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 2 of 2

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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 Monday, July 20, 2020 9:33 a.m.

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

* * *

[17] pursuant to order and agreement of the parties.

We have talked about having relatively shorter opening statements and then longer closing statements at the end of this and with a possibility of a recess to allow parties to prepare for, for their closing remarks.

But unless there are other preliminaries, I'm ready to hear your opening statements.

Ready to go, Mr. Gordon?

MR. GORDON: I am ready to go, your Honor. We've, I think we've been ready to go since September of 2016.

THE COURT: All right. Please lead off.

MR. GORDON: Thank you, your Honor. Greg Gordon, again, on behalf of the, of the debtors.

Your Honor, this case was filed almost four years ago on September 30, 2016 and at that time the debtors were facing significant legacy liabilities, both asbestos liabilities and environmental liabilities. You may recall that at the time they had over 14,000 asbestos claims pending against them. Multiple parties had alleged claims against the companies with respect, primarily, to two environmental sites, one in St. Helens, Oregon, the other, the other is along the Lower Duwamish Waterway in Seattle, Washington. In addition, the debtors are the subject of coverage disputes relating to insurance for their environmental liability and those disputes were literally with dozens of insurers.

[18] We've traveled a long road since then. We've traveled that road with full transparency, both with the Court and all parties in interest. I believe at every hearing in these cases we've provided a status report

updating the Court and the parties as to our progress. Following those reports your Honor provided all parties in interest in attendance at the hearing—and that's either in person or by telephone—an opportunity to weigh in on those reports and add anything they wished to report.

We're now, we hope, getting close to the end of the road. We've reached a consensus with all the creditor representatives. We've reached settlements with dozens of creditors, indeed almost all of them. We've reached settlements with dozens of insurers, indeed all of them except one. Only one objection to the Joint Plan remains and that's the objection of Truck Insurance Exchange. Truck objects to the plan, even though the plan fully preserves its rights. It objects to the plan, even though it will restore Truck to the exact same position it was in prior to the filing of these bankruptcy cases.

The reason Truck objects is no secret. It became evident when Truck filed its own plan. Truck objects to the plan because it does not improve Truck's position. The plan does not limit or reduce Truck's obligations under its policies. The plan also does not impose obligations on the **[19]** debtors that the debtors do not have under the Truck policies. Put simply, your Honor, Truck wants relief for itself to which it is not entitled. We submit the evidence and argument will clearly establish that the Joint Plan should be confirmed and the objection of Truck should be overruled.

I want to provide a bit of background, your Honor. The debtors filed these cases with two primary goals in mind. The first was to fully, fairly, and permanently resolve current and future asbestos claims through a consensual section 524(g) plan that establishes a trust. The second was to discharge, liquidate,

and pay legacy environmental claims and all other general unsecured claims.

In the case of asbestos, the company had been subject to 38,000 claims since 1978. As I indicated, 14,000 claims were pending at the petition date. Although the companies had substantial asbestos insurance and, in fact, insurance with no limits on either indemnity or defense, they still faced material costs and risks. They were still exposed to liability for uninsured claims and, in fact, in at least three pre-petition cases juries awarded punitive damages against the companies in amounts ranging from a hundred thousand dollars to $20 million.

Again, the company also was subject to substantial environmental liabilities at sites in St. Helens, Oregon and along the Lower Duwamish Waterway. Those liabilities arose **[20]** from the ownership and operation of various plants over the course of time and the claims with respect to those sites were being asserted by multiple parties.

After extensive negotiations among the debtors, Lehigh Hanson, its U.S., their U.S. parent, the Asbestos Claimants' Committee, the Future Claimants' Representative, numerous creditors, and the debtors' insurers and other constituents, the debtors put themselves in a position to propose a consensual plan that, if confirmed, will achieve, will achieve the companies' twin goals that it was seeking, that it has been seeking since the inception of the cases.

You'll see from Slide 1, your Honor, that's on the screen, this is a very high-level overview of the plan, itself. With respect to asbestos claims, the, the plan provides for the creation and funding of a trust under section 524(g) that will assume the debtors' asbestos

liability. The trust will be funded with a $40 million cash payment by the debtors and Lehigh Hanson, plus a $1 million note, as well as an assignment of certain rights in the pending coverage litigation with Truck—we refer to that as the Phase 1 claims—and then, also, an assignment of the debtors' rights under insurance policies covering asbestos claims, including the Truck policies.

Uninsured asbestos claims will be resolved through the trust and this is important because Truck continually ignores this feature of the trust. In contrast, insured asbestos **[21]** claims will be passed through to the tort system where those claims can pursue recoveries from available insurance, including the Truck policies and a number of excess policies. And this is important as well, your Honor, because none of the other insurers, none of the excess insurers is objecting to the plan. The trust will satisfy uninsured asbestos claims and uninsured portions of otherwise insured asbestos claims in accordance with the proposed trust distribution procedures. These procedures will apply to both current and future asbestos claims. Importantly, the proposed treatment of asbestos claims was accepted by a unanimous vote of current claimants who voted on the plan and it's also obviously supported by the Asbestos Committee and the Future Claimants' Representative, both of which are co-proponents of the Joint Plan.

With respect to environmental claims, the Joint Plan provides for cash payment in full. General unsecured creditors will also receive cash payment in full. And the source of the funding for these payments is proceeds from environmental insurance and again, funding from the debtor's U.S. parent, Lehigh Hanson.

Would you go to Slide 2, please, Paul?

Now over the course of many months—and it may have extended beyond months—the debtors worked hard to resolve multiple environmental claims and that was done, in some cases, with the help of the, I think we all agree, was a very

* * *

[85] understood that the Garlock estimation approach was preferable for the company and they felt it was the right approach.

You've added some language in characterizing the Garlock opinion and estimation approach and, and as I think I've indicated previously, I've not read that opinion. I've had it explained to me by counsel.

So I, I don't know that I can adopt your testimony about what the Garlock opinion and its approach held.

Q Okay. Well, the opinion, obviously, speaks for itself, but, but you do agree that it was Kaiser's view that Judge Hodges' approach to estimation was the correct approach?

A We believed that the approach used in the Garlock opinion, estimation opinion was the correct approach for valuing the Kaiser asbestos liability.

Q Are you aware that the valuation methodology that Judge Hodges adopted in Garlock was presented in Garlock by Dr. Charles Bates, Truck's expert economist in these cases?

A I was—I am aware of that today. I was not aware of that when Mr. Hyer gave me a summary of the meeting in June 2014.

Q You do agree that in defending the asbestos claims against Kaiser Gypsum it is important to have as

much of plaintiff's exposure history as possible, including all the plaintiff's asbestos exposures, correct?

A Can you repeat that question? There were—you had two parts of information in there.

[86] Q Okay.

A I'm afraid I didn't catch all of it.

Q Let, let me restate it.

You agree that in defending the asbestos claims against Kaiser Gypsum it is important to have all of plaintiff's asbestos exposure history available to the defendants?

A I, I agree that—yes. I agree that having all of the exposure history is important to defending asbestos claims.

Q And that is important so that you can not only defend the claims but, potentially, fairly evaluate them for settlement purposes?

A So the Kaiser entities don't do the evaluation for settlement purposes. That's a function that's Truck's responsibilities. I—I—I can tell you that from my experience the, in assisting Truck in discovery or discovery purposes it is important to have that information. What's done with it in terms of defense or settlement, I don't know that I can opine on that. That, that's Truck's, you know, there, there are arbitration and litigation rulings that say that's Truck's province, not Kaiser's, the defense of these claims.

Q Would you agree that without full exposure evidence there is a risk that Kaiser Gypsum's liability could be inflated, correct?

A There's a risk that you would not know all the information in defending a claim. I—I—I don't know

what, I mean, **[87]** Kaiser Gypsum's exposure liability is what it is. I don't know why you're saying it's inflated.

Q That without the full exposure information the jury might assess greater liability to Kaiser Gypsum than it would if it had the full exposure evidence.

A I think in defending a claim you would want to present as much exposure evidence to the jury as you could. I—I—I—you're asking me to speak to what a jury does with that information. I don't know that I can do that.

Q Does Kaiser believe it has been victimized by evidence suppression misconduct in the tort system?

A I, I think Kaiser believes it's been treated unfairly in the tort system, but I don't know that we subscribe to your description of "victimized" as a result of evidence suppression. Because I, I think, as I've testified before, I don't have direct factual information with respect to any Kaiser claim that I, that I can point to that says there was evidence suppression (indiscernible) made.

So I, I think I've adopted Mr. Gordon's statements on behalf of the debtors that we were not treated fairly in the tort system. I don't know that that goes to evidence suppression.

Q Now as far as you are aware, all of the, roughly, 13,900 asbestos personal injury claims pending at the time of Kaiser's bankruptcy filing were insured by Truck, correct?

[88] A And I think what I testified previously was that of those 13,900 I could not testify as to whether any of them were uninsured. I don't have that information.

Q So, so you have no information that any of them were uninsured?

A I had no information as to whether they were insured or were not insured other than what might have been alleged in a complaint, which is the basis for Truck accepting defense or not accepting defense. To my knowledge, Truck was defending those claims, but I don't know that those claims had, any of those claims had necessarily proceeded to the point that I could say they were insured or uninsured.

Well, I, I guess that—I'll qualify that. There were some that had actually been settled, but payments not made at the time of the bankruptcy filing. I think both we and Truck would agree those claims were insured.

Q Now when I asked you about this in your deposition I think what you told us is that in the entire history of Kaiser the number of uninsured claims that were ultimately resolved in some form of settlements or payment was in the single digits, correct?

A The—I, I believe what I testified—and, you know, if you want to point me to my deposition, that's fine—is that in the entire history of the Kaiser asbestos portfolio the number of uninsured settled claims was in the single digits.

[89] Q Right. And then, and then you—and if you want, you can look at the, Pages 182 and 183 of your deposition.

A Okay. I'm there.

Q And your testimony—if, if we start at Line 20 of Page, or Line 21 of Page 182, my question was:

"Q What number or approximate percentage of the 13,900 claims were uninsured?"

And you, you first responded to that question by, by stating that, what, what you just told us, that the, the number of uninsured claims in Kaiser's history ultimately resolved in some form of settlement or payment was in the single digits, correct?

A That's correct.

Q And then we had a back and forth on what constitutes an uninsured claim and then I said:

"Q We're really just talking at least at the time of the bankruptcy filing about a handful of such claims?"

And your answer was, what, starting on Line 19 of Page 183?

A It said:

"A I do, I don't know as I sit here that any of those 13,900 claims was an uninsured claim. I'm not aware of that."

Q Now for an asbestos claim to not be covered by a Truck policy the claimant's first exposure to a Kaiser product would have had to have occurred outside the policy periods, correct?

A It, it would have to have occurred after the last Truck **[90]** policy. So that would be a date after, I believe, April 1, 1983.

Q Certain Kaiser products had contained a small amount of asbestos, but the asbestos had been removed from Kaiser's products by the end of 1976, correct?

A Correct.

Q And Kaiser's sole payment obligation with respect to insured asbestos claims is to pay the deductible

amount for claims resolved by Truck, which in most cases is $5,000, correct?

A Correct.

Q Your understanding is that the type of asbestos contained in at least most of Kaiser's products prior to the removal of asbestos was chrysotile asbestos, correct?

A Correct.

Q And it is Kaiser's understanding and belief that chrysotile asbestos is less likely to result in asbestos-related disease than other forms of asbestos?

A That is our understanding, correct.

Q So is it fair to say that if you were responsible for defending claims against Kaiser Gypsum one of the things you would want to know is whether the claimant was exposed to asbestos products of others containing types of asbestos more likely to cause an asbestos-related disease, correct?

A We would want to know that, yes.

* * *

[135] Q Thank you for the clarification.

But they, all of the claims are claims asserted against one or the other, or both debtors?

A That is correct.

Q They're not claims against Truck or any of your other insurers, right?

A That is correct.

Q You have insurance against the liabilities, but they're Kaiser's liabilities, "Kaiser" meaning Kaiser Gypsum or Hanson Permanente?

A That is correct.

Q Do the debtors care whether those claims are resolved at their fair values as opposed to fraudulently inflated values?

A I have no personal knowledge or evidence of fraudulently inflated values. So I don't know that I can answer that question. The debtors are interested in the resolution of those liabilities.

Q My, my question, sir, is whether you care if they are resolved at their fair value or fraudulently inflated values?

A I am—so those claims prepetition the debtors' liability, to the extent the claims are insured, would be the deductible. I care about the debtors' interests in paying deductibles. Those claims prepetition also included punitive damages claims, which are not insured, and I certainly would care about the resolution of punitive damages claims and I would not want a **[136]** fraud perpetrated on Kaiser Gypsum or Hanson Permanente that would result in the debtors' paying an inflated value under the example you have given, which, as I stated, I don't have personal evidence to suggest such a thing happened.

Q Yeah. If there was a fraudulent inflation of the claims where the entire burden of the fraud fell upon Truck, do the debtors care?

A I am not aware of that situation occurring and you've presented me a hypothetical that I, I've never been presented with and to speak on behalf of the debtors on that question, I don't even know how to answer.

Q Well, we have 14,000 pending, unresolved claims, right?

A That is correct.

Q We're going to send them to the tort system to be resolved—

A It's not—

Q —under your plan, right?

A The, the plan directs insured claims to the tort system to be prosecuted and defended, prosecuted against the reorganized debtors in name only and to be defended by Truck pursuant to its rights and obligations under the policies, correct.

Q Is it, is it important to the debtors that those claims be resolved in the tort system at their fair value?

A So at this point, Mr. Krakow, what would be important to the debtors is their liability exposure. So to the extent that **[137]** we are required to assist and cooperate pursuant to the policy obligations after confirmation, that's what would be important to the debtors. Truck has the right to defend these claims. The debtors do not. That, that's established in legal rulings before I was even on this account. I, you know, how Truck defends the claims or what evidence it, it seeks and gets is not something that has concerned the debtors in the past or concerns the debtors going forward because it's not something we're entitled to participate in.

Q So I take it, then, it's not important to the debtors whether or not their liabilities, if they are insured, are resolved at their fair value?

A It's important to the debtors that those liabilities be insured, be resolved in a way that they are, that they fall within the scope of the insurance policy. That's what's important to the debtors.

Q Okay. Your deal was negotiated with the ACC and the FCR, right?

A And Lehigh Hanson, correct.

Q Right. Well, you and Lehigh Hanson were on one side. The ACC and the FCR were on the other side, essentially?

A I would characterize it as Lehigh Hanson and the debtors would be aligned, but Lehigh Hanson and the debtors don't have completely similar interests in all aspects of this bankruptcy.

Q Who is it that sits on the Asbestos Claimants' Committee?

* * *

[146] Q Since deductibles can only be paid on insured claims and since the fraud prevention measures added to the Kaiser trust procedures only apply to uninsured claims, does it necessarily follow, then, that those fraud prevention measures that were added will do nothing to protect the trust from payment of deductibles on fraudulent claims?

A I agree that those information requests do not apply to insured claims. Insured claims would be prosecuted in the tort system. So to the extent the tort system finds information, I, you know, I, I'm aware of what information is requested of someone who files to recover a deductible.

But I, again, I—Mr. Krakow, I, I'm not aware specifically of any fraudulent claims involving Kaiser Gypsum or, or Hanson Permanente Cement.

Q I'd like to turn back to your testimony, Exhibit 19.

A Okay.

Q And specifically, Paragraphs 50 and 51.

A Yes.

Q These two paragraphs are under a section that's entitled Insurance Neutrality, correct?

A Correct.

Q Are you offering legal conclusions in these two paragraphs?

A I think I'm offering my opinion that's based on my understanding of the insurance neutrality requirements that I believe the plan to be insurance neutral.

* * *

[150] Q Is the plan finding that you are requesting a factual finding or a legal finding?

A I think it's a legal finding.

Q So you're asking the Court to find as a matter of law that the duty to cooperate has, has not been violated?

A I think that's correct.

Q Mr. McChesney, as was mentioned in my opening, Truck is prepared to withdraw all objections to confirmation of the Joint Plan, to waive any claim that confirmation of the Joint Plan violates the debtors' policy obligations if, as a condition to resolving the insured asbestos claims in the tort system, the same fraud prevention measures you have added for uninsured claims are required for insured claims with Truck being provided with the disclosures, the authorizations, and the rights to audit.

Are the debtors opposed to adding these fraud prevention measures for insured claims?

A The term sheet deal gives the ACC and the FCR the rights to decide what's in the trust distribution procedures. We—that is the benefit of the bargain that we negotiated. It's my understanding that the ACC and the FCR oppose the addition of the provisions that you just, or the, the modifications to the trust distribution procedures that you just articulated and we are committed to the term sheet deal.

Q Okay. If the ACC and the FCR were to agree to include the **[151]** fraud preventions, would the debtors have any objection?

A Well, as I stated, if the ACC and the FCR support the trust distribution procedures, then we are in, we are being consistent with our term sheet deal.

MR. KRAKOW: Your Honor, just bear with me one moment, please.

THE COURT: Take a moment.

(Pause)

MR. KRAKOW: Your Honor, I have nothing further at this time.

THE COURT: All right.

Shall we take about a ten-minute recess and then get redirect, or you're ready to go in at this point?

MR. RASMUSSEN: I think a ten-minute recess would be helpful, your Honor.

THE COURT: All right.

MR. RASMUSSEN: Thank you.

THE COURT: Mr. Rasmussen, we'll—well, let's pick up as close as we can to a quarter till. Maybe a moment or two after that, but let's try to stick to that.

(Recess from 2:36 p.m., until 2:46 p.m.)

* * *

[168] arbitration, correct?

A Right.

Q And it's only uninsured claimants who elect non-binding—let me go back.

For uninsured claimants, only if they elect non-binding arbitration and reject the arbitration award, then only then can they initiate a suit in the tort system against the trust?

A That is correct.

Q Now let's turn to Section 5.5(b) of the trust procedures, starting on Page 163.

A Yes.

Q 5.5(b) covers extraordinary claims, right?

A Yes.

Q And these are claims where Kaiser Gypsum was allegedly solely responsible or almost solely responsible for the claimant's asbestos-related disease with no reasonable prospect of significant recovery elsewhere, right?

A That is correct.

Q And these extraordinary claims are claims where because the claimant alleges that Kaiser is solely responsible the claimant seeks more than would be offered to other claimants with the same injury, correct?

A Yes.

Q So Section 5.5(b)(2) requires the extraordinary claimant to provide additional documentation over and above what is **[169]** required of all claimants under 5.5(a), correct?

A Yes.

Q The extraordinary claimant is required to identify all claims that they have asserted that relate in any way to the injuries for which they seek compensation, right?

A Correct.

Q That could include lawsuits they have filed?

A Yes.

Q It could include claims that were resolved or settled without instituting litigation?

A Yes.

Q It could include claims that they submitted in other bankruptcy proceedings or to claims resolution facilities or trusts arising out of bankruptcy proceedings?

A That is correct.

Q And then, specifically, 5.5(b)(2)(i) details the information about the claimant's other claims that must be provided, right?

A Right.

Q So they have to list the names of the entities against whom claims were made?

A Yes.

Q The dates of the claim?

A Yes.

Q The amounts received?

[170] A Yes.

Q They must submit copies of documents submitted elsewhere containing information regarding their contact with or exposure to asbestos-containing products?

A Correct.

Q That includes claims forms submitted to other trusts?

A Yes.

Q Or to claims resolution facilities?

A Yes.

Q It includes ballots submitted in other bankruptcy cases?

A Yes.

Q And discovery responses filed and served in tort litigation?

A Yes.

Q And then, after submitting all that information, the claimant has to certify that to the best of his or her knowledge, aside from the disclosures made, no other entity is known to the claimant to be potentially liable for the alleged illness and injuries?

A Yes.

Q Thus, even claims that have not yet been submitted but may be submitted in the future must be disclosed?

A I believe that that's correct. I don't see it here, but I, I believe that's correct.

Q Then, on top of all of the mandated disclosures and **[171]** authorizations, the holder of an uninsured extraordinary claim must execute a release of

information form in favor of the Kaiser Gypsum trust, correct?

A Yes.

Q And this form authorizes the trust to go to any of the other 68 asbestos trusts and claim resolution facilities to obtain information from them about any claims that have been submitted by the claimant?

A I'm not sure the number 68 is correct. Other than that, your statement seems correct.

Q Right. There, there is a, a listing on Appendix 1 of all of, of the trusts and claims resolution facilities that—

A Yes, there is, but I think there are some missing.

Q Okay.

These authorizations are a backstop against the claimant not disclosing claims that have been asserted against other trusts, correct?

A Yes.

Q And then the final sentence of Section 5.5(b)(2)(iii) provides that the authorizations may be used not only to verify information in connection with particular extraordinary claims, but also in connection with periodic audits for fraud, correct?

A Yes.

Q So if we refer to these 5.5(b) provisions as fraud prevention measures, they were added to the Kaiser Gypsum trust **[172]** procedures in September of 2019, correct?

A I believe that that's true.

Q Okay. And they, they are very similar to what was added to the trust procedures in the Maremont asbestos bankruptcy, correct?

A They are quite similar, yes.

Q And that was after the bankruptcy judge in that case, Judge Carey, refused to confirm a fully consensual plan of reorganization due to a concern raised by the U.S. Trustee as to the lack of fraud protection, correct?

A Correct.

Q Now more recently and subsequent to the amendments to the Kaiser Gypsum trust procedures, fraud prevention measures were added to the trust procedures in an Ohio asbestos bankruptcy case, In re Sepco Corporation, correct?

A Yes.

Q And you are the FCR in Sepco?

A Yes.

Q And again, these are the same type of fraud prevention measures that were in the Maremont and, and now the Kaiser Gypsum trust procedures?

A Yes, they're quite similar.

Q And similar to what's in the Garlock trust procedures, right?

A I never looked at the Garlock trust procedures.

[173] Q So in, in Sepco you're, you're likewise represented by the Young Conaway firm, right?

A In Sepco?

