely found problems with 15 out of 600,000 or more claims. In rejecting the claimants approach of extrapolating Garlock's future liabilities based upon its tort system experience, Judge Hodges found as follows:

> Garlock's evidence at the present hearing demonstrated that the last ten years of its participation in the tort system *was infected by the manipulation of exposure evidence by plaintiffs and their lawyers.* That tactic, though not uniform, *had a profound impact on a number of Garlock's trials and many of its settlements* such that the amounts recovered were inflated.[80]

45. To be clear, Judge Hodges did emphasize the suppression of evidence in 15 settled cases. Judge Hodges found as follows:

> In 15 settled cases, the court permitted Garlock to have full discovery. Garlock demonstrated that exposure evidence was withheld in *each and every one of them.* These were cases that Garlock settled for large sums. The discovery in this proceeding showed what had been withheld in the tort cases—on average plaintiffs disclosed only about 2 exposures to bankrupt[ ] companies' products, but after

---

[79] *Id.*

[80] *Id.* at 82 (emphasis added).

> settling with Garlock made claims against about 19 such companies.[81]

Judge Hodges then puts to bed any assertion that the malfeasance identified in the 15 cases was somehow limited to those cases:

> The court permitted Garlock to have full discovery in only 15 closed cases. In each and every one of those cases it disclosed that exposure evidence was withheld. For fifteen plaintiffs represented by five major firms, the pattern of non-disclosure is the same:

Case	Disclosed	Not Disclosed
1	2	22
2	7	25
3	3	23
4	6	19
5	2	22
6	1	14
7	0	11
8	5	11
9	0	25
10	0	20
11	1	23
12	3	26
13	1	25
14	1	14
15	0	4

---

[81] *Id.* at 84 (emphasis in original).

> These fifteen cases are just a minute portion of the thousands that were resolved by Garlock in the tort system. And they are not purported to be a random or representative sample. But, the fact that *each and every one of them* contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those cases appears to have been sufficiently widespread to have a significant impact on Garlock's settlements and results. Garlock identified 205 additional cases where the plaintiffs discovery responses conflicted with one of the Trust claim processing facilities or balloting in bankruptcy cases. Garlock's corporate parent's general counsel identified 161 cases during the relevant period where Garlock paid recoveries of $250,000 or more. The limited discovery allowed by the court demonstrated that almost *half of* those cases involved misrepresentation of exposure evidence.[82]

In other words, Judge Hodges found that there was evidence of suppression in hundreds of cases, not just the 15 where he had authorized full discovery. And lest there be any doubt as to the breadth of his findings, he added the following:

> **It appears certain that more extensive discovery would show more extensive abuse. But that is not necessary because the startling pattern of**

---

[82] *Id.* at 85-86 (emphasis in original).

> **misrepresentation that has been shown is sufficiently persuasive.**[83]

46. Having made these findings, Judge Hodges rejected the proposed liability estimate offered by the experts for the ACC and the FCR. As stated by Judge Hodges:

> [T]he settlement history data does not accurately reflect fair settlements because exposure evidence was withheld. While that practice was not uniform, *it was widespread and significant enough to infect fatally the settlement process and historic data. It has rendered that data useless for fairly estimating Garlock's liability to present and future claimants.*[84]

Thus, the argument advanced by the ACC here—that *Garlock* merely involved 15 "cherry-picked" cases and actually demonstrated that there was no "widespread fraud problem"—is wholly inconsistent with what Judge Hodges found. Beyond the fact that Judge Hodges found that the wrongful practices were "widespread and significant," had he believed that the problems were limited to a tiny fraction of the claims brought against Garlock, he would have had no basis to reject the use of Garlock's settlement history in estimating its future liabilities.[85]

---

[83] *Id.* at 86 (emphasis added).

[84] *Id.* at 94 (emphasis added).

[85] I am aware that nowhere in Judge Hodges's opinion does he actually use the word "fraud." There can, however, be no doubt that (a) he was describing wrongful conduct and (b) that conduct, as a matter of law, constitutes fraud, defined in *Black's Law*

I. Judge Hodges Found that it Was a Regular Practice of Plaintiffs' Firms to Delay Filing Trust Claims Until After Tort System Recoveries were Obtained

47. One of the specific findings of Judge Hodges in *Garlock* that is of particular relevance here concerns the practice of plaintiffs' firms to delay filing trust claims so that they simply would not exist at the time the claimants' tort system claims were being litigated. Judge Hodges noted that the disappearance of evidence of exposure to the asbestos products of bankrupt companies "was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock "and other viable defendants."[86] Judge Hodges found that

---

Dictionary as a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment." Moreover, in rejecting a motion to 'dismiss Garlock's suit under the Racketeer Influenced and Corrupt Organizations Act (RICO) against four of the law firms that had brought mesothelioma claims against Garlock that were tainted by evidence suppression, U.S. District Judge Graham C. Mullen noted that "Garlock successfully alleges that Defendants engaged in a wide-ranging, systematic, and well-concealed *fraud* designed to suppress evidence and inflate settlement values for mesothelioma claims. Indeed, *the bankruptcy court found as much* when it reviewed a number of these *cases." Garlock Sealing Techs., LLC v. Shein,* No. 3:14-cv-137, 2015 WL 5155362, at *2 (W.D.N.C. Sept. 2, 2015) (emphasis added). Judge Mullen thus concluded that Garlock's allegations in the RICO suits that plaintiffs' counsel had engaged in a "well-concealed fraud designed to suppress evidence" were consistent with Judge Hodges's findings in the Garlock estimation proceeding.

[86] *Garlock,* 504 B.R. at 84.

"[i]t was a regular practice by many plaintiffs firms to delay filing Trust claims for their clients so that remaining tort system defendants would not have that information."[87] Judge Hodges specifically noted that one plaintiffs' lawyer even defended this practice "as seemingly some perverted ethical duty:"

> My duty to these clients is to maximize their recovery, okay, and the best way for me to maximize their recovery is to proceed against solvent viable non-bankrupt defendants first, and then, if appropriate, to proceed against bankrupt companies.[88]

As I will discuss further below, this practice is a prime reason why it is no answer to say that Truck can uncover the fraud in the tort system. If the *modus operandi is* to delay the filing of the trust claims until after the tort system cases are resolved, even discovery efforts targeted at the trusts that somehow successfully break through the confidentiality barriers of the TDPs will not reveal trust filings that have yet to be made.

J. The *Garlock* Trust Procedures Include Fraud Prevention Requirements

48. Judge Hodges, having rejected the use of Garlock's settlement history as a basis for estimating its future asbestos liabilities, instead adopted Dr. Bates's econometric opinion that current and future liabilities would total approximately $125 million. Thereafter, a settlement was reached on a funded 524(g) trust at a level far closer to Dr. Bates's estimate than the $1 billion+ amount suggested by the ACC and FCR.

---

[87] *Id.*

[88] *Id.*

49. Once an agreement was reached on the funding of the Garlock trust, attention shifted to the Garlock TDP. The ACC sought to adopt the standard form TDP, the terms of which had aided and abetted the fraudulent scheme to suppress exposure evidence in the tort system. However, the Garlock FCR, Joe Grier, seeking to protect the interests of future claimants, insisted upon Claims Resolution Procedures ("CRPs") previously proposed by Garlock. Those procedures included fraud prevention requirements specifically designed to prevent a recurrence of the evidence suppression that had plagued the claims in the tort system.

50. Like many trusts, the Garlock CRPs proposed to give claimants two options for the resolution of their claims. The first was to seek "expedited review," which would lead to settlement offers at compensation levels that have baked into them the presumption that the claimant has been exposed to asbestos products of many companies. The other option was to seek "extraordinary review," which can result in settlement offers five times greater than expedited review, if the claimant can demonstrate a history of extraordinary exposure to Garlock's products with little or no exposure to any other companies' products.