Q Yes.

A Yes. I am represented by Young Conaway.

Q And the ACC is represented by Mr. Maclay and Caplin & Drysdale, correct?

A Correct.

Q It's correct that an agreement on a plan was reached in Sepco between the debtor, the ACC, and the FCR, correct?

A Could—could—could you please repeat the question?

Q Yes.

An agreement was reached in Sepco between the debtor, the ACC, and the FCR on a plan of reorganization, correct?

A Yes.

Q And then the U.S. Trustee in that case raised concerns in a disclosure statement objection about the potential for fraud based on what was uncovered in Garlock, right?

A The U.S. Trustee did raise objections. I'm not sure what it was based on.

Q It was—but it was concerns about the potential for fraudulent resolution of claims, correct?

A Correct.

Q And then what happened in that case is that Mr. Maclay called the attorney for the U.S. Trustee, Tiiara Patton, and **[174]** suggested inserting the Maremont-type fraud prevention measures to avoid a confirmation objection, correct?

A That, I don't know.

Q In any event, the objection that was raised as a disclosure statement objection by the U.S. Trustee

was resolved in advance of confirmation by putting in these fraud prevention measures?

A That's correct.

Q Sorry. My outline just jumped on me.

A That's all right. I'm going to get my water.

Did you find yours yet?

Q I'm just about there. Hold on.

A Give me a second to get a glass of water.

Q Sure.

(Pause)

THE WITNESS: I'm ready if you're ready.

BY MR. KRAKOW:

Q Okay.

So let, let's turn now to how and when the fraud prevention measures were added to the Kaiser Gypsum trust procedures.

You are aware that at the September 4, 2019 hearing on the disclosure statement motion Judge Whitley raised concern about a federal court approving a mechanism and process that could lead to fraud and whether the plan could be confirmed without something like the fraud prevention measures implemented in **[175]** Garlock and Maremont?

A I'm aware he was concerned about fraud and, and the need to add fraud protection. I'm not sure about like the ones in Maremont and, and, whatever you just said.

Q Now Judge Whitley specifically raised concern about the trust being responsible for deductibles on

the 14,000 pending claims with, with more potentially to come, correct?

A Yes.

Q So after the disclosure statement hearing the Kaiser Gypsum trust procedures were amended to include the same type of fraud prevention measures found in Maremont and now the Sepco trust procedures, right?

A Yes. They are very similar.

Q At the next hearing debtors' counsel in announcing these changes told the Court, "We certainly heard your concern," and I want to drill down on that a bit.

Now the—I think you've told us that you certainly agree it's appropriate for trust distribution procedures to have provisions to guard against fraudulent claims being presented to the trust, right?

A Yes, uh-huh.

Q Now the fraud prevention measures added to the Kaiser Gypsum trust procedures only apply to uninsured extraordinary claims, correct?

A Correct.

[176] Q For extraordinary claims, you would certainly want to be sure a claimant who is attributing most or all responsibility to Kaiser is not withholding information about claims filed against other trusts, right?

A Right.

Q Now the reason you don't need these disclosures and authorizations for non-extraordinary uninsured claims is that for those claims the trust only pays

those claims for Kaiser's several share of the overall claim, right?

A Yes.

Q In other words, the valuations for trust payments of a non-extraordinary uninsured claim have baked into them the assumption that the claimant had a number of other asbestos exposures?

A I think that's correct.

Q Now as to the insured claims against Kaiser Gypsum being defended by the trust, the fraud prevention measures added to the Kaiser Gypsum trust procedures do not apply, correct?

A Correct.

Q They only apply to uninsured claims?

A Yes.

Q And then if an uninsured claim—I'm sorry.

If an insured claim has been resolved in the tort system against Truck, then the claimant comes to the trust and seeks payment of the, the deductible, either 5,000, 50,000, or a **[177]** hundred thousand?

A Correct.

Q And by definition, the deductible can only be owed on an insured claim, right?

A Yes.

Q Now going back to the Court's concern about the trust possibly paying deductibles on fraudulent claims, the fraudulent, the fraud prevention measures added to the trust procedures don't add any protection against the trust paying deductibles on fraudulent claims, right?

A I didn't understand your question. Could you please repeat it?

Q Let me, let me break that down.

So the, the deductibles are only paid on insured claims?

A Correct.

Q And the trust procedures only apply to certain uninsured claims? Sorry. The, the fraud pro—let me restate that.

The fraud prevention measures in the trust procedures only apply to certain uninsured claims?

A Yes, that's correct.

Q So with respect to deductible payments, the fraud prevention measures don't provide any protection?

A Well, the protections are found in the tort system on the insured claims. Truck in the tort system has the same rights in this bankruptcy that it had prior to the bankruptcy as far **[178]** as determining which claims are fraudulent and which claims are not, just like it always has.

Q We're going to get into that, but, but the answer to my question is the fraud prevention measures don't provide any protection with respect to the payment of deductibles by the trust?

A On uninsured claims, yes, that's correct.

Q On insured claims?

A On, on, on insured claims. I'm sorry.

Q Right.

Now extraordinary uninsured claimants do have a right to go to the tort system under the Kaiser Gypsum trust procedures, right?

A If they follow the requisite procedures, that is correct.

Q Right. So if they submit their claim to the trust, they get a settlement offer, they reject it, they elect non-binding arbitration, they reject the arbitration award, all those things happen, the claimant can then sue the trust in the tort system?

A Correct.

Q And the trust in defending that claim would have the benefit of all the information provided through the fraud prevention measures, right?

A Yes.

Q I want to go back to Sepco and, and Maremont and Garlock, **[179]** to the extent you know.

In, in those trusts all claimants are required to first come to the trust with their claim, correct?

A I really don't know about Maremont or Garlock. Sepco, I just don't recall.

Q Okay. You don't recall that in Sepco there's a requirement that all claimants submit claims to the trust and only go to the tort system if they have followed a similar procedure of rejecting a claim and, and rejecting non-binding arbitration and then they can go to the tort system?

A Let me think. Since we resolved all outstanding coverage disputes, I think your statement would be correct. All claimants would have to come to the trust.

Q And assuming that that was true for Sepco and Maremont as well, then in all of these other cases where there's fraud prevention measures no claim would go to the tort system where there hadn't been the production of fraud, the information and authorizations required by fraud prevention measures?

A I'm getting a little lost here. I—all claims in Sepco have to come to the trust, but they don't get the benefit of all this expanded discovery, if you will, just because they come to the trust.

Q It's only if they have an extraordinary claim and they're not willing to accept the—

A Right.

[180] Q —settlement offer that they would litigate in which case the trust will have as to all of those claims the benefit of the fraud prevention measures?

A On the extraordinary claims, yes.

Q Mr. Fitzpatrick, you've been involved in the asbestos claims resolution business in one role or another since 1980, correct?

A Yes.

Q And you don't know of any other bankruptcy plan for an asbestos defendant that has ever mandated that all insured claims be resolved in the tort system?

THE COURT: Take a moment. I'm not sure how the court reporter would translate that sound.

(Pause)

THE WITNESS: My apologies.

THE COURT: Ready to go?

THE WITNESS: All right. Repeat the question, please.

BY MR. KRAKOW:

Q Yes.

A I've been in the business for 40 years.

Q Right.

And you don't know of any other 524(g) bankruptcy plan that has ever mandated that all insured claims be resolved in the tort system?

A Well, I think there have been a number of what are called **[181]** pass-through plans where claims are handed over to the bankrupt's or the debtor's insurers for handling.

Q Do you know of any other plan that has ever mandated that all of the insured claims must be resolved in the tort system? A Well, I think by passing them over to the insurer, passing them through to the insurers, that's the equivalent for saying they need to be resolved in the tort system.

Q If you would turn, please, to your deposition, Page 20, starting on—are you with me?

A Not quite yet. Give me just one second.

All right. I'm there.

Q Okay. I'm going to—for purposes of completeness, I'm going to start on, on Line 6 on Page 20.

A Okay.

Q I asked you:

"Q Was it the structure of both the Federal-Mogul and the THAN plan to have all claims, all asbestos claims resolved in the tort system?"

You answer was:

A (Reading):

"A That, I'm not going to say. I don't know. I'm not that familiar. They weren't my cases, so I'm not positive. I can't answer a question."

Q And then I asked:

"Q The Kaiser plan calls for, at least all insured claims, **[182]** mandates that all insured claims be resolved in the tort system, correct?"

And your answer was?

A (Reading):

"A That's correct."

Q And then I asked:

"Q Okay. As you sit here today, do you know of any other plan that has ever mandated that all insured claims be resolved in the tort system?"

And your answer was?

A (Reading):

"A No, but as I say, I'm not that familiar with the Federal-Mogul and THAN plan. So they are not my cases."

Q And now you, you've testified—in fact, I think you testified just a few minutes ago—that Truck has all its rights in the tort system that it's always had and can obtain the exposure evidence in the tort system through discovery, correct?

A Yes.

Q Okay.

Now I want to ask you about one particular evidence suppression practice identified in Garlock and testified to by a couple of the, the plaintiffs' attorneys,

which is to delay the filing of trust claims until after the tort system litigation is concluded.

[183] You have acknowledged that this sometimes happens, correct?

A Yes.

Q I want you to assume the following hypothetical. Assume asbestos plaintiff, John Smith, believes he has claims against various asbestos trusts, but delays filing the trust claims during the tort system litigation and denies in his discovery responses and at deposition and trial exposure to the products of any bankrupt defendants.

Are you with me so far?

A Yes.

Q Assume further that the defendant manages to successfully subpoena all 68 or more asbestos trusts and claims facilities and requests information about all claims filed by John Smith with his Social Security number attached.

If Mr. Smith had not filed anything with the trusts, would they have anything to produce?

A The other facilities would not.

Q Isn't this the very reason some plaintiffs' lawyers delay filing the trust claims?

A I think there are various reasons why plaintiffs' lawyers delay filing, but this is probably one of them.

Q Well, in fact, one of the, the lawyers testified in Garlock, "We filed trust claims after the completion of the tort litigation. My duty to these clients is to maximize their recovery, okay? And the best way for me to maximize their **[184]** recovery is to proceed against

the solvent, viable, non-bankrupt defendants first and then, if appropriate, to proceed against bankrupt companies."

Now for uninsured claims, the Kaiser trust procedures provide not only for, for authorizations to subpoena records from the trusts, but provide for post-claim resolution audits, correct?

A Correct.

Q Are you aware of any Rules of Civil Procedure that would allow tort system defendants after they resolved their claim to obtain information about claimants with whom they had resolved their claims?

A No. The tort system and the bankruptcy system are two entirely different systems, obviously.

Q Exactly.

With regard to the negotiations with the debtors and the ACC that led to the agreement in principle on the terms of the plan, you were not personally in attendance, correct?

A Right, that's correct.

Q Mr. Harron was there on your behalf

A Yes.

Q And since you were not there, privilege issues aside, you cannot testify as to whether such topics as Truck or insurance coverage or Garlock or evidence suppression were discussed?

A Well, Mr. Harron was very good to keep me informed so I can **[185]** —I had, certainly knew what was going on during the various sessions.

Q Now you are aware that under their insurance policies debtors have a duty to cooperate with Truck?

A Yes.

Q You understand that if insurance coverage was lost due to a breach of the duty to cooperate, the debtors would be responsible for payment of the asbestos liability claims?

A Under the TDP?

Q Under the plan.

A Under the plan, yes.

Q And in that event the debtors' obligations would be guaranteed by Lehigh Hanson, correct?

A Yes.

Q And is it correct that you believe that if the Truck coverage was lost and the debtors became liable for the asbestos claims, Lehigh Hanson would be able to satisfy the debtors' obligations to pay the claims?

A I believe that's true.

Q Accordingly, you believe the plan would still be feasible even if insurance coverage was lost?

A Could you define "feasible" for me, please?

Q Would be able to satisfy all of the obligations under the plan, including the obligation to, to, to pay the asbestos liabilities.

[186] A You're talking now after this case has been confirmed and we are in an operational mode?

Q Yes.

A Oh. Yes, I believe that, I believe that's true, provided this plan is confirmed first.

Q Going back to the Sepco case, is the 524(g) trust in Sepco a limited fund?

A Well, technically speaking, no, but I, I think all bankruptcies, bankruptcy trusts are, to some extent, limited funds.

Q Is it likely that the trust in that case will not have sufficient assets to pay all asbestos claims in full?

A It's likely in nearly every bankruptcy, including Sepco, that there will not be enough assets to pay all claims in full. Very few bankruptcies pay all claims in full.

Q Right. And, and that's why it's important that claims not be fraudulently inflated because if, if Claimant X obtains more than he's entitled to, he's taking money away from the other claimants, right?

A Yes.

Q But in this case, as to the insured claims and Truck's obligations to pay those claims, there is no aggregate limit to Truck's indemnity obligations under the policies, correct?

A That's my understanding, yes.

Q So if we assume hypothetically that Truck pays more than **[187]** the fair value of a claim because of fraud, that won't impact any other claim, right?

A Hmm. I guess that's correct. I hadn't really thought about it.

Q Should we be any less concerned about fraudulently inflated asbestos claims when the available funding for the other claimants is not limited?

A No, I don't think you can say a little bit of fraud is okay—

Q Thank you.

A —to quote the judge. And to my knowledge there have been two individuals sent to prison for fraud in asbestos personal injury litigation. I was involved in both prosecutions, assisted the U.S. Attorney and the District Attorney, respectively. And I'm certainly no friend of fraudulent practices.

Q Under the terms and structures of this plan who other than Truck has any financial incentive to protect against fraudulently inflated insured bankruptcy asbestos claims?

A I think we all have that duty, everybody involved in the bankruptcy.

Q You recall I asked you at your deposition what would be the problem, even if it was just belts and suspenders with what might be otherwise discoverable in the tort system, with requiring the Kaiser asbestos claimants as a condition to **[188]** resolving their asbestos claims against the debtors to make the very same types of disclosures you are requiring for extraordinary uninsured claims. Remember I asked you that?

A Yes.

Q You first expressed a concern as to the cost of the trust, the cost to the trust in collating and furnishing the information.

I then asked you to assume that the certifications and authorizations went directly to Truck with no repository requirements for the trust and with that clarification you were unable to identify a problem, correct?

A Well, I think there are some problems with that. You're imposing a burden on the asbestos victims with no corresponding benefit, which I think is a problem.

You're forcing in some states clients to do things in discovery that aren't required by state law in that particular state. Other states are different, I understand that, but there are states where you're forcing claimants to do things beyond what would be called for by their, their rules. So I think there are some problems with that.

Q Well, the problems are requiring something more than what the rules of discovery would require?

A And—yes. And not—there is no benefit to the claim, claimants. What is the benefit to the claimants?

Q What's the benefit to the claimant in an uninsured claim **[189]** from providing that information to the trust?

A They get money when, when, when they have an uninsured claim.

Q Right. And don't claimants with insured claims get money from Truck if they can back those claims up?

A Yes, but they're going to get money either way.

Q Right, but the trust says if you want more than the limited amount offered to most claims, you have to provide this information?

A The trust says if you want to file an extraordinary claim, you have to provide this sort of information, yes.

MR. KRAKOW: Your Honor, I, I have nothing further.

THE COURT: All right.

THE WITNESS: Thank you, Mr. Krakow.

MR. KRAKOW: Thank you.

THE COURT: At this point would it be appropriate for us to take a recess for comfort, or are we all good? Everyone—anyone need to take a break?

MR. HARRON: I'd like to take a short break, your Honor.

THE COURT: Take ten. We'll be back, then, that puts us right before, right at the top of the hour, okay?

MR. HARRON: Thank you.

(Recess from 3:50 p.m., until 4:00 p.m.)

AFTER RECESS

[190] (Call to Order of the Court)

THE COURT: Have a seat, everyone.

Okay. Are we ready to proceed?

MR. HARRON: Thank you for the break, your Honor, but I don't have any redirect.

MR. MACLAY: And, your Honor—

THE COURT: Mr. Maclay?

MR. MACLAY: —Kevin Maclay for the ACC.

THE COURT: Uh-huh (indicating an affirmative response.)

MR. MACLAY: I don't have any redirect, either, your Honor, but I do have one objection I would like to make.

THE COURT: All right.

MR. MACLAY: And I apologize. If we were in the courtroom, I would have had a running transcript tied to the testimony and I could have been precise about the questions which I'm objecting.

THE COURT: Uh-huh (indicating an affirmative response.)

MR. MACLAY: It was—is one—something along the lines of, your Honor—and I'm doing my best to paraphrase it—

THE COURT: Right.

MR. MACLAY: —it's the plaintiffs' lawyers delay filing trust claims and then something about nondisclosure of **[191]** those in tort litigation.

THE COURT: Uh-huh (indicating an affirmative response.)

MR. MACLAY: And the answer was "that's probably one reason." And, your Honor, I object to that question as lacking foundation. There's been no showing that Mr. Fitzpatrick has any personal knowledge of the thinking, the mindset of what tort plaintiffs' lawyers do or don't do under those circumstances.

THE COURT: Okay. Noted for the record, but overruled. I'll let that go to weight. His, his experience is fairly extensive, at least in terms of being in the area, and I suspect he knows a little bit about that topic, but how much is, remains debatable, so.

Thank you.

MR. MACLAY: Thank you.

THE COURT: Any other questions of this witness?

Anyone?

(No response)

THE COURT: That got it? All right.

Effectively, the witness is stepping down, then.

Who else?

MR. KRAKOW: So, your Honor, I, I think we're, we're at the point now of, unless the plan proponents have any further testimony, we're at the point of Truck presenting its * * *

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 Thursday, August 13, 2020 9:30 a.m.

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

* * *

[6] P R O C E D I N G S

(Call to Order of the Court)

THE COURT: All right. Have a seat, those of you who are standing in your homes or, or offices.

We're back in the Kaiser Gypsum case pursuant to the proposed agenda that was filed on Octo—excuse me—August the 10th. We're here, essentially, for a ruling on the confirmation hearing of the, of the plan, the Joint Plan as amended many times now.

Let me see about appearances, first, and then we'll talk about any preliminaries and then get a ruling.

My list has on—appearing—this is a combination of Zoom.gov hearing with some appearing by video on Zoom, some appearing telephonically only by Zoom, and others appearing telephonically, audio only. By video, I have on behalf of the, the debtors, Greg Gordon and Paul Green on video.

The ACC, Sally Higgins and Kevin Maclay.

For the FCR, Ed Harron.

For the UCC, Ira Herman.

David Christian and Ashley Edwards on behalf of several insurance companies, Insurance Company of the State of Pennsylvania, AIU Insurance, Lexington Insurance, National Union Fire. And additionally, Harry Lee for all of those, except, it looks like Lee is Insurance Company of the State of Pennsylvania, Lexington Insurance, and National Union Fire.

[7] Then on behalf of First State Insurance Company and its affiliates, Craig Goldblatt and Christy Myatt.

On behalf of National Casualty, Sentry, Westport, and Munich Risk, Janet Shapiro.

Then we have on behalf of Truck, again, Truck Insurance, Robert Krakow, Michael Rosenthal, Russell Faulkner [sic], Greg Marino (phonetic), Scott Hoyt, and Michael Martinez.

That's all I have on the video, anticipating that they might speak.

On video not anticipating to speak, we have on behalf of Kaiser Mark Rasmussen, Phil Cook, Jack Miller.

And then on audio I am showing, audio only, Charles McChesney, Amanda Rush for the debtor, as well as Matthew Tomsic, and Michaela Crocker.

For the UCC, Jeff Rhodes, Evan Zucker, Regina Kelbon.

And for the FCR, Sharon Zieg and Travis Buchanan. I thought I had Ms. Zieg, earlier. Guess not.

For the ACC, Todd Phillips.

For Lehigh Hanson, Douglas Ghidina.

And for the Oregon Department of Environmental Quality, Laura Davis Jones.

Now that's all I have on our list. I'd first ask if there are corrections in the appearances, if some of you, if I got you wrong as to who you're representing or you need to **[8]** announce someone else that you're representing. Any corrections there?

MR. SHAPIRO: Yes, your Honor. This is Seth Shapiro for the United States.

THE COURT: All right.

I was going to get those who were, have been left off entirely, but the U.S., Mr. Shapiro.

Any other corrections before I get deletions? MR. SHAPIRO: Thank you, your Honor.

(No response)

THE COURT: Anyone on the, those who were on the list, any corrections?

(No response)

THE COURT: Okay. Any others who need to announce an appearance, but were not mentioned?

MR. HORKOVICH: Your Honor, Bob Horkovich here as insurance counsel for the ACC and the FCR. Good morning.

THE COURT: All right, Mr. Horkovich. Anyone else?

MR. ROTEN: Russell Roten for Certain Insurers, your Honor.

THE COURT: All right.

Anyone else?

MR. PARRISH: Good morning, your Honor. Felton Parrish for the FCR.

[9] THE COURT: Any others?

MR. WEHNER: Yes, your Honor. Jim Wehner is on the listen-only line for the ACC.

THE COURT: All right.

MS. ZIEG: Good morning, your Honor. Sharon Zieg, also here for the FCR.

THE COURT: Okay. I think we got you, Ms. Zieg.

MR. KELLY: Good morning, your Honor. This is Brian Kelly for Certain Excess Insurers.

THE COURT: Anyone else? Good?

MR. BUCK: Good morning, your Honor. Erich Buck and my co-counsel, Andrew Craig, on behalf of Allstate Insurance Company.

THE COURT: Anyone else?

MR. MATTHEWS: Good morning, your Honor. Phil Matthews for Certain Insurers.

THE COURT: Anyone else?

MR. HARRON: Your Honor, Mr. Fitzpatrick is also on the line, but muted, by video.

THE COURT: Thank you. I wasn't going to ask for the actual party representatives, but good to know, all in all.

Any other attorneys announcing appearances?

MR. HERMAN: Your Honor, Andrew Houston is also on the phone for the UCC.

THE COURT: Okay.

[10] MR. HERMAN: I think we forgot him.

THE COURT: Very good.