51. One set of provisions in the CRPs, perhaps more than any other, appears to take direct aim at the fraudulent practices revealed in the Garlock bankruptcy proceeding and is a direct counter to the standard TDP provisions seeking to facilitate suppression of evidence of tort claimants' exposures to the products of reorganized companies. These provisions require that a Garlock trust claimant seeking Extraordinary Claim Review must identify all other asbestos-related claims that the claimant has asserted, and

provide copies of any documents submitted to or served upon any entity containing information regarding the claimant's contact with or exposure to asbestos or asbestos-containing products, including claims forms submitted to other trusts, ballots submitted in any bankruptcy case and discovery responses served in tort litigation.[89]

52, The claimant must also certify that, to the best of his knowledge at that time, with the exception of the other claims that been expressly disclosed and identified by the claimant, no other entity is known to the claimant to be potentially responsible for the alleged injuries that are the basis for the claims.[90] In addition, claimants seeking Extraordinary Claim Review are required to identify a complete set of information about all other claims made by the claimant that "relate in any way to the alleged injuries for which the Claimant seeks compensation" including lawsuits and other trust claims.[91] The Garlock trust claimant must also provide copies of all documents that were submitted to trusts or used in litigation in support of such claims.[92]

53. Additionally, and critically, the Garlock trust claimant seeking Extraordinary Claim Review must also execute a release of information in favor of the Garlock Settlement Facility authorizing all asbestos bankruptcy trusts against which the claimant has

---

[89] *See* Settlement Facility Claims Resolution Procedures, *Garlock,* No. 3:17-cv-000275, Dkt. No. 13-1, at Ex. B, p.27 (W.D.N.C.) (TRUCK0001135, at -0001305).

[90] *Id.* at 28.

[91] *Id.* at 27.

[92] *Id.* at 28.

also filed a claim to release all information submitted to that trust and the status of any such claim and the amount and date of any payment.[93] This requirement ensures that the trust can receive information on all other trust filings, regardless of when made and regardless of whether the claimant himself makes a full disclosure.

54. Finally, the CRPs provides that trustees "shall develop methods for auditing the claims process" in consultation with plaintiffs' counsel on the CAC (formerly the ACC) and the FCR.[94] This audit right allows the trust to review the accuracy of the disclosures even after payment has been made and makes it possible to take appropriate steps if it is subsequently determined that full and accurate information was not provided.

K. In *Maremont*, the Delaware Bankruptcy Court Insists Upon Fraud Prevention Measures

55. In *In re Maremont Corporation*,[95] Judge Kevin Carey of the United States Bankruptcy Court for the District of Delaware was presented with a plan of reorganization fully consented to by all parties in interest. The only objection to the plan was filed by the United States Trustee, who, citing my scholarship regarding fraud and abuse in mesothelioma litigation, raised concerns in light of the *Garlock* findings of exposure evidence suppression that the plan lacked

---

[93] *Id.*

[94] *See id.* at 39.

[95] Case No. 19-10118-KJC (Bankr. D. Del.).

adequate fraud prevention measures.[96] Judge Carey remarked, "I don't know any reason why, under the circumstances, if, in fact, it's happened in some cases, looks to me from the Garlock opinion, that we shouldn't try to guard against it here."[97] Judge Carey specifically asked why the bankruptcy claimants, as a condition of bringing a claim, should not be required to (1) disclose what other claims they have made against other trusts and (2) offer a release in favor of the trust to share their information with other trusts.[98] Tellingly, the lawyer for the ACC acknowledged the validity of Judge Carey's concern:

> For the record, I think the court is in line with the committee in terms of the Garlock decision. I think that our position is that it illustrates the possibility that there could be claims paid that should not be paid. And we acknowledge that that is a potential.[99]

However, the ACC argued that the provisions of the plan authorizing the trust to require additional information when it deems necessary were sufficient, and expressed the concerns that if the trust actually obtained full disclosure information, the trustees could

---

[96] *See* Objection of the Acting United States Trustee to the Disclosure Statement and Joint Prepackaged Plan of Reorganization of Maremont Corp., *Maremont,* No. 19-10118-KJC, Dkt. No. 112 at 1 (Bankr. D. Del.) (citing Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation,* 88 Tul. L. Rev. 1071, 1104 (2014)).

[97] March 18, 2019 Tr. at 7, *Maremont,* No. 19-10118-KJC, Dkt, No. 166 (Bankr. a Del.).

[98] *Id.* at 18.

[99] *Id.* at 45.

be second guessed as to why they paid the claims and the trust would have to bear the cost of responding to discovery requests from defendants in the tort system for the exposure information.[100] Judge Carey was unmoved and reiterated that he would not confirm the plan unless his concerns were addressed.[101] Two months later, in May 2019, the parties filed an amended TDP that included fraud prevention measures substantially the same as those found in the *Garlock* CRP.[102]

L. The Kaiser Trust Includes Fraud Prevention Measures But Only for Uninsured Claims

56. At the September 4, 2019 hearing where the Court ruled on the disclosure statement motions, the Court questioned whether a "federal court should approve a mechanism and a process that could lead to fraud" and whether the Joint Plan "could be confirmed without something more like what Garlock and Maremont implemented," but said that it would hold that issue until confirmation.[103] In apparent response to that concern, the Debtors, the ACC and the FCR did in fact amend the Kaiser TDP to include the types of fraud prevention measures adopted in *Garlock* and *Maremont,* but **excluded** Truck and the other insurers from that protection by limiting the amendment to extraordinary *uninsured* claims. Thus, no fraud prevention measures apply to the insured claims to be

---

[100] *Id.* at 45, 47-48.

[101] *Id.* at 55.

[102] Maremont Asbestos Personal Injury Trust Distribution Procedures, *Maremont,* No. 19-10118-KJC, Dkt, No. 222-2 (Bankr. D. Del.).

[103] Sept. 4, 2019 Tr. (Dkt. No. 1785) at 65-66.

resolved under the Joint Plan in the tort system. Indeed, this not only exposes Truck and other insurers to continued fraud, but also leaves the Trust exposed to fraud with respect to its obligation to pay up to $5,000 in deductibles on every insured claim.

M. The Asbestos Evidence Fraud Cannot Be Fully Combatted in the Tort System

57. The proponents of the Joint Plan will undoubtedly argue that any concerns Truck may have with respect to fraud in the tort system can be addressed in the tort system, and that since the insured claims are to be resolved in the tort system, there is no need for the bankruptcy court to address fraud prevention as to such claims. Indeed certain courts, over the strenuous opposition of plaintiffs' lawyers, have held that claim forms submitted to asbestos bankruptcy trusts and factual information such as medical records submitted in support of trust claims are not confidential records and are discoverable in civil litigation.[104] In addition, several courts have promulgated standing case management orders ("CMOs") requiring asbestos plaintiffs to disclose information about trust claims filed or intended to be filed by the plaintiff.[105] And as discussed further below, a number of states, in the wake of the *Garlock* findings, have enacted "trust transparency" statutes designed to mandate full disclosure by tort system asbestos claimants

---

[104] For a listing of decisions and orders requiring tort plaintiffs and/or trusts to produce documentation relating to trust claims filed by plaintiffs, see Victor E. Schwartz, *A Letter to the Nations Trial, Judges: Asbestos Litigation, Major Progress Made over the Past Decade and Hurdles You Can Vault in the Next,* 36 Am. J. Trial Advoc. 1, 18 n.86 (2012).

[105] *Id.* at 18-19 n.87.

of all claims they have tiled with trusts or may file in the future.

58. Whatever surface appeal this argument might have is belied by practical realities. To begin with, and as I detailed in Section F of this report, the TDPs of most if not all of the asbestos trusts other than Garlock and Maremont are specifically designed to facilitate fraud by preventing tort system defendants from gaining access to trust filing information. In the absence of a transparency statute, a CMO or other standing order mandating disclosures, a tort system defendant seeking to learn whether the plaintiff had filed claims with any of the 60+ asbestos trusts would need to go to each of the bankruptcy courts from which those trusts were created, or courts in Delaware, and convince those courts, over the objections of the trusts and the plaintiff, that the trust secrecy provisions previously authorized by those same courts should not be applied to deny the plaintiff access to information the trust may have with respect to that plaintiff. Furthermore, there is evidence that plaintiffs and their counsel, in some cases, simply ignore the requirement in CMOs and standing orders of courts that plaintiffs provide defendants with a statement of any and all claims that may exist against asbestos trusts.[106]

---

[106] *See* Mark Davidson *et al., Asbestos Bankruptcy Trusts and Their Impact on the Tort System,* 7 J.L. Econ. & Pol'y 281, 297-98 (2010) (remarks by Judge Mark Davidson); *see also* Mary M. Gay and Sarah Beth Jones, *A Matter of Trust? How Access to Asbestos Trust Claims Information Affects Cases in New York Courts,* www.NYCJL.org (Oct. 2019) (stating that information included with trust claims sought by asbestos defendants in New York "remains difficult to obtain and is often times intentionally withheld").

59. Moreover, even assuming Truck took on the cost and time burden required to seek this information in each case from each trust, and even if Truck was successful in obtaining the information sought in each and every case from each and every trust, it would still be exposed to fraud. As detailed in Judge Hodges's *Garlock* ruling, a key component of the fraudulent scheme has been delaying the filing of trust claims until *after* the tort system claims are resolved. Thus, in any given lawsuit, even successful efforts to subpoena trust records will, of course, not reveal any trust claims that have not yet been filed. A plaintiff and his lawyer, during the duration of trials in the tort system, can rest assured that evidence contradicting the denials will be far beyond the reach of defendants. Once the tort claims have concluded, however, counsel can file multiple trust claims for a plaintiff, claiming "under penalty of perjury" a "meaningful and credible exposure" to the products of the very trusts to which the plaintiff had denied exposure. Thus, there is no effective way in the tort system for a defendant in a given lawsuit to confront this aspect of the fraudulent scheme.

60. As noted above, 17 states have enacted trust transparency statutes.[107] Although the statutes vary somewhat from state to state, they all mandate that asbestos plaintiffs must disclose all filed and potential asbestos trust claims. The very fact that these statutes have been enacted is a recognition that the tort

---

[107] The 17 states include Alabama, Arizona, Georgia, Iowa, Kansas, Michigan, Mississippi, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia and Wisconsin. All but three of these statutes were enacted post-*Garlock*.

system cannot address the problem of withheld exposure evidence. Indeed, as observed by Mark Behrens in his 2018 *Fordham Law Review* article "Asbestos Trust Transparency,"[108] an "argument frequently heard in debates about trust transparency is that reform is unnecessary because information about a plaintiff's exposures should be available through ordinary discovery."[109] But as Mr. Behrens observes, while this should theoretically be true, plaintiffs who are asked about exposures that occurred many decades prior do not recall the names of those products they came in contact with which contained the more highly toxic forms of asbestos.[110] Judge Hodges in *Garlock* explained this loss of memory, noting that "[t]he 30 to 40 year latency period between exposure and onset of disease means that a plaintiff may have had many exposures over a long period of time, many of which were in the distant past," and thus "the plaintiff may not be able to specifically identify the responsible tortfeasors."[111] "Consequently, in many instances, the exposure evidence is under the control of the plaintiffs' lawyer rather than the plaintiff."[112] Judge Hodges further noted that the "disappearance" in the tort system of evidence of exposure to insulation products is abetted by the practices I have described in ¶ 14 which I referred to as the Baron & Budd Script Memo detailing how the firm's paralegals would instruct the firm's clients how to testify with regard to their exposures

---

[108] 87 Fordham L. Rev. 107 (2018).

[109] *Id,* at 120.

[110] *Id.*

[111] *Garlock,* 504 B.R. at 82.

[112] *Id.*

and, where necessary, would "implant false memories" so they would have for each client a product "ID for every manufacturer that we needed to get ID for."[113] Coupled with that is the control that plaintiffs' counsel have exercised over the content of the TDPs, discussed in ¶¶ 20-30, designed to suppress defendants' ability to obtain exposure evidence from the trusts to which plaintiffs have submitted claims. And finally, as Judge Hodges noted, it is "a regular practice by many plaintiffs' firms to delay filing Trust claims for their clients so that remaining tort system defendants would not have that information."[114] Mr. Behrens adds:

> A separate 2015 report revealed additional instances of "inconsistent claiming behavior and allegations between the tort and trust systems" by plaintiffs. For example, a West Virginia plaintiff recalled the products of more than a dozen noninsulation defendants but could not remember the asbestos-containing thermal insulation products to which he alleged exposure. Plaintiffs counsel eventually "filed claims against 20 trusts, a majority of which represent predecessor companies that once engaged in the manufacturing, distribution or installation of asbestos-containing thermal insulation products."[115]

---

[113] *Id.* at 84.

[114] *Id.*

[115] Behrens, *Asbestos Trust Transparency,* 87 Fordham L. Rev. at 115-16 (quoting Peter Kelso & Marc Scarella, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims,* U.S. Chamber Inst. For Legal Reform, 8-9 (2015)).

Mr. Behrens then cites 2016 and 2017 studies revealing further instances of plaintiffs being unable to recall exposures when questioned in tort cases, only to later file trust claims against entities not identified during the tort system litigation.[116] The evidence is compelling that asbestos defendants' attempts to conduct discovery of plaintiffs' asbestos exposures are simply being overwhelmed by plaintiff counsel's scheme to suppress that exposure evidence. It is therefore not surprising that state legislatures have not been persuaded by the argument that the exposure histories are available through discovery in the tort system.

61. Of course, the fact that only slightly more than one-third of the states have enacted trust transparency statutes, plus the fact that some of those statutes only apply to claims brought after the statute was enacted, means that these statutes are insufficient to ensure that most of the alleged 14,000 pending Kaiser asbestos claims will not be fraudulently inflated in the tort system. Indeed, according to Truck data, only approximately 300 pending lawsuits of the many thousands were filed in states that have enacted transparency statutes. Moreover, of the 890 cases that have reactivated since the automatic stay was lifted, only five are in states with transparency statutes, which suggests that plaintiffs' lawyers have less interest in litigating the cases in states where full disclosures are mandated.

62. The structure of the Joint Plan, which mandates that all insured claims be resolved in the tort system, as opposed to through a funded trust that could include fraud prevention measures as in

---

[116] *Id.* at 116.

Garlock and *Maremont* and in the proposed Joint Plan but only applicable to uninsured claims, seems specifically designed to pave the way for the preservation of the scheme to withhold exposure evidence and to visit fraud upon the insurers. I concur with this Court that "a federal court doesn't normally want to put its stamp of approval on any course that would naturally lead to sharp practices or fraud."[117] There is, however, a way to address the Court's expressed concern that any plan it approves should minimize the possibility that the debtors' asbestos claims will be resolved in the tort system at fraudulent levels. I understand Truck has proposed that all claimants who want to resolve their asbestos claims in the tort system be required, prior to proceeding with their litigation, to provide Truck with the types of disclosures and authorizations required of trust claimants in *Garlock* and *Maremont,* and that are proposed to be required from uninsured Kaiser claimants. In addition, Truck has also proposed that it be provided with the right to periodically audit the disclosures to be sure that claims are not later filed with trusts which are not identified by the claimants. Adoption of these proposed requirements will help prevent claimants from receiving fraudulently elevated payments, whether from the insurers or from the Kaiser Trust with respect to the deductibles. Conversely, the failure to impose these types of requirements on claimants is almost certain to facilitate the payment of fraudulent claims. Indeed, the fact that 99.5 percent of the cases that have reactivated since the lifting of the stay are in the jurisdictions that lack transparency statutes is compelling evidence of the need to ensure that Kaiser's asbestos

---

[117] Sept. 4, 2019 Tr. at 51.

claimants are required to fully disclose their exposures.