Anyone else?

(No response)

THE COURT: Okay.

All right. Any preliminary matters before we get, get the ruling? Anyone got anything to—

MR. GORDON: Your Honor, it—

THE COURT: Mr. Gordon.

MR. GORDON: It's Greg Gordon, Jones Day, on behalf of the debtors.

I thought I'd give a very short update before we start, if that would be okay with your Honor.

THE COURT: Please.

MR. GORDON: Really, just two things to mention. One is that we've been talking over the last several hearings about progress we've been making with respect to escrow agreements that would go into place if the plan is confirmed and goes effective and one, in particular, relates to the escrow into which the proceeds from the settlements with the environmental insurers would go. We've continued to make steady progress on that escrow agreement. I think at this point we have signoff from all the parties to the form of that environmental escrow agreement. We're just waiting now for the actual escrow agent to let us know whether the final changes that we submitted a **[11]** relatively short time ago were acceptable.

So we are extremely close. We're about at the one-yard line, I think, on the escrow agreement. Of course, the completion of, of that document is the document that will then enable us to upload to your Honor the various orders approving—

THE COURT: Uh-huh (indicating an affirmative response.)

MR. GORDON:—those settlements which have, obviously, been pending for quite some time.

And then the, the second thing I, I just wanted to mention with respect to the Glacier claim litigation, the parties did submit on July 29 their competing findings of fact and conclusions of law.

THE COURT: Uh-huh (indicating an affirmative response.)

MR. GORDON: And then on August 10th your Honor probably noted that the parties filed their joint stipulated list of exhibits.

THE COURT: Right.

MR. GORDON: So I did want to call those two things to your, to your attention, your Honor.

But that's it for the update.

THE COURT: Thank you. I had to park that—

MR. GORDON: Thank you.

[12] THE COURT:—matter until we got through this, so as you would understand.

MR. GORDON: Understood. Understood.

THE COURT: Any other updates? Truck? ACC? UCC?

FCR? Anyone?

(No response)

THE COURT: Okay. Well, I was hoping you might say that settlement negotiations broke out and you had arrived at a resolution of this matter but, since that is not the, the occasion, but we will go ahead and get a ruling then.

I'm going to try to spare you the two-hour speech I, I made last time. One of the things I found was in trying to address all of the arguments at that time that had been made, that it (a) took a great deal of time and even then I was only hitting the tops of the, of the waves as we went through and I don't want to put you through that again because we were dealing with patently unconfirmable issues and confirmation

objection issues and you got a big dose of what I thought about this.

So I'm going to try to spare you that today and effectively, just either give you a, a summation of what the ruling would be and then if I have some comments or changes or elaborations, then to touch on those as I can. It's going to be hard not to, to get bogged down, but I'm going to give it my best shot.

[13] The short answer is that I agree with the proponents' arguments and believe the plan is confirmable and that the 524(g) issues have been met and, therefore, I will recommend confirmation and entry of the injunction to the District Court. The arguments are set forth in your briefs and your, your hearing arguments. In the greatest detail, the arguments for confirmation are found in, in the debtors' confirmation brief, 2275. And effectively, I, I adopt the proponents' reasoning and would make the findings supported by the evidence.

We spoke at the confirmation hearing about the form of this order and the problems that are attendant to making final rulings on core matters at this level and having the, the 524(g) issues go up to the District Court as a trial court as well as the confirmation matters as a, an appellate court and to avoid that I think we all agreed—and I want to make sure of that—that instead of having to have it split out in two fashions like that that I would simply make recommended findings of fact, conclusions of law, and a proposed order to the District Court as to all and that we would employ the Rule 9033 procedures for advancing objections to those proposed findings and conclusions and, and pursuing entry of both the confirmation and the 524(g) injunction by order to the District Court.

So unless someone sings out now and has a better idea that we need to discuss, I'm going to assume we're all still in **[14]** agreement as to that and that, that'll be the way I try to approach this, okay?

Anyone?

(No response)

THE COURT: All right.

We need to talk about timing. I'm going to call upon the proponents for proposed findings of fact and conclusions of law and a proposed order. I know you've got some things going in other asbestos cases in our court and that they're going to have you tied up. Can we get those within, say, four weeks? I'm looking for findings of fact and conclusions consistent with your briefs unless otherwise stated to the contrary and what I'm about to tell you, but you think four weeks—MR. GORDON: Your Honor, this is Greg, Greg Gordon again on behalf of the debtors.

From our perspective, we would like to get those to your Honor much quicker than within the four-week period. We have not conferred with the ACC and the FCR. Maybe we can deal with it on the call, but I, I would suggest that we can get those to your Honor within a week.

THE COURT: Okay.

How about others on the proponents' side? Think that gives you enough time to get your input to the debtor?

MR. MACLAY: We think it does, your Honor. And—and if—and if we're wrong on that, then I guess it would take a **[15]** little longer. But that seems very reasonable.

THE COURT: Okay.

How about from Truck's perspective? I'm going to give you a chance to comment, in the first instance—you get two bites at this apple—in the first instance of whether those proposed findings and conclusions reflect the evidence and, and the, effectively, the briefs that I'm adopting in my comments and then once we enter the recommended order to the District Court, then we would use the 9033 procedures, which would give you a second bite. For now, I'm only asking whether the, the findings and conclusions are consistent with the ruling. The next level at 9033, then you can argue whether the evidence supports the findings and whether the conclusions should be adopted by the District Court and the usual things there.

So how much time would you need just to see, to review the proposed order that they tender? I'm anticipating I'll make a few changes and nits no matter what, but if this is what local lawyers consider does it fairly capture my ruling and then you can argue to the District Court that the ruling's wrong.

MR. KRAKOW: Your Honor, Robert Krakow for Truck.

I would request that we have, since we don't know exactly when these are, are coming, assuming we, we receive the proposed findings by August 20th, that we have until September 3rd to advise as to any objections we have to, the form.

[16] THE COURT: Anyone else?

(No response)

THE COURT: Okay. The 20th and the 3rd for those deadlines. My law clerk will make a note of those so I don't forget them. That'll give me a little

time to, to try to get out the other orders in these cases, to say nothing of attending to the rest of my caseload.

But I'm going to try not to go through everything here, but I think a few things ought to be said just by way of elaboration. Effectively, the standing issue is one of the more ethereal matters that we have and as we know, insurers generally have standing to contest insurance neutrality, but generally don't have standing if the plan is insurance neutral to contest other confirmation issues.

We disagree about whether this plan is insurance neutral and what that means. Truck says that courts require plans to be insurance neutral and if it's not, that means you have to preserve all contractual rights and coverage defenses. That last statement is not controversial. The debtors and the proponents don't believe that insurance neutrality is, is required to confirm the plan and I agree with that. It gives the insurers standing to object to the rest of the plan, but I don't think it necessarily means the plan can't be confirmed. I'm not going to go back through all the details of insurance neutrality, but I believe this one is insurance neutral.

[17] Effectively, Truck gets to contest insurance neutrality as a standing matter and because that neutrality argument is founded upon this plan finding and the plan finding, in turn, deals with the cooperation clause, the declaratory judgment issue, the core, the non-core question, and a few bankruptcy issues like whether or not it's good faith to do what is being proposed, the means, implementation of the plan, and feasibility, I think Truck has standing to, effectively, in the context of contesting insurance neutrality to weigh in on those topics as a matter of standing, but

because I conclude the plan is insurance neutral and returns Truck to the tort system exactly as it was in prepetition I don't think Truck has standing to advance the other confirmation objections such as the contention the plan is collusive and not in good faith because returning the asbestos claims is guaranteed to produce fraud and, and, effectively, cause it harm or that the debtor isn't entitled to a discharge or that 524 is not met. I just don't think under the circumstances that's where the insurer lies.

Now I, I recognize that Truck is a creditor in the case but as we talked about before, unin, unsecured claims such as the deductible claims by which Truck is a creditor are unimpaired by this plan and they're going to be paid a hundred cents on the dollar. Effectively, what we're getting, instead, are insurer arguments about the plan of what does this plan do **[18]** to me in the capacity as an insurer and under the policy. That's a different thing entirely and in this situation I don't believe, first of all, that the, the insurance policy provisions extend so far as to where we are going here in the plan.

So I don't think that they are being violated, in the first place, and, if they were, as far as Truck contends them to be, I believe they, effectively, represent an intent to either deal with confirmation issues or to reserve a right to collaterally attack the confirmation issues in another forum and, and to that extent they're not allowable.

I think our case, to a certain extent, is similar to the Admiral case or the Grace case, if you will, where the plaintiff was proposing to grant relief from stay to allow claims to go into insurance, or to seek insurance in the state court system and the holding there was that in that context that decision really didn't

implicate the insurance company and its views were not to be considered, that, effectively, the, the debtor was not required to take on a partner in its bankruptcy case or to make litigation decisions for the benefit of the insurer. And that is, effectively, I think, where we are. Truck's an insurer who contracted to defend these claims in the state court system and they are being sent back to defend the claims in the state court system and I don't think there is a problem there in terms of violating the insurance **[19]** clauses.

Effectively, I think what's happening here is that these are all core issues reserved to the federal courts and to the bankruptcy courts, in particular, and I'm not going to go through all of it. Basically, bankruptcy's a federal matter constitutionally. 28-1334. We've got arising in and arising under and, dropping down a level, these are core bankruptcy proceedings. I agree with the proponents on all those things.

So to the extent the policy tries to legislate confirmation issues debtor-in-possession responsibilities, and those of the conduct of the parties in the bankruptcy case, effectively, I don't think the contract ever contemplated that and if it did contemplate that, it would violate principles of federalism and would amount to a collateral attack. I agree with Truck that we have some changes here to the magic words of the Combustion Engineering case that so many courts rely on, but they are only limited to a *res judicata* effect as to the plan finding and because the plan doesn't permit the insurer to contest in a coverage lawsuit to follow the drafting, proposing, or confirmation and consummation of a plan of reorganization.

I think Truck's contention that the plan impairs its contract rights is based on a false premise, the notion that it, its contract gives it the right to collaterally

attack elsewhere a confirmation ruling and make determinations of the **[20]** propriety of the conduct of the parties in the course of this case. Well, to quote the singer, Greg Allman, "You can't spend what you ain't got and you can't lose what you never had." I don't think those rights ever existed under this, the insurance policy and to the extent they do, they are preempted.

I would point out a case that—that—an old Fourth Circuit case that's kind of in the same ballpark, the Grausz v. Englander case, which is 321 F.2d [sic] 467—it's a 2003 decision—where a debtor tried, a debtor in possession tried postconfirmation to sue its own attorneys, the DIP attorneys, for malpractice after confirmation of the plan and the Fourth Circuit said that the plan precluded that and these were core matters. You basically had to bring them in the bankruptcy case or lose the right.

I think in the narrow, narrow context that the plan finding comes into it is dealing with the issues that are core to the confirmation process and whether or not this plan was in good faith, whether the proponents complied with the Bankruptcy Code, whether it's means prohibitive by law, whether the plan is feasible, whether the plan has the means for implementation. Those are all core bankruptcy questions and I don't think they can be sent to a, another forum other than our District Court by withdrawal, but they can't be treated out of bankruptcy. They don't arise out of bankruptcy and, therefore, I don't think there's any impairment of the contract.

[21] This case is sort of like Federal-Mobil, Mogul Global where insurers retained all of their coverage defenses, save one, the right to contest the transfer of insurance to the trust in the bankruptcy case. That,

of course, violated the policies and any transfer provision, but because the transferability of assets is something that is a bankruptcy concept the plan was, nevertheless, insurance neutral, even though it violated the term. Well, the things that Truck says, the only things that Truck says violate its clauses, its contracts, are, basically, whether this plan should have been confirmed, the legality of its provisions, the good faith of the proponents, the conduct of the parties in the case. Those are all bankruptcy issues.

So notwithstanding that slight deviation from, from the Combustion Engineering words, I think it is entirely consistent with those cases. The plan's neutral and, therefore, Truck lacks standing as to raising the other objections. But if it had standing, that standing would not extend to things like the 524(g) compliance. You can't raise the rights of third parties in, in opposition to a plan. Here, those statutes are concerned about the claimants, future and present, and the debtor being protected for future claims that would, basically, upend the reorganization.

Here, all of the parties who have rights under 524 are in agreement that the statute is met and that the plan is **[22]** confirmable. Truck wants me to ignore those parties' views in favor of its own, even though Truck has no interest in this trust and how it pays claims. This is not a case where you're setting up an asbestosis trust and demanding the insurer pay for it. It's the opposite. These claims don't ever get to the trust until Truck has already either settled or been adjudged liable for those claims.

So effectively, the operations of the trust are of no moment to it.

The last standing argument Truck made was that it had standing because the proponents were arguing, were ignoring the fact that, that they didn't meet 524 and that if the plan was confirmed, at the end of the day Truck would end up being defrauded in the tort system. We'll talk more about that prospect. But generally, a party's desire to block confirmation doesn't provide it with standing to raise the rights of third parties and that's what I think we've got here.

Okay. We're going to go over—the second big issue I think we had was about the plan finding and I may have already said enough on that, but the bottom line is I think the plan finding, first of all, as I said at the disclosure statement hearing, the fact that someone wants to demand a finding is of no moment. Courts find what is necessary to confirm a plan under 1129, the related statutes, and, in this case, 524. It's not like you go into McDonald's and order what **[23]** kind of burger you want. The fact that someone demands a finding doesn't really matter. We do what we need to do and what is necessary to the ruling based on the evidence presented.

It is true, that said, it, it's true this isn't a declaratory judgment action, but nor is it a routine insurance coverage action. What we've got, essentially, is a dressed-up bankruptcy confirmation objection dressed up to be an insurance coverage suit that was filed in an attempt to block confirmation or to force negotiations. They're still core matters.

So effectively, the fact that there is not an adversary, at least it's not being decided in the adversary that Truck filed, is of no moment. The finding, nevertheless, ends up being a core matter. There's no question we had insurance coverage for the debtors at the petition date. Truck never argued otherwise and as

Mr. Hoyt said, the only reason that there would be a violation of the insurance policy is the confirmation of this plan. That makes it a bankruptcy matter. It's an arising in-arising under matter. The questions that are addressed by the finding are contemplated by the confirmation statutes and I hate to go through it again, but 1129(a)(1) and (2), (a)(3), whether the plan's feasible under (a)(11), and has the means of implementation under 1123(a)(5) and as the American Capital case said, in this case the **[24]** insurance is the predominant asset of the debtors' estate and the driver for the plan. So that makes it core as well.

The fact that it turns on a state law contract is of no moment, either. Core proceedings often deal with state law rights and contract rights, in particular, and any bankruptcy plan deals with contract rights and often modifies them. But in this case, these adjudications of rights wouldn't exist independent of a bankruptcy environment. This, these issues, the things that Truck believes violate the policy could not exist outside of the bankruptcy case. So effectively, they are core.

I think this is very similar to the Special Metals case out of Kentucky and the adversary there that was seeking a declaratory judgment that the treating of insurance policies in the plan had voided the coverage that would have otherwise been available but was held to be a core proceeding and, effectively, governed by the Code and the terms of the plan. So I think that's, and it was *res judicata*, the confirmed plan on those issues.

So I think the finding is appropriate. Even if it were not, I think Truck's injected this into the plan for the reasons argued—and I'm not going to put you through that—but we all know the, the way this came

up originally as an objection to the disclosure statement, then it was strengthened to the plan was providing Truck with a policy defense—that **[25]** was in Truck's disclosure statement—to the April letter, the reservations-of-rights letter that Mr. Hoyt wrote, effectively saying that the plan violates the duty of, to cooperate and assist and if it is confirmed without the modifications Truck wanted, it reserved the rights to deny coverage. And then they hoped, as was expressed in court, the debtors would respond by joining Truck's plan or making necessary changes. The proponents, of course, then added the finding. Truck then filed the adversary proceeding.

Truck suggests it's preposterous to suggest it's injected the policy arguments into the confirmation. I would suggest just the opposite. It would be preposterous to think otherwise. This was a variety of threats being made to block confirmation or to avoid coverage until it got what it wants in the confirmation process.

So I think it's been injected, but if the District Court disagrees and thinks that the declaratory judgment that's pending right now is necessary, that this matter is not a, a contested matter confirmation issue, well, it simply holds up on entering the order and the 524 while either it or this Court determines in the context of a motion of, for judgment on the pleadings or a summary judgment motion the entry of a ruling in that case in favor of the defendants. There are no disputed facts at issue. It all turns on the policy, the statute, and the plan. Those are uncontested. I don't see a jury trial **[26]** right there. It could be done that way if the District Court thinks necessary, but I don't believe so.

I don't think the plan violates the policy provisions on the merits. We've talked about that at length. Basically, I think this is beyond, for the reasons argued, beyond what those provisions are used. I've said before I think it would also be preempted. I basically don't think I need to say anything more about that other than because I don't think the joint, the plan cooperation provisions—and even the implicit duty of good faith argument's even weaker—but I don't think that the, there is a failure of coverage there and for that reason, the plan is both feasible and has the means for implementation.

Let me go over to 524, briefly. I'm not going to walk you through all of those, but I had raised a couple of concerns at the time of the hearing and, and, basically, the same arguments are being made as at the disclosure statement hearing and I went through what I was thinking in depth at that point.

But the note, the, the, million-dollar note, short term, is that pretextual? Truck says it is. I was concerned about this lack of real world economic control at the time of the disclosure statement hearing based on the Congoleum, my reading of the Congoleum case. I've become more comfortable with that, at least in this context. I'm going—the next case might present different facts. So it might be an issue. **[27]** But in this context the insurance is being contributed to the trust. The insurance is the primary source of payment for asbestos claims. The secondary payment comes out of the cash being contributed to the trust and only a tiny amount of the payments to, on asbestos claims would come from the note in question.

Now I warrant, it's a matter of some semantics and this is one of the closest calls on this plan, but several courts have confirmed asbestos plans that

technically comply with the statute in, in this manner, even though the funding to be supplied under a security is not really material. But in this case, the two official constituencies that are charged with representing claimants believe this arrangement to be valid and of no concern. A hundred percent of the claimants, the present claimants, have voted in favor of the plan and the only party objecting is one that doesn't have standing to raise this because it does not affect their, its interest and whose motivations are, lie elsewhere. So I think it, it's acceptable.

We talked about whether or not the debtor would have enough operating assets and wherewithal on a reorganization basis to be a going concern to meet the 524 requirement there, 524(g)(2)(B)(i)(2). I think the evidence is sufficient to support that, again given how the payments are going to be made, small amount, funding elsewhere, and no party with a, **[28]** with standing objecting to that.

Whether 524(g) relief is necessary, given the, all of this insurance, I adopted the proponents' arguments that the, and believe the evidence covers that the debtors' obligations to pay deductibles and uninsured amounts, including punitives, puts it at some, puts them at some risk there. The deductibles can be 5,000 to a hundred thousand dollars per claim. The punitives in the last two or three cases were getting to be sizable. So I think that that is met.

I believe the trust, in effect, assumes the debtors' asbestos liabilities for the reasons argued. The insurance is now a trust asset. So it is assuming those liabilities, but paying through the insurance. The uninsured are being paid by the cash contributed to the trust. So I think, notwithstanding the fact that the reorganized debtors would be the backup there, that

it has assumed the liabilities. Does the plan saddle the debtors with a contingent liability? Well, I don't believe coverage is lost. So I don't think it's a moot point, but it's also another example of a lack of standing. If this happened, what effect would it have on Truck? All the adverse effects would be on the claimants and the reorganized debtors. So again, I think we've got a lack of standing there.

Then we get into what are generalized good faith arguments, both as to 524 spirit and purpose and the ones being raised by Truck under (a)(3). We—Truck points out in most **[29]** cases debtors with asbestos liabilities route the claims to a trust and then assign the trust the insurance and, effectively, all the claims come there. There's nothing that I can find that requires that or prohibits a mini trust, if you will. The, the thing that differentiates this from the prior cases is this debtor has unlimited insurance and that being the case, it changes all of the dynamics in the case and the parties' motivations.

So I don't think that there is any violation of the spirit and purpose of 524 there.

On this record I don't find bad faith in doing what they're doing. As we've noted before, routinely bankruptcy courts in all cases, not just asbestos cases, grant relief from stay to allow claimants and creditors to pursue insurance in the, in state court. There's nothing bad faith about that. In the bankruptcy context, and noting that, that Truck is a contract party in this regard, not really a, even a creditor in that regard, I don't see anything that would amount to bad faith.

Now that backs us into this argument about an overarching collusion and fraud and it's all based upon Judge Hodges' Garlock findings and the cases

that, that had been identified earlier. I've told you previously that it says what it says. Judge Hodges was dealing with whether or not the estimation ruling should be made based on, on prior settlements **[30]** and because of finding some of those suppression-of-evidence matters didn't think that that was the best methodology. That case got a lot of attention. It got notice in Congress. It got notice in state legislatures. A few changed their, their laws because of it. It, it was out there in all the trades.

So there's nothing being hidden under the covers here. The evidence that Truck presents for the potential of, of fraud in this case is not particularly strong and it's not direct. There's a lot of conjecture and assumption and just assuming that everybody is in cahoots ranging from the debtor, the ACC, the FCR, all the plaintiffs' firms, and it speculates as to future events of what would happen in state court.

So evidentially, I think it's a little bit of a reach. I am concerned for the reasons Judge Hodges was concerned there, but I don't read Garlock as a indictment of the tort system or a ruling that you can't get a fair trial in state and federal court elsewhere. Obviously, that is one of the legal options and obviously, I'm not inclined to indict my colleagues on the state benches and have the arrogance to believe that a bankruptcy court in North Carolina is necessary to protect all of them from fraud. They, obviously, would be alert to what's been proposed here and they can take their own actions.