Dated:
February 20, 2020

Respectfully submitted,

/s/ Lester Brickman
Lester Brickman
Emeritus Professor of Law

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re	
KAISER GYPSUM COMPANY, INC., et al.,[1]	**Case No. 16-31602**
	Chapter 11
	(Jointly Administered)
Debtors.	

TESTIMONIAL DECLARATION OF TRUCK INSURANCE EXCHANGE WITNESS SCOTT R. HOYT

GIBSON, DUNN & CRUTCHER, LLP
Michael A. Rosenthal
Robert B. Krakow
Russell H. Falconer
Matthew G. Bouslog
Dylan S. Cassidy
2001 Ross Avenue,
Suite 2100
Dallas, TX 75201

GRIER WRIGHT MARTINEZ, PA
Michael L. Martinez
(N.C. Bar No. 39885)
521 E. Morehead St.,
Ste 440
Charlotte, NC 28202

Counsel for Truck Insurance Exchange

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Kaiser Gypsum Company, Inc. (0188); and Hanson Permanente Cement, Inc. (7313). The Debtors' address is 300 E. John Carpenter Freeway, Irving, Texas 75062.

DECLARATION OF SCOTT R. HOYT

l. I have served as outside coverage counsel to Truck Insurance Exchange for nearly 30 years. In that role, I have regularly dealt with issues involving Truck's insurance policies issued to the Debtors, Kaiser Gypsum Company and Hanson Permanente, Inc. (collectively referred to herein as "Debtors" or "Kaiser") between the years 1964-1983 that provide primary insurance coverage to Kaiser for their asbestos personal injury liabilities for asbestos exposures beginning no later than the end of Truck's 1983 policy. My involvement has also extended to participation in discussions and negotiations with Kaiser, in the wake of the Garlock estimation ruling in January 2014, concerning the potential resolution of Kaiser's asbestos personal injury liabilities, and Truck's coverage obligations related thereto, through a trust to be created pursuant to 11 U.S.C. § 524(g). I also drafted on behalf of Truck the April 9, 2019 Reservation of Rights letter that detailed potential coverage issues that could arise from confirmation of the proposed plan of reorganization if certain changes were not made to prevent the allowance of fraudulently inflated claims.

2. I am testifying not in my capacity as Truck's legal counsel, but rather as a fact witness to certain important meetings and communications and as Truck's corporate representative. My designation as Truck's corporate representative was made necessary by the unfortunate death of Dennis Patterson, the Truck employee primarily responsible for the handling of the Kaiser account. Mr. Patterson was the point person at Truck for all Kaiser-related matters that occurred starting with

coverage and contribution actions in 1990, the discussions with Kaiser from 2014-2016 about a possible prepackaged bankruptcy resolution, and continuing after the filing of the bankruptcy cases in 2016. Unfortunately, serious health issues led to Mr. Patterson's retirement in 2018 and his eventual passing in August 2019. This led to Truck's decision to designate me as its corporate representative.

3. My involvement in the events specifically relevant to this confirmation proceeding began with a phone call from Phil Cook, Kaiser's coverage counsel, in late January 2014. Mr. Cook called to inquire as to Truck's willingness to discuss a possible prepackaged bankruptcy for Kaiser as a means to resolve its asbestos personal injury liabilities.

4. Mr. Cook's call came just shortly after Judge Hodges' January 10, 2014 ruling in the Garlock estimation proceeding. In that ruling, the Court found that Garlock's "participation in the tort system was infected by the manipulation of [asbestos] exposure evidence by plaintiffs and their lawyers," and that this practice "had a profound impact on a number of Garlock's trials and many of its settlements such that the amounts recovered were inflated." According to Judge Hodges, the evidence showed a "startling pattern of misrepresentation."

5. In light of these findings, Judge Hodges rejected the estimation of Garlock's liability for present and future mesothelioma claims proffered by the ACC and FCR, which was based upon Garlock's tort system history, finding that the withholding of exposure evidence "was widespread and

significant enough to infect fatally the settlement process and historic data . . . [rendering] that data useless for fairly estimating Garlock's liability to present and future claimants." Instead, the Court adopted the estimation of Garlock's liability proffered by Dr. Charles Bates of Bates White, which applied an econometric analysis of data received from Garlock's current claimants to project Garlock's actual "legal liability" to those claimants.

6. Mr. Cook's call eventually led to a June 3, 2014 meeting between representatives of Kaiser and Truck in Los Angeles. I participated in that meeting along with Mr. Patterson and other Truck employees as well as David Neale, who had been retained as Truck's bankruptcy counsel. Kaiser was represented at the meeting by Mr. Cook, Mike Hyer, who was Kaiser's General Counsel, and Greg Gordon, Kaiser's bankruptcy counsel. During the meeting, the Kaiser representatives stated that they were contemplating negotiations with asbestos plaintiffs' counsel on a prepackaged bankruptcy plan to create a 524(g) trust to resolve their asbestos personal injury liabilities. They explained how such a plan could result in an injunction that would protect Kaiser as well as Truck and the excess insurers from further liability for the asbestos personal injury claims from both current and future asbestos claimants.

7. The Kaiser representatives told us that they would not participate in the funding of the trust, but rather expected the trust to be funded by Truck and the excess carriers. They stated that they expected Truck to finance the majority of the bankruptcy costs. We asked how much money would be needed to fund the trust, which led to a

discussion of the Garlock ruling. We were told by Mr. Gordon that the plaintiffs' lawyers would likely take the same position that they had taken in Garlock—that the contribution should be based on what Kaiser had historically paid to resolve the cases in the tort system. However, and obviously consistent with the Garlock findings, the Kaiser representatives did not believe the tort system history was the appropriate way to calculate the trust contribution. Rather, they believed the claims should be valued using the legal liability approach adopted by Judge Hodges.

8. The Kaiser representatives projected a 10 month timeline for a prepackaged resolution. The first 4-6 months would involve the negotiation of a common interest agreement between Kaiser and Truck, the retention by Truck and Kaiser of economic consultants to project the amount of present and future asbestos liabilities, and consideration of a funding proposal by Truck's management. The remainder of the 10 months would involve making contact with representatives of the plaintiffs' bar and negotiation of an agreement. They gave no assurance that the negotiations would be successful, but they were asking Truck to fund a negotiation process involving Kaiser, Truck and asbestos plaintiffs' counsel that hopefully would lead to a fair resolution of the asbestos liabilities.

9. Approximately three weeks later, Kaiser and Truck entered into a Common Interest and Confidentiality Agreement, dated June 23, 2014. That agreement confirmed the common interest of Truck and its insured Kaiser in attempting to negotiate a prepackaged plan of reorganization that

would resolve Kaiser's asbestos personal injury liabilities and would further our mutual interests in achieving that goal. Moreover, and as I will go into greater detail later in my testimony, this agreement to work together to achieve a fair resolution of Kaiser's asbestos liabilities was entirely consistent with Kaiser's policy duty to cooperate and assist Truck in resolving the insured asbestos claims.

10. Following the execution of the Common Interest and Confidentiality Agreement, Truck heard very little from Kaiser over the next several months. However, in early 2015, Kaiser's counsel, Mr. Gordon, advised that Kaiser wanted to move forward and to negotiate a cost sharing agreement with Truck. Ultimately, a Cost Sharing Agreement effective June 15, 2015 was entered into. That agreement obligated Truck to pay the great majority of the fees and costs associated with the negotiations for a prepackaged bankruptcy. The covered costs included Kaiser's professional fees and related expenses as well as the professional fees and expenses of an asbestos creditors' committee and a future claims representative. The total costs were capped at $5 million. Truck's share of the first million was 90%, and reduced by 4% for each successive million dollars. Overall, Truck committed to pay $4.1 million of the first $5 million of bankruptcy costs. Again, Truck fully understood that there was no guarantee the negotiations would be successful. But based upon the discussions in the above described meetings, those of us involved for Truck were led to believe that Truck was agreeing to fund a process that would involve it in negotiations with Kaiser and lawyers for asbestos plaintiffs, with the goal being a

successful resolution of Kaiser's asbestos personal injury liabilities.

11. However, the promised negotiation process that was the inducement to the Cost Sharing Agreement never took place. This was due to a unilateral decision by Kaiser to abort the process. In mid-July 2016, Mr. Gordon advised Mr. Neale that Kaiser was contemplating a September 30, 2016 bankruptcy filing, with or without a prepackaged agreement. As testified to by Mr. Neale, by mid-September, 2016, Kaiser was preparing for the bankruptcy filing and asking Truck to enter into a new cost sharing agreement whereby Truck would agree to pay 95% of the bankruptcy costs, with no cap. Projections shared by Kaiser with Truck estimated bankruptcy fees and expenses in excess of $24 million over a two-year period.

12. Truck was, to say the least, extremely frustrated by this turn of events, which certainly had the feel of a bait and switch. Truck had agreed to fund a negotiation process that was now being abandoned by Kaiser, not because the negotiations had failed, but rather before a single negotiation had even taken place. Moreover, Truck had paid and/or become liable for the payment of millions of dollars of bankruptcy professional fees and expenses that were supposed to cover a negotiation process, but instead were funding most of Kaiser' professional costs to prepare for the filing of the bankruptcy cases. On top of all that, Kaiser was now asking Truck for a commitment to pay what could be tens of millions of dollars of fees and expenses even though (a) Truck had absolutely no control of the direction of the bankruptcy cases, (b) Truck had no basis to evaluate whether an

agreement was even possible having had no discussions with representatives of the asbestos plaintiffs' bar, and (c) there was no cap on Truck's obligation aside from a right to terminate, presumably after many millions more had been invested.

13. Truck certainly had no obligation to fund the Debtors' fee and expense obligations in bankruptcy, and was understandably concerned about a second funding commitment, having already been burned once to the tune of millions of dollars for a process that never began. Nevertheless, Truck remained willing to bear the great majority of the bankruptcy costs, provided the funding obligation was tied to a successful outcome of the bankruptcy cases, with success defined by Debtors' own goal at the outset of the cases—a 524(g) plan agreed to be the Debtors, the asbestos claimants and the insurers, including Truck.

14. Debtors and other plan proponents have described Truck's position as demanding an outcome favorable and acceptable to Truck. However, this mischaracterizes Truck's position. By definition, an agreement on a 524(g) plan would have required not only the support of the Debtors, but also the ACC, the FCR and 75% of the asbestos claimants. Thus, Truck was conditioning its cost share obligation not on something it alone could dictate or benefit from, but rather on a consensual resolution that benefited all parties including Truck, which was the stated goal of the Debtors when they filed the cases.

15. As reflected in David Neale's email exchanges with Greg Gordon in the period November 2016-January 2017 concerning a bankruptcy cost

sharing agreement, Truck repeatedly told the Debtors of its interest in entering into good faith negotiations with the claimants and achieving the consensual resolution the Debtors represented was their goal. Indeed, that had been Truck's goal ever since I received the post-Garlock call from Phil Cook in January 2014. But Truck was understandably concerned that it not incur tens of millions of dollars of fees and then find itself excluded from the ultimate deal. Subsequent events during these cases have only validated Truck's concerns.

16. Truck's interest in a consensual resolution cannot seriously be questioned. It was the reason Truck committed to paying up to $4.1 million in costs associated with a prepackaged bankruptcy. Following the filing of the cases, Mr. Neale repeatedly informed Mr. Gordon of Truck's interests in engaging in such negotiations. Separately, I had conversations with Kevin Maclay, counsel for the ACC, where I reaffirmed Truck's interest in talking. Moreover, Debtors in their statements to the Court at the outset of the cases, the Debtors and the ACC in written and oral statements to the Court during the first year or so of the cases, and Mr. Maclay in his conversations with both Mr. Neale and me, repeatedly professed to be interested in including Truck and other insurers in such negotiations.

17. Reaching agreement on a funded 524(g) trust seemingly made sense for all parties. Such an agreement would enable claimants with valid asbestos personal injury claims against the Debtors to obtain fair compensation payments many years before they were likely to recover anything in the tort system, the insurers could obtain cost

certainty, and all parties—the claimants, the Debtors and Truck and the other insurers could save the costs associated with the litigation of many thousands of tort system claims. I would point out that these very benefits of a 524(g) trust have been noted by Kaiser's bankruptcy counsel both at the outset of these cases and in the recently filed Aldrich Pump asbestos case, at pages 33 and 37 of Aldrich Pump's Information Brief.

18. Yet, in the nearly four years between the signing of the Common Interest and Confidentiality Agreement in June 2014 and the filing of the Joint Plan Term Sheet in March 2018, Truck was never invited to participate, nor was it included, in a single negotiating session with the claimants' representatives. Indeed, to this day there has never been a single discussion as to the amount Truck and other insurers should contribute to a funded 524(g) trust.

19. Full and complete exposure evidence is critical to the defense of asbestos claims. A particular defendant's share of liability to an asbestos plaintiff will largely depend on the number of other asbestos products to which plaintiff was exposed. Moreover, and particularly for sellers of products containing low dose and less toxic asbestos, like Kaiser, evidence of other asbestos exposures can provide a complete defense. For that reason, the lawyers for Kaiser retained by Truck routinely seek discovery of all of plaintiff's asbestos exposures.

20. The Garlock decision made clear what asbestos defendants had long suspected—that they were being victimized by a scheme by asbestos plaintiffs' lawyers to inflate the value of asbestos claims through the manipulation and withholding

of evidence of exposure to the asbestos products of entities other than the tort system defendant. In addition, Judge Hodges' findings made clear the futility of trying to obtain full disclosures in the tort system. The scheme was specifically and intentionally designed to avoid detection in the tort system. By denying exposure to asbestos products sold by companies that had already filed for bankruptcy and established trusts to pay their asbestos liabilities and by delaying the filing of claims with those trusts until after the tort system cases were resolved, plaintiffs and their lawyers were ensuring that there was nothing to discover from the trusts that would reveal the falsity of their denials. Moreover, as shown in Lester Brickman's report and testimony, asbestos trust distribution procedures are designed to frustrate efforts to obtain discovery of any trust filings an asbestos plaintiff did make as of the time his tort system claim was litigated.

21. Having defended thousands of asbestos claims against Kaiser in the tort system over many years, and having experienced the frustration caused by the suppression of exposure evidence by plaintiffs and their lawyers, Truck believed that Kaiser's suggested pursuit of a negotiated 524(g) resolution of its asbestos liabilities, with funding based on Kaiser's legal liability and not its tort system history, was the best way to address what had been uncovered in Garlock. After Kaiser abandoned the pursuit of a prenegotiated plan and filed these bankruptcy cases in 2016, Truck continued to hope that a negotiated resolution would address the problem of fraudulently inflated claims. Even in 2017, Truck—and the Court—were receiving assurances from the Debtors, the

ACC and the FCR that once they came to an agreement, Truck and the other insurers would be brought into the next stage of the discussions. Nevertheless, as 2017 came to end there still had been no outreach to Truck, and we were increasingly concerned that the Debtors—our insureds—no longer cared whether or not the asbestos claims were fairly and properly resolved.