I would point out that when I raised a concern that, that the proposed Garlock measures weren't found, then, then the proponents added them. That's not sufficient for Truck's **[31]** purposes. I would point out that those Garlock measures only applied to

disclosures to be made to the trusts and audits of the trusts when they were put in and that's what, effectively, got—and only then in the individualized review context—and that's what got added in here. But what I'm hearing Truck say is it's collusive and bad faith if all those disclosures are not given to it as an insurer for the purposes of defending against claims in the tort system. And, in fact, they're not just the individualized review creditors. This would be a condition for all creditors to pursue their lawsuits, all 14,000 that were pending and all that would come. That is a, a greatly expanded obligation and it's expanded not for the benefit of the trust, which, over which this Court would have jurisdiction, but for generalized defense in the state court system.

I don't think bankruptcy was ever intended to relieve insurers of their contract liabilities, including defense in the state court system, and that's exactly what Truck agreed to do. I don't think I can simply assume fraud would result and, effectively, there's nothing in this case that is an impediment to confirmation of splitting the payment of claims between the two systems.

So I first don't think Truck has standing to object to good faith because it's an insurance neutral plan, but, if it did, I just think it's not supported by, evidentially, and **[32]** don't think that I can make the very bodacious ruling that a trial in state court is guaranteed to result in fraud. The other part is I don't think it's my province for me to mandate to the state courts and other federal courts what kind of discovery is required. I've got sympathy for those concerns, but I think they're legislative in nature and if we're going to require those sorts of things that, before you can exer, even sue in state court you have to, to provide all

kinds of pre-trial, pre-suit discovery that is not mandated in other forums, well, that's, that's a remedy that's legislative in nature and needs to be adopted at all by either Congress or the state legislatures or, at the very least, the various state and district court rules committees.

The last one I think I had was that Truck suggested that it was denied an opportunity to negotiate with the ACC and the FCR pre and postpetition. I didn't think the evidence supported that. Prepetition, there weren't any negotiations, to speak of, but at one point Truck got frustrated with the pace and said it was going to do its own and didn't and then after bankruptcy, everyone was free to negotiate, but didn't. And then it was only after the other parties reached agreement in the form of the term sheet and with their proposal agreed to that Truck wanted to, to talk to them about other plans that would involve routing all claims to the Trust and capping claims at first. It's not surprising that, that it found it **[33]** hard to, to get other parties to negotiate at that point.

I would point out in bankruptcy that while we prefer and, and encourage people to negotiate, there's no real requirement that anyone negotiate with anyone else or that they satisfy the desires of an insurer. As long as they don't violate the policy rights, the insurer is not really a party in interest.

So at the end, Truck asked at, at the outset, "Why are we here," and suggested that the only reason was collusion. I would posit a different reason. We are here, in my opinion, because decades ago Truck improvidently wrote an unlimited insurance policy, probably having no idea of what kind of asbestos liabilities it was going to guarantee to pay, and without caps on the coverage and since then, having paid out

huge sums of money based on that decision, Truck would like to, to improve that deal and use this case to limit its financial exposure. It's tried three different ways thus far.

First, by routing all claims to an asbestos trust that had a hard cap on, on liabilities. That was obviously a nonstarter, given the uncapped insurance. And then when that didn't fly it went to proposing an uncapped trust, but one that had the simplified claims valuation procedures that you see in asbestos trusts. And that didn't go. And now, it would ask that I require all claimants, every last one of them to provide it with what would be burdensome and unprecedented pre-trial **[34]** discovery as a condition of exercising what, I think, deep down we all believe to be the right of these claimants, which is to get a trial in, in the tort system and do that as a condition of just even trying to seek recovery of insurance.

I don't think that the failure to accede to that is either collusive or bad faith or fraud or anything else. It's, effectively, changing Truck's insurance policies to its advantage. I don't think this is a case of bad faith or collusion. I believe this is everyone pursuing their self-interests and I don't blame Truck for trying. But in the rarest of contexts, which is an asbestos case with unlimited insurance, in this circumstance I believe Truck gains no advantages under this plan, but it also loses nothing. It returns to state court to defend these claims with all of its rights and defenses intact, all of the ones it had before bankruptcy, and it need not have its rights, contract rights augmented.

So that's basically where I come out. Consistent with that, I would, and the briefs, I, I would ask the parties to prepare the proposed findings and conclusions and order and by the deadline.

So anything else to talk about today?

(No response)

THE COURT: I would thank you all for your work. It's been a long road, but—maybe we're just at a bend and not the end—but it's been a long road and I, I appreciate the quality of the briefing and the arguments. You've given me a lot to think about over the last few years and we'll just see where you go from there, all right?

Anything else?

MR. GORDON: Thank you very much, your Honor.

THE COURT: All right.

MR. MACLAY: Thank you, your Honor.

THE COURT: All right. We will recess, then.

MR. HARRON: Thank you, your Honor.

(Proceedings concluded at 10:20 a.m.)

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE	Chapter 11
KAISER GYPSUM COMPANY, INC., *et al.*,[1]	Case No. 16-31602 (JCW)
	(Jointly Administered)
Debtors.	Aug. 17, 2020

ORDER ALLOWING, IN PART, THE CLAIMS OF TRUCK INSURANCE EXCHANGE (CLAIMS NOS. 42 AND 43)

This matter comes before the Court on the Debtors' Omnibus Objection to the Claims of Truck Insurance Exchange (Claims Nos. 42 and 43) [Dkt 1953] (the "Objection"), filed by the above-captioned debtors (together, the "Debtors").[2]

The Court having reviewed the Objection, Truck Insurance Exchange's Objection to Debtors' Omnibus Objection to the Claims of Truck Insurance Exchange (Claims Nos. 42 and 43) [Dkt 2008] ("Truck's Objection"), Truck Insurance Exchange's Supplement to Its

[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.

[2] Capitalized terms not otherwise defined herein have the meanings given to them in the Objection.

Objection to Debtors' Omnibus Objection to the Claims of Truck Insurance Exchange (Claims Nos. 42 and 43) [Dkt 2019] ("Truck's Supplemental Objection"), Debtors' Reply in Support of Omnibus Objection to the Claims of Truck Insurance Exchange (Claims Nos. 42 and 43) [Dkt 2292], Truck Insurance Exchange's Response to Reply of Debtors to Omnibus Objections to Truck Insurance Exchange Claim Nos. 42 and 43 [Dkt 2328] ("Truck's Response"); and the Court having heard the statements of counsel regarding the relief requested at a July 16, 2020, hearing before the Court (the "Hearing");

The Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b) and (c) notice of the Objection and the Hearing was sufficient under the circumstances and in compliance with the requirements of the Bankruptcy Code and the Bankruptcy Rules;

The Court having determined that the legal and factual bases set forth in the Objection and at the Hearing establish just cause for the relief granted herein, including each of the following findings:

1. Truck filed Proof of Claims Nos. 42 and 43 (the "Claims") against Debtors for unpaid deductibles arising from Truck's pre-petition settlements of Asbestos Personal Injury Claims. In response to the Claims, which assert that amounts owed to Truck for deductibles total $3,365,500.00, Debtors asserted a right of setoff for each the following:

b. $2,187,398.17 owed to Debtors under the parties' Cost Sharing Agreement;

c. $411,947.00 owed for appeal bond premiums incurred by Debtors;

d. $297,500.00 for deductible overbilling by Truck on settlements it did not pay; and

e. $3,514.00 owed for costs incurred by Debtors for corporate designee witnesses.

Truck Objection, ¶ 3.

2. The parties have reached agreement on all issues relating to the Claims and Debtors' offsets except for the $411,947.00 of appeal bond premiums that Debtors incurred during Truck's defense of underlying Asbestos Personal Injury Claims.

3. The parties agree that the 1974 policy, as applied to Truck's obligations to defend and indemnity Debtors for Asbestos Personal Injury Claims, is interpreted and applied pursuant to California law.

4. Under California law, "interpretation of an insurance policy is a question of law." Waller v. Truck Ins. Exchange, 11 Cal. 4th 1, 18 (1995). "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1264 (1992). Thus, "the mutual intention of the parties at the time the contract is formed governs interpretation." AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 821 (1990); Cal. Civ. Code § 1636. If possible, the Court infers the parties' intent solely from the written provisions of the insurance policy. Id. at 822. Finally, each provision must be interpreted "in context," giving effect to "every part" of the policy, with "each clause helping to interpret the other." Palmer v. Truck Ins. Exchange, 21 Cal. 4th 1109, 1115 (1999) (citing Cal. Civ. Code § 1641).

5. Truck Insurance Exchange ("Truck") Comprehensive Liability Policy No. 3504000, incepting Jan. 1, 1974 ("1974 Policy"), which the parties agree is

"triggered" by the vast majority of Asbestos Personal Injury Claims against the Debtors, has been selected by the Debtors to respond to such claims.

6. Within Insuring Agreement No. II of the 1974 Policy, entitled "DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS," the policy expressly provides that Truck "shall . . . pay . . . all premiums on appeal bonds required in any defended suit." 1974 Policy, ¶ II.2(a) at TRK0000575.

7. Where Truck intended to limit its obligation to pay for a bond, the 1974 Policy language shows that it did so expressly. Immediately before the appeal bond provision in Paragraph II.2(a) is a provision governing Truck's obligation to pay for a different kind of bond, requiring Truck to "pay all premiums on bonds to release attachments," expressly limited to "an amount not in excess of the applicable limit of liability in this policy." 1974 Policy at TRK0000575. Likewise, immediately after the appeal bond provision in Paragraph II.2(a) is a provision limiting Truck's obligation to pay "the cost of bail bonds required of the insured in the event of automobile accident or automobile traffic violation during the policy period," which expressly is "not to exceed $250 per bail bond." Id.

8. Insuring Agreement No. II, containing Truck's promises to pay for these three types of bonds, expressly provides that "amounts so incurred, except settlements of claims and suits, are payable by the company [Truck] in addition to the applicable limit of liability of this policy." 1974 Policy at TRK0000576.

9. In light of these express policy provisions, viewed in context and giving effect to every part of the 1974 policy, with each part helping to interpret the other, Truck's argument that "it is implied in the

policy" that the most it would bond on appeal is its $500,000 indemnity limit is unsupportable. Truck's Objection, ¶ 8 ("While Truck's policy states that it will pay 'all premiums on appeal bonds,' it is implied in the policy that because the most Truck would ever pay is its 'applicable limit of liability' of $500,000, the most it will bond is its policy limit."). As is Truck's appeal to "equity and logic" in arguing for its policy interpretation. Truck's Response at 1, 2, 5. If the Court were to interpret Truck's express obligation to pay all premiums on appeal bonds as limited or capped to an amount relating to its $500,000 limit, such an interpretation would violate a cardinal rule of policy interpretation under California law, as courts do not rewrite contracts. See Kwok v. Transnation Title Ins. Co., 170 Cal. App. 4th 1562, 1571 (2009) (courts "do not rewrite any provision of any contract, [including an insurance policy], for any purpose").

10. Truck relies upon a number of non-California cases that Truck contends address its 1974 policy appeal bond language—*i.e.*, that Truck "shall . . . pay . . . all premiums on appeal bonds required in any defended suit"—or what Truck contends is "similar language" and thus supports its argument that "logically, an insurer's responsibility for a bond extends only to the limits of the policy." Truck Objection, ¶ 9; see also id., ¶ 6; Truck's Response at 4, 5. However, none of these cases addresses the question before this Court—how much of an appeal bond premium Truck is required to pay—and none includes even similar policy language. For instance:

a. Bowen v. Gov't Employees Ins. Co., 451 So. 2d 1196, 1198 (La. Ct. App. 5th Cir. 1984), does not identify any policy language relevant to the insurer's obligation to pay for appeal bond premiums;

b. Charter Oak Ins. Co. v. Maglio Fresh Food, 45 F. Supp. 3d 461, 476 (E.D. Penn. 2014), identifies policy language referring to the insurer's obligation to pay for the cost of bonds, but expressly "only within the amount of insurance available"; and

c. Several cases, including Graf v. Hosp. Mut. Ins. Co., 956 F. Supp. 2d 337, 343 (D. Mass. 2013); James River Ins. Co. v. Interlachen Prop. Owners, 2016 WL 3093383 (D. Minn. June 1, 2016); and Fletcher v. Ratcliffe, No. CIV. A. 89C06160SCD, 1995 WL 790992, at *3 (Del. Super. Ct. Dec. 7, 1995), focus on whether the insurer was required under its policy to post a bond or simply pay for the cost of the bond, and not any policy language that referred to, or limited, the amount of those bond costs the insurer was obligated to pay.

11. Debtors paid appeal bond premiums totaling $411,947.00 in three cases where a judgment was entered and appealed, namely Casey ($155,310.00), Desin ($5,732.00) and Silvestro ($250,905.00) (the "Appealed Cases").

12. Truck defended each of the Appealed Cases in the trial court, approved the appeal in each of the Appealed Cases and paid for appellate counsel fees in each of the Appealed Cases.

13. Truck also asserts that Debtors' setoff claim arising from Appealed Case Silvestro, the appeal bond premiums for which total $250,905.00, are barred by California's four-year statute of limitations for breach of contract. Truck Suppl. Objection, ¶¶ 7, 9-15.

14. The Debtors' claim for appeal bond premiums is timely under both the Bankruptcy Code and California law, which preserve a debtor's right to assert setoff as a defense to a timely-filed claim. Section 558

of the Bankruptcy Code expressly preserves all defenses a debtor has under state law. See 11 U.S.C. § 558. Defenses preserved under Section 558 include a debtor's right to effectuate a setoff, or "netting," of mutual debts. See In re Circuit City Stores, Inc., 2009 WL 4755253, at *3 (Bankr. E.D. Va. Dec. 3, 2009).

15. In deciding the issue of timeliness, bankruptcy courts look to substantive state law. See Copley v. United States, 959 F.3d 118, 125 (4th Cir. 2020) ("[A] court's discretion to disallow a setoff generally is confined to those circumstances when the validity of the right of setoff can be questioned under other law outside the bankruptcy code."); In re RCS Capital Dev., LLC, 2013 WL 3618550, at *9 (B.A.P. 9th Cir. July 16, 2013) (under section 558, setoff rights are determined under non-bankruptcy law).

16. Under California law, if Truck's claims for deductible payments and Debtors' claims for Silvestro appeal bond premiums both existed at a time when neither demand was barred by the statute of limitations, Debtors' monetary cross-demand is timely. Specifically, Section 431.70 of the California Code of Civil Procedure codifies setoff as an affirmative defense and expressly makes setoff claims timely, providing in relevant part, as follows: "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations." See Cal Civ. Proc. Code § 431.70.

17. As the California Supreme Court has explained, "[o]ne important function of the section 431.70 setoff procedure is to provide partial relief from the statute of limitations. When two parties have opposing claims against one another, whether or not the two claims are related, one party might allow the statute of limitations to run on its claim, reasoning that the two claims have canceled one another out. If the second party then pursues its claim in a court action, the first party should be permitted to assert its expired claim defensively, arguing in effect that its earlier decision not to pursue the claim constituted a form of payment or compensation to the second party. But because the statute of limitations otherwise bars the first party's claim, the use of that claim should be defensive only, and the first party's recovery should be limited to offsetting any amount the second party might obtain on its opposing claim. The legislative history of section 431.70 suggests the Legislature intended the section to codify this principle." Construction Protective Services, Inc. v. TIG Specialty Ins. Co., 29 Cal. 4th 189, 195 (2002) (emphasis added).

18. Moreover, under California law, the statute of limitations on any breach of insurance contract claim that an insurer has failed to fully defend is tolled until the conclusion of the underlying case—*i.e.*, when the time for appeal has expired or, where an appeal is timely filed, when the appellate court issues remittitur. Lambert v. Commonwealth Land Title Ins. Co., 53 Cal. 3d 1072 (1991) (although a breach of the duty to defend may give rise to an immediate action, the insurer's defense obligation continues so long as the third-party action is pending; the insured has the option of waiting until the time for the insurer's performance has passed and the underlying action is concluded); Oil Base, Inc. v. Cont'l Cas. Co., 271 Cal. App.

2d 378, 389-90 (1969) (because the insurer could have assumed its duty to defend at any time, the insured had the option to sue immediately for failure to defend or to wait until the expiration of the time for performance had ended before commencing action); see also Archdale v. Am. Int'l Specialty Lines Ins. Co., 154 Cal. App. 4th 449, 477 (2007) ("the duty to defend under a liability policy arises on tender of the defense and continues until the underlying lawsuit is concluded").

19. Tolling continues to case conclusion, in part, to determine the extent of any loss. Id. at 479 (tolling the statute of limitations on a bad faith claim for failure to reasonably settle within policy limits until the underlying third-party action was concluded). Like a breach of the duty to defend, a claim for payment of appeal bond premiums is tolled until the conclusion of a case. California Rules of Court, rule 8.278(d)(1)(F), provides that the party prevailing in the Court of Appeal may recover the "cost to procure a surety bond, including the premium . . . unless the trial court determines the bond was unnecessary." Here, until the Appealed Cases were concluded, it was unknown whether Debtors would have any unreimbursed appeal bond premiums to seek from Truck.

20. The earliest date for resolution of an underlying claim in connection with which Truck seeks deductible payment from the Debtors is December 10, 2013.

21. Applying California's tolling rule, Silvestro concluded at the earliest when the time to appeal the judgment entered October 6, 2010 expired. Thus, Debtors' claim against Truck for Silvestro appeal bond premiums would have been timely under California law through at least early October 2014.

22. As a result, the statutory requirement of Section 431.70—that the Truck deductible claim (which accrued as early as December 10, 2013) and the Silvestro appeal bond premium claim (which was timely until at least October 2014)—"existed . . . at any point in time when neither demand was barred by the statute of limitations" is met and Debtors' setoff claim for the Silvestro appeal bond premiums is timely.

The Court having found that Truck is obligated to pay the entire amount of appeal bond premiums of $411,497.00 incurred in the Appealed Cases, in addition to and without being limited in any way because of Truck's $500,000.00 indemnity limit; and

The Court having found that Debtors' setoff claim under the 1974 policy for $250,905.00 in appeal bond premiums incurred in the Silvestro case is timely because it is asserted as a setoff to Truck's deductible claims under the 1974 policy pursuant to Section 431.70 of the California Code of Civil Procedure and was tolled until the Silvestro case was concluded;

IT IS HEREBY ORDERED THAT:

1. The relief requested in the Objection is GRANTED.

2. The portion of the Claims with respect to Prepetition Deductibles is allowed in the amount of $465,140.83, calculated as follows:

Deductible billing to Debtors from Truck	$3,365,500.00
Less deductible overbilling for settlements Truck did not pay	($297,500.00)

Less amounts due Debtors per the Cost Sharing Agreement w/Truck	($2,187,398.17)
Less cost of appeal bonds owed by Truck to the Debtors	($411,947.00)
Less amounts spent by or on behalf of Debtors' PMK witnesses	($3,514.00)
TOTAL	$465,140.83

3. The portion of the Claims with respect to Future Deductibles is disallowed, subject to Truck's right to resubmit such Claims for Future Deductibles in the event that the Lift Stay Order is not in place and the Plan is not confirmed. Any such resubmitted Claims for Future Deductibles shall be amended to quantify and substantiate (with supporting data) any amount being requested.

4. The Debtors' objection to the Claims addressed in the Objection constitutes a separate contested matter as contemplated by Bankruptcy Rule 9014. This Order shall be deemed a separate Order with respect to the Claims.

5. The Debtors, the Debtors' claims and noticing agent, Prime Clerk LLC, and the Clerk of this Court are authorized to take any and all actions that are necessary or appropriate to give effect to this Order.

6. This Court shall retain exclusive jurisdiction over any and all matters arising from or related to the implementation, interpretation or enforcement of this Order.

This Order has been signed electronically

The Judge's signature and Court's seal appear at the top of the Order.

United States Bankruptcy Court

Exhibit I.A.19

Asbestos Personal Injury Trust
Distribution Procedures

KAISER GYPSUM ASBESTOS PERSONAL INJURY TRUST DISTRIBUTION PROCEDURES

The Kaiser Gypsum Asbestos Personal Injury Initial Trust Distribution Procedures (the "**TDP**") contained herein provide for resolving "**Asbestos Personal Injury Claims**"[1] as defined in the Joint Plan of Reorganization of Kaiser Gypsum Company, Inc. ("**Kaiser Gypsum**") and Hanson Permanente Cement, Inc. ("**HPCI**") (together, the "**Debtors**"), dated as of July 27, 2018 (as it may be amended, modified or supplemented, the "**Plan**"),[2] as provided in and required by the Plan and the Kaiser Gypsum Asbestos Personal Injury Trust Agreement (the "**Trust Agreement**"). The Plan and Trust Agreement establish the Kaiser Gypsum Asbestos Personal Injury Trust (the "**Asbestos Trust**"). The Trustee of the Asbestos Trust (the "**Trustee**") shall implement and administer this TDP in accordance with the Trust Agreement.

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[1] Asbestos Personal Injury Claims shall be referred to herein as "**Asbestos Claims**."

[2] Capitalized terms used herein and not otherwise defined shall have the meanings assigned to them in the Plan and the Trust Agreement.

SECTION 1.

INTRODUCTION

1.1 Purpose. This TDP has been adopted pursuant to the Trust Agreement. It is designed to provide fair, equitable and substantially similar treatment for all Asbestos Claims that may presently exist or may arise in the future.

1.2 Interpretation. Except as expressly provided below, nothing in this TDP shall be deemed to create a substantive right for any claimant. The rights and benefits provided herein to holders of Asbestos Claims shall vest in such holders as of the Effective Date.

SECTION 2.

OVERVIEW

2.1 Asbestos Trust Goal. The goal of the Asbestos Trust is to treat all claimants similarly and equitably in accordance with the requirements of section 524(g) of the Bankruptcy Code. This TDP furthers that goal by setting forth procedures that allow claimants with Insured Asbestos Claims to pursue their Asbestos Claims in the tort system, as they did prior to the Petition Date ("**Pre-Petition**"), and that provide for processing and paying both the uninsured portions of such claims, as well as the Uninsured Asbestos Claims that would have been paid by the Debtors Pre-Petition, on an impartial, first-in-first-out ("**FIFO**") basis, with the intention of paying all claimants over time as equivalent a share as possible of the value of (a) subject to Section 7.2 hereof, the portions of their Insured Asbestos Claims that are not covered by any Asbestos Insurance Policy and (b) their Uninsured Asbestos Claims that would have been paid by the

Debtors Pre-Petition ((a) and (b) are collectively referred to herein as the "**Uninsured Amounts**").