22. The filing of the Joint Plan Term Sheet in March 2018 confirmed Truck's worst fears. The filed Term Sheet demonstrated that there was no intent to fold Truck or the other insurers into discussions on a 524(g) resolution. Even worse, it showed that Truck's insureds had entered into a collusive agreement with representatives of the plaintiffs' bar—those responsible for the evidence suppression scheme. Indeed, the Asbestos Creditors Committee in these cases includes law firms found to have suppressed evidence in Garlock and other cases.

23. The Term Sheet agreement, which forms the basis for the Joint Plan now before the Court, provided for a 524(g) trust. However, while it required all of Debtors' uninsured asbestos liabilities—of which there are very few, if any—be resolved by the trust, the Term Sheet mandated that all of Debtors' insured asbestos personal injury liabilities be resolved in the tort system, the very place where the evidence suppression scheme had flourished and where plaintiffs' lawyers knew it could not be detected. The plan envisioned by the Term Sheet contained none of the now-recognized fraud prevention measures, but was structured to assure the Debtors and their non-bankrupt parent that they would be protected from future

misconduct. Making matters even worse, the deal called for a lifting of the automatic stay so that the cases could resume in the tort system even prior to a determination of whether the not-yet-filed plan of reorganization was confirmable.

24. Ever since the filing of the Term Sheet, Truck's singular focus in these cases has been on ensuring that any plan ultimately confirmed by this Court is one in which the asbestos bodily injury bankruptcy claims are resolved at their fair, and not fraudulently-inflated values. There are a variety of ways this could be accomplished, varying from minor tweaks that could be made to the plan envisioned by the Term Sheet and ultimately presented to this Court for confirmation, to entirely different structures more akin to traditional 524(g) plans. While there have been some limited discussions between Truck and the Plan Proponents since the Term Sheet was filed, there has been complete and total resistance to even discussing any resolution that would involve the inclusion of fraud prevention measures or an agreed upon funding amount for a 524(g) trust.

25. Initially, the Debtors' failure to file a plan prior to the expiration of exclusivity presented an opportunity for Truck to present an alternate plan structure. The Truck plan drew strenuous opposition from the ACC, the FCR and the Debtors. Putting aside the question of whether the Court should have permitted Truck's plan to proceed, it is important here for the evidentiary record to set forth what Truck was attempting to accomplish through the filing of its proposed plan.

26. The basic structure of the Truck plan was to (1) establish a trust to resolve all of the debtors'

asbestos personal injury claims; (2) create a payment matrix for the resolution of the claims whereby settlement values for each claim would be determined; (3) provide claimants the option to decline the trust settlement offer and proceed with their claims in the tort system; and (4) make Truck responsible for payment in full of all of insured claims, with Truck bearing the responsibility to collect amounts owed by the excess insurers under their policies or by the debtors for deductible amounts. The Truck plan included fraud prevention disclosure and authorization requirements for claimants who sought more than the matrix values, much the same as the Kaiser Trust requires for uninsured claims.

27. Truck hoped that the filing of its plan would lead to negotiations with the Debtors and the claimants' representatives on the specific terms, including the matrix valuation terms. The Truck plan resembled scores of 524(g) trusts that had been agreed to in other bankruptcy cases, including Garlock. In contrast, the Joint Plan mandates that all claims be resolved in the tort system rather than having the opportunity to be resolved administratively through a trust. I am unaware of any other 524(g) plan that is structured this way.

28. The normal practice of administratively resolving asbestos claims through a trust—which is the basic thrust of 524(g) and what the Debtors proposed at the outset of the case—seemed to make particular sense in these cases. For claimants, the trusts facilitate the fast resolution and payment of their claims. The tort system is incapable of dealing with the huge volume of asbestos

claims, each of which requires individualized consideration. The backlog of 14,000 asbestos cases pending against the Debtors as of the Petition Date, some of which were first filed as early as 1994, attests to the problem. Indeed, during Kaiser's more than 35 years in the tort system prior to the Petition Date, only 29 cases, less than one per year, were ever tried to a verdict. Not surprisingly given the limited capacity of the tort system, the costs of litigating, and the huge volume of cases pending, lawyers for the asbestos plaintiffs typically push forward the claims they perceive to be of greater value in their case inventories, and not those of lesser value. This helps to explain why more than 5,000 of the cases pending as of the Petition Date were filed more than ten years prior to the Petition Date. Thus, we believed the Truck plan, which contained a process to administratively resolve the claims through a trust, yet preserved the right to a trial in the tort system, would benefit all claimants, and particularly those who have waited so long to have their cases considered.

29. The benefit to asbestos defendants and their insurers from resolving claims through a trust is that it avoids the costs of defending the cases and managing the litigation, at least for all claimants willing to accept the trust's settlement offers. In the wake of the Garlock evidence suppression scheme findings, a trust settlement process would have ensured that all of Debtors' asbestos liabilities were fairly resolved, including those insured by Truck. First, for those claimants who opted for an expedited review with limited documentation requirements, the matrix valuations used to settle such claims typically have baked into them the

assumption that the claimants also have claims against many other asbestos defendants and trusts. This effectively addresses the concern that claims could be inflated through exposure evidence suppression. Second, for those claimants who seek higher recoveries, either through individualized review by the trust or in the tort system, the Truck plan envisioned the very same types of fraud prevention disclosures and authorizations that were ultimately agreed to in the recent Garlock and Maremont cases, and have been proposed in these cases for uninsured claims resolved through the Kaiser Trust. Thus, however the claims were resolved, and regardless of whether the claims were insured or uninsured, the Truck plan would have protected Truck and the Debtors from further fraud.

30. We were under no illusions as to how difficult it might be to reach agreement on the Truck plan. There would need to be negotiation and agreement on the matrix valuations, as well as information requirements both for those accepting the trust offers and for those electing to litigate in the tort system. Alternatively, there could be an agreement on a total lump sum Truck would pay into the trust, and the claimants' representatives could decide amongst themselves what the matrix values and information requirements would be. Either way, Truck would have protection against the evidence suppression scheme and claimants would have access to an efficient mechanism for resolving their claims. Moreover, while there were bound to be significant differences over the claim valuation amounts, either through the matrix or for a lump sum payment, the projected cost of defense savings were substantial enough to

provide significant room for movement on both sides. The parties did not need to agree on valuation, they just needed to be close enough to reach a deal by sharing the cost savings. The eventual Garlock settlement for an amount that was well above the valuation by Judge Hodges but substantially below the valuation offered by the ACC at the estimation hearing was seemingly a roadmap to a consensual plan.

31. Thus, our approach in the wake of the filing of the Term Sheet and the related motion to lift the stay was (1) submit Truck's alternative plan structure, (2) oppose the motion to lift stay on the grounds that it would facilitate a resumption of fraudulent claims in the tort system and (3) to see if agreement could be reached on a consensual plan that would resolve at least the vast majority of claims through a trust, and would do so at fair, and not inflated values.

32. While we always recognized that it was no simple task to come to an agreement on the Truck plan, particularly as to matrix valuations or, in the alternative, a fixed contribution amount from Truck and the excess insurers, we were quite surprised that the claimant representatives expressed no interest in even discussing the Truck plan. It is not lost on us that although the ACC is charged with representing the interests of the asbestos claimants, its actual membership is comprised of prominent asbestos plaintiffs' law firms, and the committee answers to a broader constituency of asbestos plaintiffs' lawyers. Thus, any agreement to address the fraud concerns must be negotiated with a group that includes, in the committee itself and its broader constituency, firms

found in Garlock and other cases to have engaged in the evidence suppression scheme.

33. Truck's insureds, the Debtors, facilitated the resistance of the plaintiffs' bar by agreeing to a deal with these same malfeasors that allows them to resume business as usual, i.e. pursuing fraudulently-inflated claims against the Debtors in the tort system, protecting only the Debtors and their parent Lehigh Hanson from any future effects of the fraud. This agreement, now embraced by the plan proposed to be confirmed, gives those who engaged in the fraud pre-bankruptcy a clear path to continue to do so post-bankruptcy, and removes the incentive they might otherwise have had to negotiate a fair resolution of Debtors' asbestos liabilities.

34. When we raised concern over the resumption of fraud in connection with the May 10, 2018 hearing on the motion to lift the stay, Debtors' counsel was quite candid. He stated:

> "[D]o the debtors think they . . . were fairly treated in the tort system? No. . . . [A]re the debtors suspicious that maybe they were the subject of misconduct in the tort system? Yes. But the . . . important point is, Your Honor, that we've negotiated an agreement. All our views were taken into account in that agreement and we're satisfied with the agreement. We think it's a good agreement and it's an agreement, in our view, that paves the way for us to emerge from bankruptcy. So, you know, a lot can be said about fraud, a lot of references can be made to Garlock and the like, but the point is there's

> nothing inconsistent in that regard, We don't think we were treated fairly, either. It is what it is. We've settled and this agreement takes the debtors out of the tort system. And that's the only point that matters from an estate perspective."

35. This acknowledgement by Mr. Gordon on behalf of Truck's insureds concedes (1) they do not dispute Truck's contention that the asbestos cases brought against the debtors have been infected by the plaintiffs' lawyers "misconduct," i.e. the scheme to suppress evidence; (2) they do not dispute Truck's contention that their deal with the plaintiffs' bar will facilitate a continuation of the scheme; but (3) they don't care because the financial burden of any fraud will not fall on them.

36. Mr. Gordon's comments show exactly what happened here—Truck's insureds knowingly agreed to a collusive arrangement with those they knew were engaged in a wrongful evidence suppression scheme designed to fraudulently inflate claims, which agreement will facilitate the resumption of the scheme to the detriment of Truck. And they did so because they believed their only obligation was to themselves.

37. Truck fundamentally disagrees with Debtor's position. We do not believe that this Court, or any court, should lend its imprimatur to an agreement designed to facilitate fraud. In addition, Debtors' assent to a collusive agreement with the wrongdoers that allows the fraud to continue directly conflicts with and contradicts their duties under the Truck insurance policies, agreed to by them as a condition to the coverage. The Truck insurance policies, like most policies of this type, include

what is generally referred to as a duty to cooperate and assist. Specifically, the policies obligate Kaiser "to cooperate with [Truck] . . . and [to] . . . assist in effecting settlement, securing and giving evidence." The recognized purposes of duty to cooperate provisions is to assist the insurer in presenting an effective defense, including securing evidence to enable the insurer to quickly and accurately assess potential liability and settle meritorious claims, and to prevent collusion between the insured and the injured party.

38. As explained in insurance industry treatises, articles and case law, duty to cooperate clauses such as the ones found in the Truck policies are worded generally and broadly, because what might constitute necessary cooperation and assistance can vary substantially from one type of claim to the next depending on the circumstances. Here, the circumstances include (1) 14,000 asbestos cases pending against the insureds at the time they filed for bankruptcy, (2) hundreds more filed since the stay was lifted, (3) thousands more likely to be filed in the future, and (4) substantial reason to believe, based upon the findings in Garlock, that many of these claims have been or will be fraudulently inflated due to evidence suppression by plaintiffs' lawyers. Importantly, this belief is not disputed by the Debtors, as Mr. Gordon conceded.

39. When the methods and scope of the fraudulent scheme were revealed in Garlock, Kaiser initially took steps that were wholly consistent with the duty to cooperate. Kaiser contacted Truck about pursuing a process to negotiate a prepackaged bankruptcy that would settle the asbestos

personal injury claims based upon Kaiser's actual legal liability, and not the inflated amounts reflected by prior tort system outcomes. Kaiser and Truck entered into a common interest agreement to pursue that outcome, and Truck, for its part, agreed to and did fund millions of dollars of professional fees and expenses arising out of the effort. Kaiser worked to identify representatives of the plaintiffs' bar with whom to negotiate and information in furtherance of negotiations was provided. Ultimately, however, Kaiser unilaterally elected to abandon the prepackaged process before any negotiations had taken place, and instead filed these cases. Even then, Kaiser professed to be committed to attempting to negotiate a proper resolution of the asbestos claims that would be acceptable to all interested parties, including Truck.

40. Everything changed, however, when negotiations between Truck and the Debtors over cost sharing in the bankruptcy broke down. As the testimony of David Neale shows, the Debtors wanted Truck to bear 95% of the bankruptcy costs, which debtors projected to be approximately $24 million if they emerged from bankruptcy in 24 months. Although Truck had no legal obligation to pay the costs of the Debtors' bankruptcy, it remained willing to pay the costs conditioned upon an outcome that included an agreed upon 524(g) trust with protections for Truck. Unwilling to accept that condition, the Debtors instead opted to negotiate their own deal with the claimants memorialized in the Joint Plan Term Sheet. Truck was excluded from the negotiations and from the fraud protections that agreement provided to Debtors and their parent.

41. Debtors' resulting collusive deal with those who are suing them is wholly at odds with their duty as insureds to assist and cooperate. Instead of working with Truck to prevent further fraudulent claims, they agreed to a deal with representatives of the many thousands who have asserted claims against them that facilitates a resumption of the evidence suppression scheme, while leaving Truck holding the bag for payment of inflated claims. As Mr. Gordon made clear, all that the insureds cared about was that they were protected from the fraud. Thus, instead of cooperating with Truck to reduce the potential for fraudulent claims, they instead cooperated with the adversaries to protect themselves, and had no problem with leaving their insurer exposed. Nothing in the policies limits the insureds' duty to assist and cooperate when presented . with a favorable financial opportunity. Nor do the policies relieve the Debtors from their policy obligations if Truck is unwilling to agree to the insureds' terms for bankruptcy cost sharing.

42. I have read Debtors' Memorandum in support of confirmation as well as the brief filed jointly by the ACC and the FCR. Both submissions significantly distort what has transpired in these cases and the positions taken by Truck. I will detail and respond to a number of those contentions in the following testimony.

43. Fundamentally, I want to make clear that Truck's goal is not and has never been to avoid its coverage obligations under the policies. While confirmation of the plan as proposed may well give Truck the right to contest coverage, our strong preference is for our insureds to make the

necessary changes to the plan that will bring them into compliance with their obligations under the policies and enable Truck to properly and fairly defend and evaluate the insured asbestos bodily injury claims asserted against them. By simply adding to the plan the same fraud prevention measures for insured claims that the plan proponents have proposed for uninsured claims, and that were agreed to in Garlock and Maremont, so that Truck can have access to full exposure evidence when defending Debtors in the tort system, the potential coverage dispute can be avoided and Truck will withdraw its objections to the plan.

44. In their confirmation Memorandum, the Debtors go to great lengths to suggest that Truck raised the duty to cooperate violation as a "plan objection" and is thus the one responsible for presenting it to this Court for resolution. That is simply not so. The Debtors first point to a statement in Truck's First Amended Disclosure Statement for the Truck plan, which was filed in September 2018. In the introduction to that submission, we made reference to the Joint Plan and how it proposed to send all the cases back to the tort system with all of the attendant costs, inefficiencies fraud and delay these cases were supposed to avoid, and that because the fraud burden would be on Truck, the Joint Plan would give rise to "a potential insurance policy defense—that the Debtors are not honoring their duty to cooperate in the defense of Asbestos Claims—that is certainly not in the best interests of the Debtors." We were simply putting people on notice of the issue, not raising a confirmation objection.