2.2 Asbestos Claims Handling and Liquidation Procedures. Insured Asbestos Claims shall be resolved primarily in the tort system as described in Section 5.3 below. Once claimants obtain payment on a settlement, judgment, or some other final resolution of their claim in their favor in the tort system, they may then submit evidence of such payment or final resolution to the Asbestos Trust, which will resolve the portions of the Insured Asbestos Claims that are not covered by any Asbestos Insurance Policy subject to Section 7.2 hereof.[3] Uninsured portions of claims shall be processed based on their place in the applicable FIFO Processing Queue to be established pursuant to Section 5.1 below. The Asbestos Trust shall take all reasonable steps to resolve the uninsured portions of Insured Asbestos Claims as efficiently and expeditiously as possible.

Uninsured Asbestos Claims, if any, shall be processed based on their place in the applicable FIFO Processing Queue. If the Asbestos Trust is satisfied that the claimant has presented a claim that would be cognizable and valid in the applicable tort system and would have been compensable by the Debtors Pre-Petition, the Asbestos Trust shall offer the claimant a settlement amount to be determined based on the values paid by the Debtors with respect to substantially similar claims in the tort system, which values shall be determined by reference to the Debtors' tort system

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[3] If an Insured Asbestos Claim is resolved in the tort system for less than the applicable deductible amount, the subject claimant does not need to submit evidence of payment to the Asbestos Trust as no payment will have been made.

history, including the valuation data contained in such history. The Asbestos Trust shall take all reasonable steps to resolve Uninsured Asbestos Personal Claims as efficiently and expeditiously as possible.

Unresolved disputes involving the Asbestos Trust and the resolution of its liability with respect to Uninsured Amounts shall be subject to binding or non-binding arbitration as set forth in Section 5.8 below, at the election of the claimant, under ADR Procedures established by the Asbestos Trust. Holders of Asbestos Claims that cannot be resolved by non-binding arbitration may enter the tort system as provided in Section 5.9 below. If a claimant obtains a judgment against the Asbestos Trust in the tort system, such judgment shall be payable as provided in Section 7.4 below.

2.3 Establishment and Application of the Payment Percentage. The initial Payment Percentage (as defined and described in Sections 4.1 and 4.2 below) for all claims, or portions of claims, paid by the Asbestos Trust shall be established by the Trustee with the consent of the Trust Advisory Committee ("**TAC**") and the Future Claimants' Representative ("**FCR**") promptly after the Asbestos Trust is established. After the uninsured amount of an Insured Asbestos Claim or the value of an Uninsured Asbestos Claim is determined pursuant to the procedures set forth herein, the claimant shall ultimately receive a pro-rata share of that amount (subject to Section 7.2 hereof) based on the Payment Percentage. Pre-Effective Date Liquidated Insured Asbestos Claims (as defined in Section 5.2 below) are included within the definition of Insured Asbestos Claims and the deductible or other uninsured amount of such claim shall be subject to the Payment Percentage. Each Asbestos

Personal Injury Indirect Claim (an "**Indirect Asbestos Claim**") is either an Insured Asbestos Claim or an Uninsured Asbestos Claim, depending upon the facts underlying the particular Indirect Asbestos Claim, and the portion of the value of any such claim for which the Asbestos Trust is responsible shall be subject to the Payment Percentage.

The Payment Percentage may be adjusted upwards or downwards from time to time by the Asbestos Trust with the consent of the TAC and the FCR to reflect then-current estimates of the Asbestos Trust's assets and its liabilities. Because there is uncertainty in the prediction of both the total amount of the Asbestos Trust's asbestos-related liabilities and the value of the Asbestos Trust's assets over time, no guarantee can be made of any particular Payment Percentage that will be applicable to a payment on any Asbestos Claim.

2.4 Asbestos Trust's Determination of the Maximum Annual Payment. After calculating the Payment Percentage, the Asbestos Trust shall model the cash flow, principal and income year-by-year to be paid over its entire life to ensure that all present and future holders of Asbestos Claims are compensated at the applicable Payment Percentage. In each year, based upon the model of cash flow, the Asbestos Trust shall be empowered to pay out the portion of its funds payable for that year according to the model (the "**Maximum Annual Payment**"). The Asbestos Trust's distributions to all claimants for that year shall not exceed the Maximum Annual Payment. The Payment Percentage and the Maximum Annual Payment figures are based on projections over the lifetime of the Asbestos Trust. If such long-term projections are revised, the Payment Percentage may be adjusted

accordingly, which would result in a new model of the Asbestos Trust's anticipated cash flow and a new calculation of the Maximum Annual Payment figures.

However, year-to-year variations in the Asbestos Trust's flow of claims or the value of its assets, including earnings thereon, will not mean necessarily that the long-term projections are inaccurate; they may simply reflect normal variations, both up and down, from the smooth curve created by the Asbestos Trust's long-term projections. If, in a given year, however, asset values, including earnings thereon, are below projections, the Asbestos Trust may need to distribute less in that year than would otherwise be permitted based on the original Maximum Annual Payment derived from long-term projections. Accordingly, the original Maximum Annual Payment for a given year may be temporarily decreased if the present value of the assets of the Asbestos Trust as measured on a specified date during the year is less than the present value of the assets of the Asbestos Trust projected for that date by the cash flow model described in the foregoing paragraph. The Asbestos Trust shall make such a comparison whenever the Trustee becomes aware of any information that suggests that such a comparison should be made. If the Asbestos Trust determines that as of the date in question, the present value of the Asbestos Trust's assets is less than the projected present value of its assets for such date, then it will remodel the cash flow year-by-year to be paid over the life of the Asbestos Trust based upon the reduced value of the total assets as so calculated and identify the reduced portion of its funds to be paid for that year, which will become the Temporary Maximum Annual Payment (additional reductions in the Maximum Annual Payment can occur during the course of that year based upon subsequent calculations). If in any

year the Maximum Annual Payment was temporarily reduced as a result of an earlier calculation and, based upon a later calculation, the difference between the projected present value of the Asbestos Trust's assets and the actual present value of its assets has decreased, the Temporary Maximum Annual Payment shall be increased to reflect the decrease in the differential. In no event, however, shall the Temporary Maximum Annual Payment exceed the original Maximum Annual Payment. As a further safeguard, the Asbestos Trust's distribution to all claimants for the first nine months of a year shall not exceed 85% of the Maximum Annual Payment determined for that year. If on December 31 of a given year, the original Maximum Annual Payment for such year is not in effect, the original Maximum Annual Payment for the following year shall be reduced proportionately.

SECTION 3.

TDP ADMINISTRATION

3.1 Trust Advisory Committee and FCR. Pursuant to the Plan and the Trust Agreement, the Asbestos Trust and this TDP shall be administered by the Trustee in consultation with the TAC, which represents the interests of holders of present Asbestos Personal Injury Claims, and the FCR, who represents the interests of holders of Asbestos Personal Injury Claims that may be asserted in the future. The Trustee shall obtain the consent of the TAC and the FCR on any amendments to this TDP pursuant to Section 3.2 below, and on such other matters as are otherwise required below or in Section 2.2(f) of the Trust Agreement. The Trustee shall also consult with the TAC and the FCR on such matters as are provided below or in Section 2.2(e) of the Trust Agreement.

3.2 Consent and Consultation Procedures. In those circumstances in which consultation or consent is required, the Trustee shall provide written notice to the TAC and the FCR of the specific amendment or other action that is proposed. The Trustee shall not implement such amendment or take such action unless and until the parties have engaged in the Consultation Process described in Sections 5.7(a) and 6.6(a), or the Consent Process described in Sections 5.7(b) and 6.6(b), of the Trust Agreement, respectively.

SECTION 4.

PAYMENT PERCENTAGE

4.1 Uncertainty of Debtors' Asbestos Claims Liabilities. As discussed above, there is inherent uncertainty regarding the Asbestos Trust's total asbestos-related liabilities, as well as the total value of the assets available to the Asbestos Trust to pay its expenses and liabilities with respect to Uninsured Amounts. Consequently, there is inherent uncertainty regarding the amounts that holders of all Asbestos Claims shall receive from the Asbestos Trust. To seek to ensure substantially equivalent treatment of all present and future Asbestos Claims by the Asbestos Trust, the Trustee must determine from time to time the percentage of value that holders of present and future Asbestos Claims are likely to receive from the Asbestos Trust (the "**Payment Percentage**").

4.2 Computation of the Payment Percentage. As provided in Section 2.3 above, the initial Payment Percentage shall be set by the Trustee with the consent of the TAC and the FCR promptly after the Asbestos Trust is established. Thereafter, the Payment Percentage shall be subject to change pursuant

to the terms of this TDP and the Trust Agreement if the Trustee, with the consent of the TAC and FCR, determines that an adjustment is required. No less frequently than once every three (3) years, with the first three-year period commencing on the first day of January following the Effective Date, the Trustee shall reconsider the then applicable Payment Percentage to assure that it is based on accurate, current information and may, after such reconsideration, change the Payment Percentage if necessary with the consent of the TAC and the FCR. The Trustee shall also reconsider the then applicable Payment Percentage at shorter intervals if they deem such reconsideration to be appropriate or if requested to do so by the TAC or the FCR. In any event, no less frequently than once every twelve (12) months, commencing one year after the date the Asbestos Trust first makes available the proof of claim forms and other claims materials required to file a claim with the Asbestos Trust, the Trustee shall compare the liability forecast on which the then applicable Payment Percentage is based with the actual claims filing and payment experience of the Asbestos Trust to date. If the results of the comparison call into question the ability of the Asbestos Trust to continue to rely upon the current liability forecast, the Trustee shall undertake a reconsideration of the Payment Percentage.

The Trustee must base his or her determination of the Payment Percentage on current estimates of payments related to Uninsured Amounts, the value of the assets of the Asbestos Trust, all anticipated administrative and legal expenses, and any other material matters that are reasonably likely to affect the sufficiency of funds available to pay a comparable percentage of the Asbestos Trust's liability to holders of Asbestos Claims with respect to Uninsured Amounts.

When making these determinations, the Trustee shall exercise common sense and flexibly evaluate all relevant factors.

4.3 Applicability of the Payment Percentage.

The Trust shall apply the Payment Percentage to all payments made to holders of Asbestos Claims. The payment to a claimant shall reflect the Payment Percentage in effect at the time of the payment. If a redetermination of the Payment Percentage has been proposed in writing by the Trustee to the TAC and the FCR but has not yet been adopted, the claimant shall receive the lower of the current Payment Percentage or the proposed Payment Percentage. However, if the proposed Payment Percentage is the lower amount but is not subsequently adopted, the claimant shall thereafter receive the difference between the lower proposed amount and the higher current amount. Conversely, if the proposed Payment Percentage is the higher amount and is subsequently adopted, the claimant shall thereafter receive the difference between the lower current amount and the higher adopted amount.

At least thirty (30) days prior to proposing in writing to the TAC and the FCR a change in the Payment Percentage, the Trustee shall issue a written notice to claimants or claimants' counsel indicating that the Trustee is reconsidering such Payment Percentage.

If the Trustee, with the consent of the TAC and the FCR, makes a determination to increase the Payment Percentage due to a change in the estimates of the Asbestos Trust's future assets and/or liabilities, the Trustee shall make supplemental payments to all claimants who previously liquidated their claims

against the Asbestos Trust and received payments based on a lower Payment Percentage. The amount of any such supplemental payment shall be the liquidated value of the claim in question times the newly adjusted Payment Percentage, less all amounts previously paid to the claimant with respect to the claim.

The Asbestos Trust's obligation to make a supplemental payment to a claimant shall be suspended in the event the payment in question would be less than $250.00, and the amount of the suspended payment shall be added to the amount of any prior supplemental payment/payments that was/were also suspended because it/they would have been less than $250.00. However, the Asbestos Trust's obligation shall resume, and the Asbestos Trust shall pay any such aggregate supplemental payments due the claimant at such time that the total exceeds $250.00.

SECTION 5.

RESOLUTION OF ASBESTOS CLAIMS.

5.1 Ordering, Processing and Payment of Asbestos Claims.

5.1(a) Ordering of Asbestos Claims.

5.1(a)(1) Establishment of FIFO Processing Queues. The Asbestos Trust shall order claims that are sufficiently complete to be reviewed for processing purposes on a FIFO basis except as otherwise provided herein (the "**FIFO Processing Queue**"). The Asbestos Trust shall establish two FIFO Processing Queues: (1) the Primary FIFO Processing Queue; and (2) the Uninsured FIFO Processing Queue. All Insured Asbestos Claims shall be placed in the Primary FIFO Processing Queue, and all Uninsured Asbestos Claims, if any, shall be placed in the Uninsured FIFO Processing Queue. The Asbestos Trust will have two

processing queues because it is anticipated that the processing of Uninsured Asbestos Claims, if any, will require more extensive individualized review of a claimant's submission materials.

The claimant's position in the applicable FIFO Processing Queue shall be determined by the date the claim is filed with the Asbestos Trust. If any claims are filed on the same date, the claimant's position in the Primary FIFO Processing Queue shall be determined by the date on which the applicable Asbestos Insurer(s) paid the claimant's claim or, if there was no payment required by such Asbestos Insurer(s), the date on which a settlement in claimant's favor was finalized, with earlier paid and resolved claims given priority over later paid claims, and the claimant's position in the Uninsured FIFO Processing Queue shall be determined by the date of the diagnosis of the asbestos-related disease, with claimants with earlier diagnosis dates given priority over later diagnosed claimants. If any claims are filed and were either paid/resolved by the applicable Asbestos Insurer(s) on the same date or diagnosed on the same date, the claimant's position in the applicable FIFO Processing Queue shall be determined by the claimant's date of birth, with older claimants given priority over younger claimants.

5.1(a)(2) Effect of Statutes of Limitation and Repose. All Uninsured Asbestos Claims, if any, must meet either (i) for claims first filed in the tort system against a Debtor or Reorganized Debtor, the applicable federal, state or foreign statutes of limitation and repose that were in effect at the time of the filing of the claim in the tort system, or (ii) for claims not filed against a Debtor or Reorganized Debtor in the tort system, the applicable federal, state or foreign

statutes of limitation and repose that were in effect at the time of the filing with the Asbestos Trust. However, the running of the relevant statute of limitation and repose shall be tolled as of the earliest of (A) the actual filing of the claim against a Debtor or Reorganized Debtor, whether in the tort system or by submission of the claim to a Debtor or Reorganized Debtor pursuant to an administrative settlement agreement; (B) the tolling of the claim against a Debtor by an agreement or otherwise; or (C) the Petition Date. If an Uninsured Asbestos Claim meets any of the tolling provisions described in the preceding sentence and was not barred by the applicable federal, state or foreign statute of limitation and repose at the time of the tolling event, it shall be treated as timely filed if it is actually filed with the Asbestos Trust within three (3) years after the six-month anniversary of the date the Asbestos Trust first makes available the proof of claim form and other claims materials required to file a claim (the "**Initial Claims Filing Date**"). In addition, any Uninsured Asbestos Claim that was first diagnosed after the Petition Date, irrespective of the application of any relevant federal, state or foreign statute of limitation and repose, must be filed with the Asbestos Trust within three (3) years after the date of diagnosis or within three (3) years after the Initial Claims Filing Date, whichever occurs later.

All claims for uninsured portions of Insured Asbestos Claims must be filed with the Asbestos Trust within three (3) years after the date on which the applicable Asbestos Insurer(s) paid (or, in the case of claims for which no payment was due from the applicable Asbestos Insurer(s), settled) the claimant's claim.

5.1(b) Payment of Asbestos Claims. All Asbestos Claims shall be paid in FIFO order based on the date the resolution of their claim with the Asbestos Trust becomes final as evidenced by the claimant's acceptance of an offer from the Asbestos Trust (the "**FIFO Payment Queue**"); all such payments are subject to the applicable Payment Percentage.

Where the claimant is deceased or incompetent, and the settlement and payment of his or her claim must be approved by a court of competent jurisdiction or through a probate process prior to acceptance of the claim by the claimant's representative, an offer made by the Asbestos Trust on the claim shall remain open so long as proceedings before that court or in that probate process remain pending, provided that the Asbestos Trust has been furnished with evidence that the settlement offer has been submitted to such court or is in the probate process for approval. If the offer is ultimately approved by the court or through the probate process and accepted by the claimant's representative, the Asbestos Trust shall pay the claim in the amount so offered, subject to the Payment Percentage in effect at the time the offer was first made.

5.2 Resolution of Pre-Effective Date Liquidated Insured Asbestos Claims.

5.2(a) Processing and Payment. After a claimant receives payment from the applicable Asbestos Insurer(s) with respect to an Insured Asbestos Claim that was liquidated by a settlement or judgment prior to the Effective Date (or if no payment was required by the applicable Asbestos Insurer(s), after such settlement or judgment is finalized) (collectively "**Pre-Effective Date Liquidated Insured Asbestos Claims**"), the claimant may then seek payment for the deductible portion of the claim from the Asbestos

Trust in accordance with the procedures set forth in Section 5.4 below.

5.3 Resolution of Unliquidated Insured Asbestos Claims.

5.3(a) Procedure for Litigating Unliquidated Insured Asbestos Claims. Pursuant to Plan Section IV.O.1., claimants holding unliquidated Insured Asbestos Claims who wish to recover on such claims must sue the Reorganized Debtor(s) in the relevant tort system to obtain the benefit of insurance coverage under the Asbestos Insurance Policies. The lawsuit may name as the defendant one or both of the Reorganized Debtors and shall be deemed by operation of law to be an action against the applicable Reorganized Debtor(s). All lawsuits brought against the Reorganized Debtor(s) must be filed by the claimant in his or her own right and name and not as a member or representative of a class. Service of process on the Reorganized Debtor(s) may be made, pursuant to applicable federal or state law where the lawsuit is filed, upon the following:

[insert address]

Any lawsuit naming the Reorganized Debtor(s) may be filed by claimants in the federal or state court of their choosing where the applicable Debtor(s) would have been subject to *in personam* jurisdiction as of the Petition Date, or any other court of competent jurisdiction, as permitted under applicable federal or state law.

Where a lawsuit that is still pending against the Debtor(s) was already pending prior to the Effective Date, the lawsuit may proceed, subject, however, to all defenses, including those based on venue, forum non conveniens, and jurisdiction.

The applicability of statutes of limitations and repose in all such lawsuits shall be determined under applicable state or federal law. If a lawsuit involving the Debtor(s) was filed prior to the Effective Date (even if the lawsuit was dismissed as a result of the filing of the Debtors' bankruptcy cases), the filing date of such lawsuit shall be the operative date for purposes of the applicable statute of limitations.

Prejudgment interest in all such lawsuits shall be subject to and calculated based on applicable state or federal law, including any applicable limitations thereunder, and including without limitation section 502 of the Bankruptcy Code.

5.3(b) Tender to Truck or Applicable Asbestos Insurer. The Reorganized Debtor(s), or their agents, shall tender all actions filed pursuant to Section 5.3(a) to Truck Insurance Exchange ("**Truck**") and, if appropriate, to any other applicable Asbestos Insurer. The Reorganized Debtor(s) shall provide to Truck, or any other applicable Asbestos Insurer, such information as is required under the terms and conditions of the Asbestos Insurance Policies and the Excess CIP Agreement, if applicable. The Reorganized Debtor(s) shall have no obligation to answer, appear, or otherwise participate in the action other than as expressly set forth in the Plan and as may be necessary to maintain coverage under the Asbestos Insurance Policies.

All defenses and all contribution claims including those that could have been asserted by the Debtor(s) prepetition shall be preserved and available to any Asbestos Insurer in regards to any Insured Asbestos Claim.

5.3(c) Denied Insured Asbestos Claims.

5.3(c)(1) Handling of Denied Insured Asbestos Claims Generally. In the event that all applicable Asbestos Insurers deny coverage for an Insured Asbestos Claim or otherwise reject or refuse to defend or pay an Insured Asbestos Claim (other than as a result of a breach by Reorganized Debtors of their Asbestos Insurer Cooperation Obligations), the claimant must first, pursue and obtain a judgment in the tort system against the Reorganized Debtor(s), in name only, and then submit documentation evidencing the judgment to the Asbestos Trust. Upon receiving such documentation, the Asbestos Trust, in consultation with the TAC and the FCR, shall, at its discretion, determine whether it will pursue payment of the judgment against the applicable Asbestos Insurer on the claimant's behalf or take no further action with respect to the claim. In the event the Asbestos Trust does not choose to pursue payment of the judgment, it will be the obligation of the claimant to pursue the applicable Asbestos Insurer for payment of the judgment.

If an Asbestos Insurer provides notice to the Asbestos Trust and a claimant holding an Insured Asbestos Claim that such Asbestos Insurer contests coverage for the Insured Asbestos Claim because the Reorganized Debtors are alleged to have failed to satisfy or otherwise perform the Asbestos Insurer Cooperation Obligations (a "**Notice**"), within forty-five (45) calendar days of receiving such Notice, the Asbestos Trust and the claimant holding such claim shall provide to the Reorganized Debtors any documents or information they respectively received from the Asbestos Insurer denying, rejecting, or disclaiming coverage. If such information is not provided within such

forty-five (45) day period, the Reorganized Debtors shall have no obligations under Section IV.L.2. of the Plan with respect to such Insured Asbestos Claim unless the failure to provide such information as required did not unfairly prejudice the Reorganized Debtors.