45. The Debtors next contend that Truck raised the coverage issue as a plan objection in Truck's November 2018 objection to the Joint Plan Disclosure Statement. This is again incorrect. The issue Truck raised was with respect to the Joint Plan's purported "Insurance Neutrality" provision. Truck was asserting that the provision was not insurance neutral notwithstanding its label, and we cited as an example the possibility that in the event there was litigation post- confirmation regarding a possible breach of the duty to cooperate because the plan facilitated fraud, a defined term within the insurance neutrality provision seemed intended to prevent Truck from asserting a policy breach. In other words, the Debtors were turning insurance neutrality on its head by using it to tilt the playing field in the event of a later coverage dispute. Our plan objection was to the lack of insurance neutrality, and not the potential coverage dispute.

46. The Debtors then point to the April 3, 2019 Reservation of Rights letter I sent at Truck's direction to attorneys for the Debtors, Greg Gordon and Phil Cook. In that letter, I specifically noted the duty to cooperate and assist language in the policies, case law explaining the purpose of such provisions, as well as the findings in Garlock and their applicability to the asbestos personal injury claims against Kaiser. I further noted that the Truck plan called for disclosures and authorizations necessary to prevent further fraudulent conduct. I then stated as follows:

> Kaiser has refused to support the Truck-filed plan, and has instead proposed a plan of reorganization that contains no fraud-

> protection measures and makes no attempt to settle any of the asbestos claims. Moreover, Kaiser has filed its plan pursuant to an agreement with representatives of the asbestos plaintiffs' lawyers that shields Kaiser and its related entities from any future fraudulent conduct by those lawyers, but leaves Truck and other insurers completely exposed. That agreement and the resulting plan of reorganization appear to be collusive and in violation of Kaiser's duty to cooperate and assist. Should the Kaiser plan be confirmed without modifications necessary to comply with Kaiser's duty to cooperate and assist, Truck reserves its right to deny coverage.

Far from objecting to the plan based on the duty to cooperate issues or seeking any relief from this Court, my letter—which we did even not submit to the Court—was sent (a) to provide clear notice to the Debtors of the coverage risk they were taking by pursuing the plan as is and (b) to explain how they could cure that problem and eliminate the risk—simply by providing for fraud prevention measures.

47. Much to Truck's disappointment, we heard nothing back from our insureds. They did amend their plan. But rather than adding fraud prevention measures, they instead asked this Court to make a plan finding that nothing they have done prior to or during these cases, including their negotiations of the Joint Plan, constitutes a violation of their duty to cooperate. This was the first and only time this Court has been asked to make a determination of whether the insureds are

complying with their policy obligations. It was the Debtors, not Truck, who made the coverage dispute a confirmation issue.

48. For reasons stated in submissions to the Court, Truck asserts that this is not the appropriate proceeding, nor is this the appropriate Court, to determine the coverage issue. In response to the requested plan finding, Truck filed an adversary proceeding seeking to have the coverage dispute resolved in district court by a jury. That case has been stayed pending the outcome of these proceedings.

49. Truck will continue to reserve its right to challenge coverage if Debtors do not make necessary changes to the plan, regardless of whether or not this Court makes the proposed finding. Nevertheless, the Debtors are not entitled to the finding because they are plainly refusing to help Truck obtain the information it needs to properly defend the claims, and thus are not fulfilling their duty to cooperate in securing vital evidence Truck cannot obtain without Debtors' assistance.

50. It is not satisfactory to assert that Truck can obtain this information in the tort system. As shown by the Garlock findings and the expert testimony of Lester Brickman, the information Truck needs cannot be obtained in the tort system for a number of reasons, including the confidentiality of trust submissions, the difficulty of developing evidence to challenge plaintiffs' product identifications, and the practice of plaintiffs' lawyers to delay filing trust claims on behalf of their clients until after the tort system cases are resolved. I would note that Debtors do not deny the existence

of these barriers and their counsel has made similar allegations in Aldrich Pump.

51. What is perhaps most disturbing to Truck about the Debtors' position with respect to the coverage issue is that they are willing to put potentially hundreds of millions of dollars of coverage at risk when the monetary cost of what Truck is requesting of them is zero. Debtors do not deny they have been victimized by evidence suppression fraud, and we have made clear that there is an easy way to fix this problem—simply require the holders of insured asbestos bodily injury claims to provide the very same disclosures and authorizations that the Kaiser Trust requires of holders of uninsured claims seeking large recoveries. The plan proponents added these fraud prevention measures to the Kaiser Trust procedures after this Court raised concerns about the plan facilitating fraud, but they continue to refuse to agree to such measures for the claims Truck must defend and resolve.

52. The only logical explanation for the Debtors' refusal to endorse measures that would (a) cost them nothing and (b) help ensure that the bankruptcy claims against them are resolved at their fair value and not inflated by fraud, is that the ACC—which is comprised of members of the plaintiffs' bar including lawyers and firms previously found to have suppressed asbestos exposure evidence—is blocking them from agreeing to such protective measures by threatening to blow up their deal. In other words, the people who created and benefited from the scheme appear to be the ones blocking efforts to prevent the scheme from continuing.

53. The plan proponents have deemed privileged all of their negotiations concerning the plan, and refused to testify as to what they may have discussed concerning this issue, but there is not any other rational explanation for Debtors' position. Kaiser's refusal to work with Truck to obtain the exposure evidence critical to defending the asbestos claims, because of a deal they struck with the very people responsible for the evidence suppression scheme is, in Truck's view, wholly at odds with Debtors' duty under the policies to cooperate and assist. Instead, Debtors are collusively cooperating with the lawyers for those who are suing them based upon a purported "common interest" against their "common enemy" Truck. Under their duty to· cooperate and assist, Debtors "common interest" should be with Truck, the entity defending the claims on behalf of the Debtors.

54. In their confirmation Memorandum, the Debtors contend that Truck "is arguing that the Debtors have an affirmative duty to reorganize in a manner that promotes Truck's financial interests." This is not what we are arguing. In truth, we would have preferred a plan that resolves at least many or most of the claims through a trust. That would have saved defense costs and enabled most claimants to resolve their claims promptly and efficiently. But we are willing to support the Joint Plan if fraud prevention measures are added. To the extent that would further Truck's financial interests, it is only because the asbestos bankruptcy claims against the Debtors that we insure would be resolved at fair, and not fraudulently-inflated values.

55. Similarly, the suggestion that asking for provisions "that help Truck defend alleged 'false and fraudulent' claims is . . . a blatant attempt by an insurer to place its own financial interests ahead of its insureds" ignores the fact that the very purpose of the duty to cooperate is to help the insurer defend the claims against the insured. Nor are we "attempting to expand [the] standard form policy language into some amorphous obligation that requires Debtors to promote Truck's general financial interests during their reorganization." We are simply holding the Debtors to what they agreed to do—to assist and cooperate—and an obligation of the insured to not collude against its insurer with those seeking to pursue fraudulent claims is not "some amorphous obligation."

56. The Memorandum also incorrectly asserts that Truck is arguing "that returning cases to the tort system post-confirmation contravenes the purpose of 524(g)." The ACC and FCR go even further, asserting that Truck argues that sending the cases back to the tort system "constitutes fraud." I will leave it to bankruptcy counsel to argue what is and is not permitted under 524(g). But I do want to make clear Truck's position. We have not and do not contend that in a 524(g) plan, asbestos claims cannot be resolved in the tort system. Our own plan provided they could in certain circumstances. But we are unaware of any 524(g) plan that has ever mandated that all claims are to be resolved in the tort system, precluding the trust from any involvement in claims resolution. And we have no objection to having the claims resolved in the tort system, provided we receive the evidentiary benefit of the same fraud prevention

measures agreed to in Garlock and Maremont and proposed by the Kaiser Trust.

57. For all of these reasons, Truck opposes the confirmation of the Joint Plan unless proper fraud prevention measures are added for insured claims to be resolved in the tort system, such that Truck will have the evidence necessary to fairly value the claims and ensure that whether ultimately settled or tried to verdict, the bankruptcy claims against the Debtors are resolved at their actual values.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 26, 2020.

/s/ Scott R. Hoyt
Scott R. Hoyt