Pursuant to Section IV.L.2.d. of the Plan, the Reorganized Debtors must, within forty-five calendar days of receiving a Notice, provide to the Asbestos Trust and the subject claimant (1) any documents or information the Reorganized Debtors received from the Asbestos Insurer denying, rejecting, or disclaiming coverage and (2) any documents or other information the Reorganized Debtors have within their possession, custody, or control regarding the Reorganized Debtors' efforts to satisfy any of the Asbestos Insurer Cooperation Obligations in respect of the subject claim. The Asbestos Trust or the holder of the subject claim or both may assert an action against the Asbestos Insurer seeking coverage for the Insured Asbestos Claim. If such an action results in a Final Order providing that the Asbestos Insurer does not have a coverage obligation for the subject claim and the basis for the finding that there is no coverage obligation *may* be because the Reorganized Debtors failed to satisfy or otherwise perform any of the Asbestos Insurer Cooperation Obligations, then the Asbestos Trust or the holder of the subject claim or both may bring a subsequent direct action against the Reorganized Debtors for the sole purpose of seeking a finding that the Reorganized Debtors failed to satisfy or perform any of the Asbestos Insurer Cooperation Obligations.

5.3(c)(2)Handling of Denied Insured Asbestos Claims Where Reorganized Debtors have Breached their Asbestos Insurer Cooperation

Obligations. If an Asbestos Insurer does not provide coverage for an Insured Asbestos Claim because a court determines in a Final Order that the Reorganized Debtors failed to satisfy or otherwise perform their Asbestos Insurer Cooperation Obligations, the Asbestos Trust, the TAC, the FCR, and the claimant, each individually or in any combination jointly, may, as outlined in Plan Section IV.L.2., seek (1) specific performance directing the Reorganized Debtors to cure the breach of their Asbestos Insurer Cooperation Obligations, and/or (2) payment from the Reorganized Debtors for the judgment or settlement amount of the Insured Asbestos Claim for which coverage has been denied by the Asbestos Insurer. Regardless of which remedy is sought, the party may also seek payment from the Reorganized Debtors for reasonable attorneys' fees expended in pursuing relief from the Reorganized Debtors.

Where a party seeks payment or specific performance related to a Denied Insured Asbestos Claim, the Reorganized Debtors shall, within thirty (30) calendar days of receiving notice of the Denied Insured Asbestos Claim, either (a) remit payment of (i) the judgment or settlement amount of the Denied Insured Asbestos Claim to the Asbestos Trust or the claimant, as applicable, and if payment of the value of the Denied Insured Asbestos Claim is made to the Asbestos Trust, the Asbestos Trust shall in turn remit payment to the claimant, and (ii) reasonable attorneys' fees expended in enforcing the right provided in Section IV.L.2. of the Plan, except for any attorneys' fees expended in connection with a direct action against the Reorganized Debtors permitted by Section IV.L.2.d. of the Plan (collectively, "**Legal Fees**") to the appropriate party, or (b) attempt to cure their breach of the Asbestos Insurer Cooperation Obligations. If the

Reorganized Debtors successfully cure their breach such that the Asbestos Insurer reverses its previous denial of coverage and pays the Denied Insured Asbestos Claim in full, the Reorganized Debtors shall have no further obligation to pay the Denied Insured Asbestos Claim; the Reorganized Debtors shall, however, remain liable for the Legal Fees and shall remit payment of such Legal Fees to the appropriate party. If the Reorganized Debtors are unable to cure their breach of the Asbestos Insurer Cooperation Obligations, the Reorganized Debtors shall pay to the Asbestos Trust or the claimant, as applicable, the judgment or settlement amount of the Denied Insured Asbestos Claim and shall remit the Legal Fees to the appropriate party.

If the Reorganized Debtors pay the claimant directly on the Denied Insured Asbestos Claim in any manner as set forth in this Section, the Asbestos Trust shall have no further obligation or liability with respect to the claim, apart from payment of the deductible portion of the claim, which the claimant may pursue separately as described in Section 5.4 below.

5.4 Payment by the Asbestos Trust of the Portion of Insured Asbestos Claims Not Covered by any Asbestos Insurance Policy.

5.4(a) Procedure. Once a claimant obtains payment from the applicable Asbestos Insurer(s) on the claimant's Insured Asbestos Claim (including a Pre-Effective Date Liquidated Insured Asbestos Claim or an insured Indirect Asbestos Claim) (or, if there was no payment required by the applicable Asbestos Insurer(s), the date on which a settlement in claimant's favor was finalized), the claimant may then seek payment from the Asbestos Trust of the portion of the

Insured Asbestos Claim that is not covered by any Asbestos Insurance Policy subject to Section 7.2 hereof.

5.4(b) Proof of Resolution and Payment. Claimants must submit proof to the Asbestos Trust that their Insured Asbestos Claim has been fully and finally resolved and, if the settlement or judgment amount exceeded the amount of the applicable deductible, paid by the applicable Asbestos Insurer(s). The Asbestos Trust, in consultation with the TAC and FCR, shall develop and establish criteria for submitting evidence of a resolved and paid claim and a claim form governing the submission of such proof. The Asbestos Trust, in consultation with the TAC and the FCR, may require claimants to submit documents evidencing the following: (1) exposure to asbestos or asbestos-containing products designed, marketed, manufactured, fabricated, constructed, sold, supplied, produced, installed, maintained, serviced, specified, selected, repaired, removed, replaced, released, distributed, or in any other way made available by Kaiser Gypsum or Hanson or any other Entity for whose products, acts, omissions, business, or operations either of the Debtors has liability ("Debtor Exposure"); (2) a first exposure date that falls within the Asbestos Insurer coverage periods; (3) evidence regarding the duration and circumstances of the Debtor Exposure; and (4) proof of diagnosis of an asbestos-related disease.

5.4(c) Releases. In addition to submitting proof of resolution or payment, claimants must also submit properly executed releases, as further described in Section 7.5 below through which the claimant fully releases the Asbestos Trust, along with any Settling Asbestos Insurers, from any liability or obligation of any

kind arising from or related to the claimant's Asbestos Claim.

5.4(d) Applicable Deductible and Other Payments Due. After receiving all required documents, the Asbestos Trust shall then determine the applicable deductible amount for the claim submitted and any amount owed to the claimant by the Asbestos Trust as a result of payments, if any, to the Asbestos Trust by Settling Asbestos Insurers. Applicable deductibles for claims settled or paid by Truck shall be those established in the Truck Asbestos Insurance Policies and shall apply as follows:

- $5,000—For all claims with a first exposure date on or before December 31, 1975.
- $50,000—For all claims with a first exposure date between January 1, 1976 and March 31, 1981 (inclusive).
- $100,000—For all claims with a first exposure date between April 1, 1981 and March 31, 1983 (inclusive).

5.4(e) Application of Payment Percentage. After the Asbestos Trust determines the applicable deductible amount pursuant to the Asbestos Insurance Policies and any other amount owed to the claimant by the Asbestos Trust with respect to the subject claim as a result of payments, if any, to the Asbestos Trust by Settling Asbestos Insurers, the claimant shall ultimately receive a pro-rata share of the value of the aggregate amount owed by the Asbestos Trust to the claimant based on the then applicable Payment Percentage described in Section 4.3 above. The Payment Percentage shall apply equally to all Insured Asbestos Claims.

5.4(f) Ordering and Payment of Payments. Upon filing an Insured Asbestos Claim with the Asbestos Trust for a payment, the claimant will be placed in the Primary FIFO Processing Queue to be established by the Asbestos Trust pursuant to Section 5.1(a) above. Payments of amounts owed shall be made in accordance with the FIFO Payment Queue described in Section 5.1(b) above.

5.5 Handling, Litigation, and Payment of Uninsured Asbestos Claims.

5.5(a) General. Consistent with Plan Section IV.O.2., claimants holding Uninsured Asbestos Claims must submit their claims directly to the Asbestos Trust. The Trustee, in consultation with the TAC and FCR, shall develop and approve separate claim materials for Uninsured Asbestos Claims. In any event, however, claimants must submit, at minimum, documents evidencing: (1) Debtor Exposure; (2) a first exposure date that falls outside the Asbestos Insurer coverage periods; (3) evidence regarding the duration and circumstances of the Debtor Exposure; and (4) proof of diagnosis of an asbestos-related disease. In addition to submitting evidence of the above, claimants holding Uninsured Asbestos Personal Injury Claims must also make an offer of proof to the Asbestos Trust demonstrating that their Uninsured Asbestos Claim would be cognizable and valid in the applicable tort system and would have been compensable by the Debtors Pre-Petition.

Before making any payment to a claimant, the Asbestos Trust must have reasonable confidence that the medical evidence provided in support of the claim is credible and consistent with recognized medical standards. The Asbestos Trust may require the submission of X-rays, CT scans, detailed results of

pulmonary function tests, laboratory tests, tissue samples, results of medical examinations, or reviews of other medical evidence, and shall require that medical evidence submitted comply with recognized medical standards regarding equipment, testing methods and procedures to assure that such evidence is reliable. Medical evidence (i) that is of a kind shown to have been received in evidence by a state or federal judge at trial, (ii) that is consistent with evidence submitted to a Debtor to settle, for payment, similar disease cases prior to the Petition Date, or (iii) that is a diagnosis by a physician shown to have previously qualified as a medical expert with respect to the asbestos-related disease in question before a state, federal or foreign judge, is presumptively reliable, although the Asbestos Trust may seek to rebut the presumption. Notwithstanding the foregoing or any other provision of this Successor TDP, any medical evidence submitted by a physician or entity that the Asbestos Trust has determined, after consulting with the TAC and the FCR, to be unreliable shall not be acceptable as medical evidence in support of any Asbestos Claim.

The claimant must demonstrate meaningful and credible Debtor Exposure. That meaningful and credible exposure evidence may be established by an affidavit or sworn statement of the claimant, a co-worker, or a family member in the case of a deceased claimant (providing the Asbestos Trust finds such evidence reasonably reliable), by invoices, employment, construction or similar records, or by other credible evidence. The specific exposure information required by the Asbestos Trust to process a claim shall be set forth on the proof of claim form to be used by the Asbestos Trust. The Asbestos Trust may also require

submission of other or additional evidence of exposure when it deems such to be necessary.

The Asbestos Trust shall, in its discretion, determine whether the evidence submitted and offer of proof are sufficient. If the Asbestos Trust concludes that the evidence and offer of proof are sufficient and that any other criteria established by the Trustee has been satisfied, the Asbestos Trust shall determine the liquidated value of the claim, with reference to Debtors' Pre-Petition tort system history and the valuation data included in such history. The Asbestos Trust shall consider all of the valuation factors reflected in Debtors' tort system history, which may include: (i) the claimant's age, disability, employment status, disruption of household, family or recreational activities, dependents, special damages, and pain and suffering; (ii) the duration and circumstances of claimant's Debtor Exposure; (iii) the asbestos-related disease of the claimant; (iv) the claimant's jurisdiction and law firm; and (v) the industry of exposure. The Asbestos Trust shall then make a settlement offer to the claimant. If the claimant accepts the offer, the claimant must submit a release, in the form to be determined by the Asbestos Trust, and shall then accept payment from the Asbestos Trust in full and complete satisfaction of the claimant's Uninsured Asbestos Claim.

If the Trust denies the claim, or the claimant rejects the settlement offer, the claimant may pursue binding or nonbinding arbitration in accordance with the ADR Procedures set forth in Section 5.8 below to resolve disputes concerning whether the evidence submitted in support of the claim is sufficient, whether the claim would have been compensable in the tort system Pre-Petition, as well as the valuation of the

claim based on comparison to the Debtors' Pre-Petition settlement history.

Claimants who elect non-binding arbitration and then reject their arbitral awards retain the right to institute a lawsuit in the tort system against the Asbestos Trust pursuant to Section 5.9 below. All lawsuits brought against the Asbestos Trust involving Uninsured Asbestos Claims must be filed by the claimant in his or her own right and name and not as a member or representative of a class and no such lawsuit may be consolidated with any other lawsuit. A claimant shall be eligible for payment of a judgment for monetary damages obtained in the tort system from the Asbestos Trust (subject to the Payment Percentage) as provided in Section 7.4 below. No award of punitive or exemplary damages shall be compensable by the Asbestos Trust.

5.5(b) Extraordinary Claim Review Process.

5.5(b)(1) In General. "**Extraordinary Claim**" means an Uninsured Asbestos Claim that otherwise satisfies the requirements herein for payment by the Asbestos Trust and that is held by a claimant whose exposure to asbestos (i) occurred predominantly as a result of working in a manufacturing facility of the Debtor during a period in which the Debtor was manufacturing asbestos-containing product at that facility or (ii) was at least 75% the result of exposure to an asbestos-containing product or to conduct for which the Debtor has legal responsibility, and in either case there is little likelihood of a substantial recovery elsewhere. Each such Extraordinary Claim shall be presented for Extraordinary Claim Review and, if valid shall be entitled to an award value that takes into account its Extraordinary Claim status, which value

shall be multiplied by the applicable Payment Percentage.

Any dispute as to Extraordinary Claim status shall be submitted to a special Extraordinary Claims Panel established by the Asbestos Trust with the consent of the TAC and the FCR. All decisions of the Extraordinary Claims Panel shall be final and not subject to any further administrative or judicial review.

5.5(b)(2) Additional Documentation and Information for Extraordinary Claim Review. To be eligible for a payment under this TDP, the holder of an Uninsured Asbestos Claim submitted for Extraordinary Claim Review must provide the following additional information:

5.5(b)(2)(i) Requirement to Identify Other Claims. A claimant seeking Extraordinary Claim Review must submit the information described in Section 5.5(b)(2)(ii) about all other claims asserted by the claimant that relate in any way to the alleged injuries for which the claimant seeks compensation. Other claims about which information must be submitted include claims by the claimant, the claimant's decedent, and any present or past holder of the Uninsured Asbestos Claim. Other claims include, but are not limited to, the following: (a) lawsuits filed in any court, arbitration proceedings before any panel or tribunal, and administrative proceedings (such as workers' compensation claims) before any governmental or quasi-governmental body; (b) claims that were resolved or settled without the institution of litigation (such as pre-filing settlements reached after notification of the existence of a claim without the need to file a lawsuit); and (c) claims that have been submitted in bankruptcy proceedings or to other asbestos trusts or

claim resolution facilities that resulted from bankruptcy proceedings.

5.5(b)(2)(ii) Information Required About Other Claims. A claimant seeking Extraordinary Claim Review shall submit the following information for each other claim: (a) the name of the entity against whom the other claim was made, (b) the date of the other claim, and (c) the amounts of all payments received or to be received from the entity to whom the other claim was submitted. The claimant must also submit copies of any documents submitted to or served upon any such entity containing information regarding the alleged injured party's contact with or exposure to asbestos or asbestos-containing products, including without limitation any claim forms submitted to other asbestos trusts or claim resolution facilities that resulted from bankruptcy proceedings (along with any attachments), ballots submitted by or on behalf of the claimant in any bankruptcy case, and any discovery response filed or served in tort litigation. The claimant shall also certify that, to the best of his or her knowledge, at that time, with the exception of the other claims that have 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 of the Extraordinary Claim.

5.5(b)(2)(iii) Authorization for Release of Information. Any claimant seeking Extraordinary Claim Review shall execute a release of information form in favor of the Asbestos Trust, in the form attached as Appendix I, authorizing all other asbestos trusts and claim resolution facilities against whom any such other claim has been made or asserted based on the injured party's injury to release to the Asbestos

Trust all information submitted to it by such claimant or entity who made such other claim and to disclose the status of any such claim and the amount and date of any payment on the claim. The release of information form shall authorize the Asbestos Trust to obtain all submissions made by the claimant or his or her heirs, executors, successors, or assigns in the future to any other asbestos trust or claim resolution facility. The Asbestos Trust may amend the form attached as Appendix I from time to time to add newly established asbestos trusts or claim resolution facilities. These authorizations will be used not only to verify information provided in connection with particular Extraordinary Claims but also in connection with the Asbestos Trust's periodic audits for fraud.

5.5(b)(2)(iv) Claimant Certification.

(a) If the claimant seeking Extraordinary Claim Review is or has been represented by an attorney in any litigation or in the filing of other asbestos trust claims based on the injury that forms the basis for the Extraordinary Claim, the claimant's attorney shall provide a certification under penalty of perjury. The certification shall affirm that the attorney has fully investigated the alleged injuries that are the basis of the Extraordinary Claim, including conferring with any other attorneys who represent the claimant asserting the Extraordinary Claim with respect to claims against other asbestos trusts or any other entity, and that no good-faith basis exists, at the time the certification is executed, to bring a claim against any entity that is not identified in the proof of claim form submitted to the Asbestos Trust by the claimant asserting the Extraordinary Claim.

(b) If the claimant seeking Extraordinary Claim Review has not been represented by an attorney in

any litigation or in the filing of other asbestos trust claims based on the injury that forms the basis for the Extraordinary Claim, the claimant shall provide a certification under penalty of perjury that he or she has fully investigated the alleged injuries that are the basis of the Extraordinary Claim, and that no good-faith basis exists, at the time the certification is executed, to bring a claim against any entity that is not identified in the proof of claim form submitted to the Asbestos Trust by the claimant.

5.6 Payment of Judgments Reduced by Settling Asbestos Insurers' Shares.

If a claimant obtains a judgment in the tort system that exceeds the Truck per claim policy limit or that otherwise requires payment from a Non-Settling Asbestos Insurer and the court hearing the Insured Asbestos Claim reduces the claimant's judgment payable by the excess Non-Settling Asbestos Insurer, dollar-for-dollar based on the share attributable to a Settling Asbestos Insurer consistent with Plan Section IV.P., the claimant whose judgment has been reduced may seek payment from the Asbestos Trust for the portion of the amount of the judgment reduction attributable to the Settling Asbestos Insurer's share. To obtain such payment, the claimant must file with the Asbestos Trust proof of the judgment and proof of the court's reduction of the judgment based on the Non-Settling Asbestos Insurer's assertion of its right to reduce the judgment attributable to the Settling Asbestos Insurer's share. Once satisfied that sufficient proof of the judgment reduction has been submitted, the Asbestos Trust shall place the claim in the FIFO Payment Queue and the Asbestos Trust shall pay the amount of the judgment reduction attributable to the

Settling Asbestos Insurer, subject to the then applicable Payment Percentage.

5.7 Indirect Asbestos Claims. An Indirect Asbestos Claim that is an Insured Asbestos Claim shall be subject to all of the procedures set forth herein with respect to Insured Asbestos Claims. An Indirect Asbestos Claim that is an Uninsured Asbestos Claim shall be subject to all of the procedures set forth herein with respect to Uninsured Asbestos Claims and to the requirements set forth below.

If an Indirect Asbestos Claim asserted against the Asbestos Trust is an Uninsured Asbestos Claim, it shall be treated as presumptively valid and paid by the Asbestos Trust subject to the applicable Payment Percentage if (a) such claim satisfied the requirements of any bar date for such claim established by the Bankruptcy Court, if applicable, and is not otherwise disallowed by section 502(e) of the Code or subordinated under section 509(c) of the Code, (b) the holder of such claim (the "**Indirect Claimant**") establishes to the satisfaction of the Trustee that (i) the Indirect Claimant has paid in full the liability and obligation of the Asbestos Trust to the individual claimant to whom the Asbestos Trust would otherwise have had a liability or obligation under this TDP (the "**Direct Claimant**"), (ii) the Uninsured Asbestos Claim of the Direct Claimant would be cognizable and valid in the applicable tort system and would have been compensable by the Debtors in the tort system Pre-Petition; (iii) the Direct Claimant and the Indirect Claimant have forever and fully released the Asbestos Trust from all liability to the Direct Claimant, and (iv) the claim is not otherwise barred by a statute of limitation and repose or by other applicable law, and (c) the Asbestos Trust has not yet paid the Direct

Claimant. In no event shall any Indirect Claimant have any rights against the Asbestos Trust superior to the rights of the related Direct Claimant against the Asbestos Trust, including any rights with respect to the timing, amount or manner of payment.

If an Indirect Claimant cannot meet the presumptive requirements set forth above, including the requirement that the Indirect Claimant provide the Asbestos Trust with a full release of the Direct Claimant's claim, the Indirect Claimant may request that the Asbestos Trust review the Indirect Asbestos Claim individually to determine whether the Indirect Claimant can establish under applicable state law that the Indirect Claimant has paid all or a portion of a liability or obligation that the Asbestos Trust had to the Direct Claimant, which shall also require establishing that the Uninsured Asbestos Claim of the Direct Claimant would be cognizable and valid in the applicable tort system and would have been compensable by the Debtors in the tort system Pre-Petition. If the Asbestos Trust determines that the Indirect Claimant has established these things and the Asbestos Trust has not already paid the Direct Claimant, the Asbestos Trust shall reimburse the Indirect Claimant the amount of the liability or obligation so paid, subject to the then applicable Payment Percentage. However, in no event shall such reimbursement to the Indirect Claimant be greater than the amount to which the Direct Claimant would have otherwise been entitled under this TDP. In all such cases, the liquidated value of any Indirect Asbestos Claim paid by the Asbestos Trust to an Indirect Claimant shall be treated as an offset to or reduction of the full liquidated value of any Asbestos Claim that might be subsequently asserted by the Direct Claimant against the Asbestos Trust.

The Trustee may develop and approve a separate claim form for Indirect Asbestos Claims.

5.8 Arbitration.

5.8(a) Establishment of ADR Procedures. The Trustee, with the consent of the TAC and the FCR, shall establish binding and non-binding arbitration procedures, as part of the Alternative Dispute Resolution ("**ADR**") Procedures to be established by the Trustee with the consent of the TAC and the FCR, for resolving disputes concerning the compensability and/or valuation of Asbestos Claims by the Asbestos Trust. With respect to all claims eligible for arbitration, the claimant, but not the Asbestos Trust, may elect either non-binding or binding arbitration. The ADR Procedures may be modified by the Asbestos Trust with the consent of the TAC and the FCR.

5.8(b) Claims Eligible for Arbitration. In order to be eligible for arbitration, the claim processing process with respect to a claim must be complete and the claimant must have also completed separately any processes required under the ADR Procedures. The claim processing process shall be treated as completed for these purposes when the claim has been reviewed by the Asbestos Trust, the Asbestos Trust has made an offer on the claim, the claimant has rejected the offer, and the claimant has notified the Asbestos Trust of the rejection in writing. The claim processing process shall also be treated as completed if the Asbestos Trust has rejected or denied the claim and has notified the claimant of the rejection or denial in writing.

5.8(c) Limitations on and Payment of Arbitration Awards. A claimant who submits to arbitration and who accepts the arbitral award shall receive

payments in the same manner as one who accepts the Asbestos Trust's original offer on the claim. Moreover, all payments on arbitral awards shall be subject to the Payment Percentage.

5.9 Litigation. Claimants who elect non-binding arbitration and then reject their arbitral awards retain the right to institute a lawsuit in the tort system against the Asbestos Trust pursuant to Section 7.3 below. A claimant shall be eligible for payment of a judgment for monetary damages obtained in the tort system from the Asbestos Trust's available cash only as provided in Section 7.4 below.

5.10 Claims Audit Program. The Asbestos Trust, with the consent of the TAC and the FCR, may develop methods for auditing the reliability of medical evidence, including additional reading of X-rays, CT scans and verification of pulmonary function tests, as well as the reliability of evidence of exposure to asbestos, including exposure to asbestos, asbestos-containing-products, or conduct for which the Asbestos Trust has legal responsibility. In the event that the Asbestos Trust reasonably determines that any individual or entity has engaged in a pattern or practice of providing unreliable medical or exposure evidence to the Asbestos Trust, it may decline to accept additional evidence from such provider in the future.

The Asbestos Trust shall utilize the services of a third-party claims processing facility (the "**Claims Processor**") to assist in the evaluation of claims submitted to the Asbestos Trust and shall participate in a cross-trust audit program (the "**Cross-Trust Audit Program**"). The Cross-Trust Audit Program shall include a comparison of Uninsured Asbestos Claims filed with the Asbestos Trust against claims filed with all other asbestos trusts administered by the Claims

Processor that participate in the Cross-Trust Audit Program, but shall include no fewer than four other trusts. The filing of any Uninsured Asbestos Claim with the Asbestos Trust, regardless of the treatment sought, shall constitute consent for each other asbestos trust participating in the Cross-Trust Audit Program to release to the entity overseeing the Cross-Trust Audit Program (the "**Auditor**") all information submitted to such other asbestos trust by or on behalf of the claimant pursuant to the provisions of the Cross-Trust Audit Program and to disclose the status of any such claim and the amount and date of any payment on the claim to the Auditor.

To the extent that the Asbestos Trust or the Auditor believes that it is relevant, nothing herein shall preclude the Asbestos Trust or the Auditor, in the Asbestos Trust's sole discretion, from reviewing or taking into consideration other claims filed against asbestos trusts in addition to those asbestos trusts involved in the Cross-Trust Audit Program when reviewing Uninsured Asbestos Claims. Any claimant subject to the Asbestos Trust's Claims Audit Program or the Cross-Trust Audit Program shall cooperate and, in the case of claimants holding Uninsured Asbestos Claims, if requested, provide the Asbestos Trust or the Auditor with authorization to obtain from other asbestos trusts any information such claimant has submitted to such other asbestos trusts.

Further, in the event that an audit reveals that fraudulent information has been provided to the Asbestos Trust, the Asbestos Trust may penalize any claimant or claimant's attorney by rejecting the Asbestos Claim or by other means including, but not limited to, requiring the source of the fraudulent information to pay the costs associated with the audit and

any future audit or audits, reordering the priority of payment of all affected claimants' Asbestos Claims, raising the level of scrutiny of additional information submitted from the same source or sources, refusing to accept evidence or claim submissions from the same source or sources, seeking the prosecution of the claimant or claimant's attorney for presenting a fraudulent claim in violation of 18 U.S.C. § 152, and seeking sanctions from the Bankruptcy Court.

SECTION 6.

CLAIMS MATERIALS

6.1 Claims Materials. The Asbestos Trust shall prepare suitable and efficient claims materials ("**Claims Materials**") for all Asbestos Claims, and shall provide such Claims Materials upon a written request for such materials to the Asbestos Trust. In developing its claim filing procedures, the Asbestos Trust shall make every effort to provide claimants with the opportunity to utilize currently available technology at their discretion, including filing claims and supporting documentation over the internet and electronically by disk or CD-ROM. The claim forms to be used by the Asbestos Trust shall be developed by the Trustee and submitted to the TAC and the FCR for approval; they may be changed by the Trustee with the consent of the TAC and the FCR.

6.2 Content of Claims Materials. The Claims Materials shall include a copy of this TDP, such instructions as the Trustee shall approve, and a detailed claim form. If requested by the claimant, the Asbestos Trust shall accept information provided electronically.

6.3 Withdrawal or Deferral of Claims. A claimant can withdraw an Uninsured Asbestos Claim

at any time upon written notice to the Asbestos Trust and file another claim subsequently without affecting the status of the claim for purposes of statutes of limitations or repose. All such claims filed after withdrawal shall be given a place in the applicable FIFO Processing Queue based on the date of such subsequent filing. A claimant can also request that the processing of his or her Asbestos Claim by the Asbestos 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 retain his or her original place in the FIFO Processing Queue. Except for Asbestos Personal Injury Claims held by representatives of deceased or incompetent claimants for which court or probate approval of the Asbestos Trust's offer is required, a claim shall be deemed to have been withdrawn if the claimant neither accepts, rejects, nor initiates arbitration within one (1) year of the Asbestos Trust's written offer of payment or rejection of the claim.

6.4 Filing Requirements and Fees. The Trustee shall have the discretion to determine, with the consent of the TAC and the FCR, whether a filing fee should be required for any Asbestos Claims.

6.5 Confidentiality of Claimants' Submissions. 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 Asbestos Trust will preserve the confidentiality of such claimant

submissions, and shall disclose the contents thereof only, with the permission of the holder, to another trust established for the benefit of asbestos personal injury claimants pursuant to section 524(g) of the Bankruptcy Code or other applicable law, to such other persons as authorized by the holder, or in response to a valid subpoena of such materials issued by the Bankruptcy Court, a Delaware State Court, or the United States District Court for the District of Delaware.

Furthermore, the Asbestos Trust shall provide counsel for the holder a copy of any such subpoena immediately upon being served; provided, however, that if a subpoena seeks records or information pertaining to more than fifty (50) claimants, the Asbestos Trust may instead first provide a copy of the subpoena to counsel for the TAC and the FCR and delay providing a copy of the subpoena to counsel for individual holders of Asbestos Claims until, in the Trustee's judgment, it appears likely that information or records relating to the holders may have to be produced in response to the subpoena. In such a case, the Asbestos Trust shall ensure that the notice that is provided to counsel for the holders allows such counsel sufficient time to object to the production. The Asbestos Trust shall on its own initiative or upon request of the claimant in question take all necessary and appropriate steps to preserve said privileges before the Bankruptcy Court, a Delaware State Court, or the United States District Court for the District of Delaware and before those courts having appellate jurisdiction related thereto.

Notwithstanding anything in the foregoing to the contrary, with the consent of the TAC and the FCR, the Asbestos Trust may, in specific limited

circumstances, disclose information, documents, or other materials reasonably necessary in the Asbestos Trust's judgment to preserve, litigate, resolve, or settle coverage, or to comply with an applicable obligation under an insurance policy or settlement agreement within the Asbestos Personal Injury Insurance Assets; provided, however, that 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.

Nothing in this TDP, the Plan or the Trust Agreement expands, limits or impairs the obligation under applicable law of a claimant to respond fully to lawful discovery in any underlying civil action regarding his or her submission of factual information to the Asbestos Trust for the purpose of obtaining compensation for asbestos-related injuries from the Asbestos Trust.

6.6 English Language. All claims, claim forms, submissions, and evidence submitted to the Asbestos Trust or in connection with any claim or its liquidation shall be in the English language.

SECTION 7.

GENERAL GUIDELINES FOR LIQUIDATING AND PAYING CLAIMS

7.1 Discretion to Vary the Order and Amounts of Payments in Event of Limited Liquidity. Consistent with the provisions hereof and subject to the FIFO Processing and Payment Queues and the Payment Percentage set forth above, the Trustee shall proceed as quickly as possible to liquidate valid Asbestos Claims, and shall make payments to holders of such claims in accordance with this TDP promptly as funds become available and as claims are liquidated, while maintaining sufficient resources to pay future valid claims in substantially the same manner.

Because the Asbestos Trust's assets and liabilities over time remain uncertain, and decisions about payments must be based on estimates that cannot be done precisely, such decisions may have to be revised in light of experiences over time, and there can be no guarantee of any specific level of payment to claimants. However, the Trustee shall use his or her best efforts to treat similar claims in substantially the same manner, consistent with his or her duties as Trustee, the purposes of the Asbestos Trust, and the practical limitations imposed by the inability to predict the future with precision.

In the event that the Asbestos Trust faces issues with respect to liquidity, the Trustee may, with the consent of the TAC and the FCR, (a) suspend the normal order of payment, (b) temporarily limit or suspend payments altogether, or (c) commence making payments on an installment basis.

7.2 Punitive Damages. Punitive or exemplary damages, *i.e.*, damages other than compensatory damages, shall not be considered or paid by the Asbestos Trust on any Asbestos Claim, notwithstanding their availability, or award, in the tort system.

7.3 Suits in the Tort System. If the holder of an Asbestos Claim disagrees with the Asbestos Trust's determination regarding the compensability or valuation of the subject Asbestos Claim, and if the holder has first submitted the claim to non-binding arbitration as provided in Section 5.8 above, the holder may file a lawsuit against the Asbestos Trust in any court of competent jurisdiction. Any such lawsuit must be filed by the claimant in his or her own right and name and not as a member or representative of a class, and no such lawsuit may be consolidated with any other lawsuit. All defenses (including, with respect to the Asbestos Trust, all defenses that could have been asserted by the Debtors, except as otherwise provided in the Plan) shall be available to both sides at trial; however, the Asbestos Trust may waive any defense and/or concede any issue of fact or law. If the claimant was alive at the time the initial Pre-Petition complaint was filed or on the date the claim form was filed with the Asbestos Trust, the case shall be treated as a personal injury case with all personal injury damages to be considered even if the claimant has died during the pendency of the claim.

7.4 Payment of Judgments for Money Damages. If and when a claimant obtains a judgment in the tort system against the Asbestos Trust, the claim shall be placed in the FIFO Payment Queue based on the date on which the judgment became final. Thereafter, the claimant shall receive from the Asbestos Trust an initial payment (subject to the applicable

Payment Percentage) of an amount equal to the greater of (i) the Asbestos Trust's last offer to the claimant or (ii) the award that the claimant declined in non-binding arbitration; provided, however, that in no event shall such payment amount exceed the amount of the judgment obtained in the tort system. The claimant shall receive the balance of the judgment, if any, in five (5) equal installments in years six (6) through ten (10) following the year of the initial payment (also subject to the applicable Payment Percentage in effect on the date of the payment of the subject installment).

Under no circumstances shall the Asbestos Trust pay exemplary or punitive damages or interest under any statute on any judgments obtained in the tort system as provided in Section 7.2 above.

7.5 Releases. The Trustee shall, with the consent of the TAC and the FCR, determine the form and substance of the release to be provided to the Asbestos Trust. As a condition to receiving any payment from the Asbestos Trust, a claimant or, in the case of an Indirect Asbestos Claim, an Indirect Claimant and the related Direct Claimant shall be required to execute such release. The Trustee may modify the provisions of this release with the consent of the TAC and the FCR.

SECTION 8.

MISCELLANEOUS

8.1 Amendments.

8.1(a) Amendments in General. Except as otherwise provided herein, the Trustee may amend, modify, delete, or add to any provisions of this TDP, provided the Trustee first obtains the consent of the TAC and the FCR pursuant to the consent process set

forth in Sections 5.7(b) and 6.6(b) of the Trust Agreement. Nothing herein is intended to preclude the TAC or the FCR from proposing to the Trustee, in writing, amendments to this TDP. Any amendment proposed by the TAC or the FCR shall remain subject to Section 7.3 of the Trust Agreement.

8.1(b) Amendments Related to a Settlement with Truck. In the event the Asbestos Trust, with the consent of the TAC and the FCR, reaches a settlement with Truck on or after the Effective Date that resolves Truck's asbestos insurance coverage, such settlement shall require the approval of the Bankruptcy Court. To the extent such settlement requires a revision of this TDP, such revision shall likewise require the consent of the TAC and the FCR, and the approval of the Bankruptcy Court.

8.2 Severability. Should any provision contained in this TDP be determined to be unenforceable, such determination shall in no way limit or affect the enforceability or operative effect of any and all other provisions of this TDP. Should any provision contained in this TDP be determined to be inconsistent with or contrary to the Debtors' obligations to any Asbestos Insurer, the Asbestos Trust with the consent of the TAC and the FCR may amend this TDP and/or the Trust Agreement to make the provisions of either or both documents consistent with the duties and obligations of the Debtors to their Asbestos Insurers.

8.3 Governing Law. Except for purposes of determining the validity and/or liquidated value of any Asbestos Claim, administration of this TDP shall be governed by, and construed in accordance with, the laws of the State of Delaware. The law governing the determination of validity and/or liquidation of Asbestos Claims in the case of arbitration shall be the laws

of the State of Delaware and in the case of litigation in the tort system shall be decided by the choice-of-law rules applicable in the state or federal court where the lawsuit is filed.

APPENDIX I: AUTHORIZATION FOR ASBESTOS TRUST TO OBTAIN TRUST RECORDS

AUTHORIZATION FOR RELEASE OF RECORDS OF OTHER ASBESTOS TRUSTS AND CLAIM RESOLUTION FACILITIES

TO WHOM IT MAY CONCERN:

The Claimant named below hereby authorizes each asbestos trust and claim resolution facility listed in the attachment hereto to provide directly to the Kaiser Gypsum Asbestos Personal Injury Trust (the "Asbestos Trust"), or any of its representatives, all submissions made by Claimant and (if different from the Claimant) the party whose injury forms the basis of the claim (the "Injured Party"), including claim forms, any attachments to claim forms, and any amended or supplemental claim forms. Claimant expressly acknowledges that the other asbestos trust or claim resolution facility may provide such documents directly to the Asbestos Trust and need not obtain any further authorization from the Claimant or his/her representatives.

A copy of this Authorization shall be as valid as the original. This Authorization contains no expiration date and may be exercised by the Asbestos Trust at any time. If Claimant's representative has signed this Authorization, a notarized power of attorney is attached.

Name of Claimant: _____
Social Security No.: _____
Date of Birth: _____

Name of Injured Party (if different from Claimant): _____

Social Security No.: _____

Date of Birth: _____

Name of representative for Claimant or Injured Party: _____

Signing party: _____

Signature: _____

Date: _____

Notarized:

Attachment: List of Asbestos Trusts and Claim Resolution Facilities

List of Other Asbestos Trusts and Claim Resolution Facilities

A&I Corp. Asbestos Bodily Injury Trust	Forty-Eight Insulations Qualified Settlement Trust	Raytech Corp. Asbestos Personal Injury Settlement Trust
A-Best Asbestos Settlement Trust	Fuller-Austin Asbestos Settlement Trust	Rock Wool Mfg Company Asbestos Trust
AC&S Asbestos Settlement Trust	G-I Asbestos Settlement Trust	Rutland Fire Clay Company Asbestos Trust
Amatex Asbestos Disease Trust Fund	H.K. Porter Asbestos Trust	Shook & Fletcher Asbestos Settlement Trust
APG Asbestos Trust	Hercules Chemical Company, Inc. Asbestos Trust	Skinner Engine Co. Asbestos Trust
API, Inc. Asbestos Settlement Trust	J.T. Thorpe Settlement Trust	Stone and Webster Asbestos Trust
Armstrong World Industries Asbestos Personal Injury Settlement Trust	JT Thorpe Company Successor Trust	Swan Asbestos and Silica Settlement Trust

ARTRA 524(g) Asbestos Trust	Kaiser Asbestos Personal Injury Trust	T H Agriculture & Nutrition, LLC Industries Asbestos Personal Injury Trust
ASARCO LLC Asbestos Personal Injury Settlement Trust	Keene Creditors Trust	Thorpe Insulation Company Asbestos Personal Injury Settlement Trust
Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust	Lummus 524(g) Asbestos PI Trust	United States Gypsum Asbestos Personal Injury Settlement Trust
Bartells Asbestos Settlement Trust	Lykes Tort Claims Trust	United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust
Brauer 524(g) Asbestos Trust	M.H. Detrick Company Asbestos Trust	United States Mineral Products Company Asbestos Personal Injury Settlement Trust

Burns and Roe Asbestos Personal Injury Settlement	Manville Personal Injury	UNR Asbestos-Disease
Trust	Settlement Trust	Claims Trust
C.E. Thurston & Sons Asbestos Trust	Muralo Trust	Utex Industries, Inc. Successor Trust
Celotex Asbestos Settlement Trust	NGC Bodily Injury Trust	Wallace & Gale Company Asbestos Settlement Trust
Combustion Engineering 524(g) Asbestos PI Trust	Owens Corning Fibreboard Asbestos Personal Injury Trust (OC Sub-Fund)	Western MacArthur-Western Asbestos Trust
Congoleum Plan Trust	Owens Corning Fibreboard Asbestos Personal Injury Trust (FB Sub-Fund)	W.R. Grace Trust
DII Industries, LLC Asbestos PI Trust	PLI Disbursement Trust	Pittsburgh Corning Trust

Eagle-Picher Industries Personal Injury Settlement Trust	Plibrico Asbestos Trust	Bondex Trust
Federal Mogul U.S. Asbestos Personal Injury Trust	Porter Hayden Bodily Injury Trust	Flintkote Company and Flintkote Mines Limited Asbestos Personal Injury Trust
MLC Asbestos Personal Injury Trust	Metex Asbestos Trust	Leslie Controls, Inc. Asbestos Personal Injury Trust
Plant Insulation Company Asbestos Settlement Trust	Quigley Co. Inc. Asbestos Personal Injury Trust	Yarway Asbestos Personal Injury Trust
GST Settlement Facility	Geo. V. Hamilton, Inc. Asbestos Trust	

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

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

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CONFIRMATION OF THE JOINT PLAN OF REORGANIZATION OF KAISER GYPSUM COMPANY, INC. AND HANSON PERMANENTE CEMENT, INC., AS MODIFIED

* * *

[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.

INTRODUCTION

WHEREAS, Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc. (together, the "Debtors" and, as reorganized entities after emergence, the "Reorganized Debtors") proposed the Third Amended Joint Plan of Reorganization of Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc., dated October 14, 2019 [Conf. Exhibit 1][2] (as amended by the modifications set forth in the blackline of the Plan in Exhibit B attached to the Confirmation Order, and as may be further amended, the "Plan");[3]

WHEREAS, on October 23, 2019, the Bankruptcy Court signed its Order (I) Approving the Debtors' Disclosure Statement, (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Proposed Joint Plan of Reorganization and (III) Scheduling a Hearing on Confirmation of Proposed Joint Plan of Reorganization and Approving

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[2] "D.I." refers to docket entries in the Debtors' lead bankruptcy case, 16-31602.

[3] Capitalized terms and phrases used herein have the meanings given to them in the Plan. The rules of interpretation set forth in Section I.B.l of the Plan apply to these Findings of Fact and Conclusions of Law (the "Findings and Conclusions") and to the order confirming the Plan (the "Confirmation Order"), which is being issued concurrently herewith. In addition, in accordance with Section I.A of the Plan, any term used in the Plan, these Findings and Conclusions or the Confirmation Order that is not defined in the Plan, these Findings and Conclusions or the Confirmation Order, but that is used in the Bankruptcy Code or the Bankruptcy Rules, has the meaning given to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable. A copy of the Plan (without the exhibits thereto) is attached to the Confirmation Order as Exhibit A and is incorporated herein by reference.

Related Notice Procedures [Conf. Exhibit 16] (the "Disclosure Statement Order"), by which the Bankruptcy Court, among other things, approved the Debtors' proposed disclosure statement (the "Disclosure Statement"), established procedures for the solicitation and tabulation of votes to accept or reject the Plan and scheduled a hearing to consider Confirmation of the Plan for March 30, 2020, which hearing was continued to and held on July 20, 2020 and July 22, 2020, with the Bankruptcy Court giving its oral ruling on August 13, 2020 (the "Confirmation Hearing");

WHEREAS, affidavits of service were executed by Prime Clerk LLC, the Bankruptcy Court-appointed notice, claims and solicitation agent ("Prime Clerk"), with respect to the mailing of notice of the Confirmation Hearing and solicitation materials in respect of the Plan in accordance with the Disclosure Statement Order (collectively, the "Affidavits of Service") and were filed with the Bankruptcy Court [D.I. 1892, 1904, 1911, 1938, 1947, 1948, 2007, 2042, 2168, 2172, 2178];[4]

WHEREAS, the Declaration of Anna Jadonath [D.I. 1903] (the "Publication Declaration") was filed with the Bankruptcy Court on November 14, 2019, regarding the publication of the Notice of (I) Deadline for Casting Votes to Accept or Reject Proposed Joint Plan of Reorganization, (II) Hearing to Consider Confirmation of Proposed Joint Plan of Reorganization and (III) Related Matters and/or the other forms of

[4] The Affidavits of Service were filed on November 6, 2019, November 14, 2019, November 20, 2019, December 17, 2019, January 2, 2020, January 6, 2020, February 7, 2020, February 14, 2020, March 24, 2020, March 30, 2020 and April 20, 2020.

publication notice approved by the Bankruptcy Court as set forth in the Disclosure Statement Order;

WHEREAS, the Declaration of Cameron R. Azari, Esq. on Implementation of Notice Regarding the Joint Plan of Reorganization of Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc. [Conf. Exhibit 21] (the "Notice Declaration") was filed with the Bankruptcy Court on July 1, 2020, attesting to publication notice of the Plan;

WHEREAS, the Declaration of James Daloia of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Third Amended Joint Plan of Reorganization of Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc. [Conf. Exhibit 20] (the "Voting Agent Declaration") was filed with the Bankruptcy Court on July 1, 2020, attesting to the results of the tabulation of the properly executed and timely received Ballots for the Plan as follows:

> **Class 4 Claimants.** The Debtors received 24,310 acceptances out of 24,310 votes from holders of Class 4 Asbestos Personal Injury Claims, with Class 4 claimants who voted in favor of the Plan holding Claims in the amount of $2,439,570,176.00 for voting purposes only, such acceptances being 100 percent in number and 100 percent in amount of all ballots received from holders of Class 4 Asbestos Personal Injury Claims (Voting Agent Decl. ¶ 10.);

WHEREAS, the Debtors made non-material modifications to the Plan, which are set forth in Exhibit B attached to the Confirmation Order (collectively, the "Modifications");

WHEREAS, Truck Insurance Exchange ("Truck") filed an objection to the Plan [D.I. 2070] and a consolidated response to the Plan Proponents' briefing [D.I. 2359] (together, the "Objection"), as well as various affidavits in support of its Objection [Conf. Exhibits 37, 65-67];

WHEREAS, the Objecting Excess Insurers made the Objecting Excess Insurers' Objections, and voluntarily withdrew them when the Plan was modified to insert, among other things, Section IV.M.3.a., entitled, "Settlement with Truck;"

WHEREAS, the Debtors filed a memorandum of law in support of Confirmation of the Plan [D.I. 2275] and a reply to Truck's consolidated response [D.I. 2377], and the Asbestos Personal Injury Committee (the "ACC") and the Future Claimants' Representative (the "FCR") filed an omnibus reply in support of the Plan [D.I. 2274] and a joint reply to Truck's consolidated response [D.I. 2376] (collectively, the "Memoranda of Law");

WHEREAS, the declarations of Kevin O'Neal Holdeman [Conf. Exhibit 23], John D. Bittner [Conf. Exhibit 22], Charles E. McChesney II [Conf. Exhibit 19] and Lawrence Fitzpatrick [Conf. Exhibit 18] were submitted in support of the Plan (collectively, the "Declarations");

WHEREAS, the Court has reviewed the Plan, the Disclosure Statement, the Disclosure Statement Order, the Voting Agent Declaration, the Affidavits of Service, the Publication Declaration, the Notice Declaration, the Memoranda of Law, the Declarations and the other pleadings before the Court in connection

with the Confirmation of the Plan, including the objections filed to the Plan;[5]

WHEREAS, the Court has considered the arguments of counsel made on the record at the Confirmation Hearing;

WHEREAS, the Court has considered all evidence presented and admitted into the record at the Confirmation Hearing;

WHEREAS, the Court has taken judicial notice of the papers and pleadings on file in these Reorganization Cases, including any related adversary proceedings;

WHEREAS, the Court, after due deliberation and for sufficient cause, finds that the evidence admitted in support of the Plan at the Confirmation Hearing is persuasive and credible;

NOW, THEREFORE, the Court enters the following Findings of Fact and Conclusions of Law with respect to Confirmation of the Plan.[6]

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[5] Truck's Objection was the only unresolved objection as of the Confirmation Hearing.

[6] The Bankruptcy Court made additional findings and conclusions on the record at the Confirmation Hearing, which findings and conclusions are adopted and fully incorporated herein.

I. FINDINGS OF FACT.[7]

A. HISTORY OF THE DEBTORS' ASBESTOS PERSONAL INJURY AND ENVIRONMENTAL LIABILITIES.

1. Background.

Debtor HPCI owns the Permanente Property, which consists of more than 3,400 acres of land that includes a cement plant, rock plant and quarry (including the minerals) located in Santa Clara County, California. (McChesney Decl. ¶ 10.) HPCI leases the Permanente Property to its non-debtor affiliate Lehigh Southwest Cement Company ("Lehigh Southwest"), pursuant to a July 1, 2008 Master Agreement Regarding Permanente Cement Plant, Quarry and Rock Plant and a July 1, 2008 Quarry Mineral Lease Agreement (together, the "Permanente Leases") (Id.) Under the Permanente Leases, HPCI receives rent, royalties and other payments from Lehigh Southwest, which, in tum, operates the cement plant, rock plant and quarry and assumes responsibility for the Permanente Property's operating costs. (Id.) The Permanente Leases further provide that HPCI is obligated to fund capital expenditures for the cement plant, quarry and rock plant, and reclamation obligations related to the quarry. (Id.) In accordance with an agreement reached with the ACC, the FCR and the Creditors' Committee, and as approved by the Bankruptcy Court in its April 10, 2017 Agreed Order Amending

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[7] These Findings and Conclusions constitute the Court's findings of fact and conclusions of law under Fed. R. Civ. P. 52. Any finding of fact shall constitute a finding of fact even if it is referred to as a conclusion of law, and any conclusion of law shall constitute a conclusion of law even if it is referred to as a finding of fact.

the Interim DIP Financing Order [Conf. Exhibit 24], HPCI has not been paying its obligations to fund capital expenditures and reclamation under the Permanente Leases, subject and without prejudice to Lehigh Southwest's right to accrue those ongoing obligations. (Id.)

The Debtors are wholly-owned, indirect subsidiaries of Lehigh Hanson, Inc. ("Lehigh Hanson"). (Id. ¶ 9.) Lehigh Hanson is not a Debtor in these Reorganization Cases. (Id.) HPCI is the direct parent of Kaiser Gypsum, non-debtor Permanente Cement Company and two operating non-debtor subsidiaries, Hanson Micronesia Cement, Inc. and Hanson Permanente Cement of Guam, Inc. (together, the "Operating Subsidiaries"), which distribute and sell cement in key markets in the Pacific region, including Saipan and Guam. (Id.) Lehigh Hanson provides the funding required by the Operating Subsidiaries. (Id.) Non-debtor Permanente Cement Company has no assets or operations. (Id.)

Kaiser Gypsum currently has no material tangible assets or business operations, other than managing its significant, legacy asbestos-related and environmental liabilities described below. (Id. ¶ 11.) Under the Plan, the Debtors' non-debtor affiliate, Lehigh Cement Company LLC ("Lehigh Cement"), will transfer to Kaiser Gypsum its interests in certain real property located in Kosse, Limestone County, Texas and Kunkletown, Monroe County, Pennsylvania (together, the "Real Properties"), together with Lehigh Cement's rights under certain leases related to the Real Properties. (Id.) Based on the Projections, Kaiser Gypsum is expected to generate net cash flows of approximately $68,000 and $93,000 in 2020 and 2021, respectively. (Bittner Decl. ¶ 30.)

2. General Overview of the Debtors' Manufacture and Sale of Products Alleged to Contain Asbestos.

Kaiser Gypsum's principal business consisted of manufacturing and marketing gypsum plaster, gypsum lath and gypsum wallboard. (Declaration of Charles E. McChesney II in Support of First Day Pleadings [Conf. Exhibit 36] (the "First Day Declaration") ¶ 25.)

In connection with its wallboard business, Kaiser Gypsum marketed, manufactured and sold products categorized as "wallboard accessories," which included joint compounds, texture paints and other similar products used to laminate wallboard or cover radiant heat surfaces and cables. (McChesney Decl. ¶ 12.) Certain versions of these wallboard accessories included asbestos during varying time periods. (Id.) In addition to wallboard accessory products, Kaiser Gypsum manufactured mineral fiberboard products, which are used for acoustical ceiling tile and lay-in board that also contained asbestos. (Id.) By 1978, Kaiser Gypsum had sold substantially all its assets and ceased to be involved in any product manufacturing. (Id.)

HPCI's primary business was the manufacture and sale of Portland cement products, which is a fine powdery substance that is mixed with water and an aggregate, such as gravel or sand, to form concrete. (Id. ¶ 13.) HPCI made two types of products—"masonry cement," and "plastic cement"—that in certain versions and at certain times contained asbestos.

3. History of the Debtors' Asbestos Personal Injury Litigation.

The Debtors' asbestos-related liabilities arise from their manufacture and sale of certain products that contained asbestos. (McChesney Decl. ¶ 12.) Although asbestos was removed from each of the Debtor's products, the Debtors have been the subject of thousands of lawsuits. (Id. ¶ 14.) Since 1978, one or both of the Debtors have been named in more than 38,000 asbestos-related lawsuits. (Id.) As of August 31, 2016, the Debtors were named as defendants in approximately 14,000 asbestos-related bodily injury lawsuits pending in courts across the country. (Id.)

4. Asbestos Personal Injury Insurance and Coverage Litigation.

Truck issued a Comprehensive General Liability policy, renewed annually, that covered the Debtors from January 1, 1965 through April 1, 1983 (collectively, the "Truck Policies"). (McChesney Decl. ¶ 15.) As a result of over 19 years of litigation,[8] it is now settled that: (a) Truck must defend each covered Asbestos Personal Injury Claim (without eroding coverage) and indemnify the Debtors for such claims up to the $500,000 per claim limit of the Truck Policy year selected by the Debtors;[9] and (b) the Debtors' excess

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[8] Certain issues in asbestos coverage litigation are the subject of an appeal pending in the California Court of Appeal (No. B278091); however, those issues do not address (and will not alter) the fundamental aspects of the Debtors' coverage for Asbestos Personal Injury Claims under the Truck Policies.

[9] Although the per-occurrence limit and deductibles under the Truck Policies vary, virtually all Asbestos Personal Injury Claims have triggered a policy year with a $5,000 deductible and a $500,000 per claim primary product liability insurance limit. (McChesney Decl. ¶ 15, n.4.)

insurers are obligated under their policies (each an "Excess Policy") to respond to an Asbestos Personal Injury Claim and indemnify the Debtors for amounts in excess of the $500,000 Truck policy limit. (Id.) The Excess Policy obligated to respond corresponds to the Truck policy year selected by the Debtors. (Id.) In addition, there exists certain excess coverage available to pay asbestos claims outside the policy periods of the Truck Policies, and the Plan includes an exhibit list identifying all known available excess insurance policies that provide coverage for asbestos claims. (Plan Exhibit IV.M.3, List of Asbestos-Only Policies.)

In December 2013, the Debtors and certain of their excess insurers entered into a confidential coverage in place agreement (the "Excess CIP Agreement") with respect to the Debtors' excess coverage. (Id. ¶ 16.) The Excess CIP Agreement provides, among other things, that: (a) the excess insurers that are party to the Excess CIP Agreement will provide coverage for the Asbestos Personal Injury Claims in amounts above Truck's primary policy limit of $500,000, notwithstanding the insolvencies of certain excess insurers; and (b) the Debtors will pay to the excess insurers some portion of any funds distributed from insolvent asbestos insurers in accordance with a formula set forth in the Excess CIP Agreement. (Id.)

Although the Debtors successfully established insurance coverage for substantially all of the Asbestos Personal Injury Claims before filing for bankruptcy, they still faced substantial costs and risks associated with asbestos-related lawsuits. (Id. ¶ 17.) The Debtors were obligated to pay policy deductibles, owing more than $3 million in deductibles as of the Petition Date, and faced liability for uninsured judgments and claims, including punitive damages. (Id.) In at least

three prepetition cases, juries awarded punitive damages against the Debtors in amounts ranging from $100,000 to $20,000,000. (Id.)

5. The Debtors' Environmental Liabilities.

One or both of the Debtors also have alleged environmental liabilities arising from formerly owned and/or operated properties located in St. Helens, Oregon and Seattle, Washington.[10] (McChesney Decl. ¶ 18.)

Both Debtors owned and operated facilities in the Seattle area during periods between 1929 and 1987. (Id. ¶ 20.) HPCI operated a cement plant, and owned and operated a ready-mix cement plant and a bulk cement receiving, storage and distribution facility. (Id.) Kaiser Gypsum owned and operated the same cement plant, as well as a gypsum plant and a gypsum accessories facility. (Id.) All of these facilities were on or adjacent to the Lower Duwamish Waterway, an industrial waterway near Seattle, Washington. (Id.) By 1978, Kaiser Gypsum had sold all of its operations in the Seattle area, and by 1987, HPCI had sold all of its facilities in Seattle. (Id.)

In 1956, Kaiser Gypsum acquired a fiberboard manufacturing facility in St. Helens, Oregon that produced ceiling tiles, ceiling panels and related products. (Id. ¶ 19.) In 1978, Kaiser Gypsum sold the plant to Owens Corning Fiberglas Corporation ("Owens Corning"). (Id.) In 1987, the plant was sold to Armstrong World Industries, Inc. ("Armstrong"), which closed the plant in 2018. (Id.)

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[10] HPCI never owned or operated the St. Helens plant. (McChesney Decl. ¶ 18, n.5.)

A five-mile stretch of the Lower Duwamish Waterway is a United States Environmental Protection Agency (the "EPA") Superfund site (the "Lower Duwamish Superfund Site" and, together with the aforementioned former Seattle area facilities adjacent to the Lower Duwamish Superfund Site and the St. Helens site, the "Two Sites") involving approximately 120 potentially responsible parties ("PRPs"), including the Debtors. (Id. ¶ 21.)

6. Environmental Insurance.

The Debtors believe that they have liability insurance that provides coverage for their environmental liabilities relating to their formerly owned plants in Seattle and St. Helens. (Id. ¶ 22.) On September 29, 2016, the Debtors filed suit against their environmental insurers in state court in Oregon seeking coverage for defense and indemnity costs incurred and to be incurred with respect to their environmental liabilities at the Two Sites. (Id.)

B. PREPETITION DISCUSSIONS WITH REPRESENTATIVES OF ASBESTOS CLAIMANTS.

Prior to the Petition Date, an ad hoc committee of asbestos personal injury claimants (the "Ad Hoc Committee") consisting of law firms that have filed Asbestos Personal Injury Claims against the Debtors was formed to engage in discussions with the Debtors regarding the terms of a consensual plan of reorganization. (First Day Decl. ¶ 46.) Following its formation, the Ad Hoc Committee retained bankruptcy counsel, insurance counsel, a financial advisor and an asbestos estimation consultant. (Id.) The Ad Hoc Committee's work prepetition included gathering, review and analysis of information regarding the Debtors. In that

regard, the Ad Hoc Committee delivered to the Debtors a series of information requests and, in response thereto, the Debtors provided the Ad Hoc Committee with numerous documents and other information. (Id.) Prior to the Petition Date, the Debtors and the Ad Hoc Committee also agreed on the selection of Lawrence Fitzpatrick as the FCR. (Id.) Mr. Fitzpatrick retained his own counsel and an estimation consultant. (Id.) The Debtors provided the FCR and his professionals with the same information they furnished to the Ad Hoc Committee. (Id.)

Prepetition meetings and other communications occurred among some or all of the Debtors, Truck, the Ad Hoc Committee and the FCR. (First Day Decl. ¶ 47.) Communications between the Debtors and certain of the excess carriers also took place. (Id.) Among other things, the parties discussed the filing of the Reorganization Cases and potential paths forward to a consensual plan. (Id.) Although all the parties indicated a desire to reach agreement on a consensual reorganization plan, due to time constraints, the parties were not able to engage in substantive discussions regarding the terms of a plan prior to the Petition Date. (Id.)

C. DEBTORS' DECISION TO FILE THE REORGANIZATION CASES.

The Debtors filed these Reorganization Cases to fairly and permanently resolve their legacy asbestos and environmental liabilities. (McChesney Decl. ¶ 23.) Resolving these liabilities in accordance with the Plan will benefit both the Debtors and their creditors by, among other things, (a) eliminating the ongoing costs, administrative burdens, risks and distractions that the Debtors have been subjected to from these decades-old liabilities, and (b) providing for

(i) the liquidation in the tort system and the payment of current and future Asbestos Personal Injury Claims from the Asbestos Personal Injury Trust and the Debtors' asbestos insurers and (ii) the payment in full on the Plan's Effective Date of all Allowed General Unsecured Claims, including Allowed Environmental Claims. (Id.)

D. APPOINTMENT OF THE CREDITORS' COMMITTEE, THE ASBESTOS PERSONAL INJURY COMMITTEE AND FUTURE CLAIMANTS' REPRESENTATIVE.

On October 14, 2016, the Bankruptcy Court entered an order appointing the Creditors' Committee pursuant to section 1102 of the Bankruptcy Code. [D.I. 84]. On August 30, 2019, the Creditors' Committee filed a motion [D.I. 1771] indicating that members Owens Corning and Armstrong were retiring from the committee and requesting Ash Grove Cement Company ("Ash Grove") be substituted as a member of the committee for such retiring members. On October 17, 2019, the Bankruptcy Court entered an order [D.I. 1864] granting the Creditors' Committee's motion. On October 19, 2016, the Bankruptcy Court entered an order appointing the ACC pursuant to section 1102 of the Bankruptcy Code. [D.I. 100] With the assistance of counsel and other advisers, the ACC has been active in all aspects of the Debtors' cases, including numerous investigations and ultimately the negotiation of the Term Sheet leading to the Plan.

In addition, by order dated October 19, 2016 [D.I. 99], the Bankruptcy Court approved the appointment of Lawrence Fitzpatrick as the FCR. Mr. Fitzpatrick has extensive experience with the resolution of asbestos-related personal injury claims and asbestos

bankruptcy cases. (Fitzpatrick Decl. ¶¶ 4-10.) With the assistance of counsel and other advisors, Mr. Fitzpatrick has been involved in all aspects of the Debtors' Reorganization Cases.

E. RESOLUTION OF THE REORGANIZATION CASES.

1. Settlement Regarding Asbestos Personal Injury Claims.

On October 20, 2017, the Debtors and Lehigh Hanson reached an agreement in principle with the ACC and the FCR on the treatment of present and future Asbestos Personal Injury Claims. (McChesney Decl. ¶ 26.) The Plan implements that settlement by, among other things, providing for the creation and funding of the Asbestos Personal Injury Trust to resolve Asbestos Personal Injury Claims pursuant to section 524(g) of the Bankruptcy Code. (Id.) The Asbestos Personal Injury Trust to be created under the Plan will be funded with a $49 million cash payment by the Debtors or Lehigh Hanson, a $1 million Payment Note, the first $12 million of net recovery on Phase 1 Claims, if any (after the Asbestos Personal Injury Trust Appellate Costs have been deducted) and the assignment of the Debtors' rights under insurance policies covering Asbestos Personal Injury Claims. (Id.; Fitzpatrick Decl. ¶ 16.) The Plan provides that, with respect to the Debtors' Insured Asbestos Claims, the insurer's defense rights will be preserved and asbestos claimants will be permitted to continue to assert actions against the Reorganized Debtors in name only in the tort system to collect available insurance. (Plan §§ III.B.4., IV.L, IV.Q.) The Asbestos Personal Injury Trust will fairly and equitably satisfy the Asbestos Personal Injury Claims in accordance with the

Asbestos Personal Injury Trust Distribution Procedures, described below.

2. Settlements Regarding Environmental Claims.

The Debtors successfully negotiated settlement agreements with the Oregon Department of Environmental Quality (the "DEQ") regarding the St. Helens site and the United States regarding the Lower Duwamish Superfund Site. (McChesney Decl. ¶ 29.) The Debtors also reached settlement agreements with other environmental creditors, multiple insurers and several co-PRPs regarding the Two Sites. (Id.)

In particular, the Debtors have negotiated and the Bankruptcy Court has approved settlements with (a) Armstrong [D.I. 1556], pursuant to which Armstrong withdrew its proofs of Claim with respect to the St. Helens site and paid the Debtors $1 million; (b) Owens Corning [D.I. 1558], pursuant to which Owens Corning's proofs of Claim were deemed withdrawn and Owens Corning was deemed to waive and release any Claims against the Debtors related to the St. Helens site; (c) the DEQ [D.I. 1625], pursuant to which the Debtors agreed to pay in full an Allowed General Unsecured Claim in the amount of $67 million; (d) the City of Seattle (the "City") [D.I. 1602], pursuant to which the City will have an Allowed General Unsecured Claim in the amount of $80,951.87 against each of the Debtors; (e) the Port of Seattle (the "Port") [D.I. 1603], pursuant to which the Port will have an Allowed General Unsecured Claim in the amount of $81,815.22 against each of the Debtors; (f) King County, Washington (the "County") [D.I. 1604], pursuant to which the County will have an Allowed General Unsecured Claim in the amount of $85,255.87 against each of the Debtors; (g) The Boeing Company

("Boeing") [D.I. 1601], pursuant to which Boeing will have an Allowed General Unsecured Claim in the amount of $137,500.00 against each of the Debtors; and (h) Ash Grove [D.I. 1908], pursuant to which Ash Grove will have an Allowed General Unsecured Claim in the amount of $8,618.42 against each of the Debtors. (McChesney Decl. ¶ 30.)

In addition, the Bankruptcy Court entered an order [D.I. 1789] approving the Debtors' settlement with the United States, on behalf of the EPA and the United States Department of Interior, acting through the U.S. Fish and Wildlife Service (the "DOI"), and the United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration (the "NOAA"), pursuant to which the Debtors agreed to the allowance and payment in full of the following general unsecured claims: (a) Proof of Claim No. 10 (EPA) in the amount of $1,300,000 against Kaiser Gypsum; (b) Proof of Claim No. 11 (EPA) in the amount of $1,300,000 against HPCI; (c) Proof of Claim No. 9 (NOAA) in the amount of $200,000 against Kaiser Gypsum; (d) Proof of Claim No. 6 (NOAA) in the amount of $200,000 against HPCI; (e) Proof of Claim No. 7 (DOI) in the amount of $200,000 against Kaiser Gypsum; and (f) Proof of Claim No. 8 (DOI) in the amount of $200,000 against HPCI. (Id. ¶ 31.) The Debtors' agreement with the United States also resolved the following claims filed by Ash Grove on behalf of the United States: (a) Proof of Claim No. 648 (EPA) in the amount of $325,000 against Kaiser Gypsum; (b) Proof of Claim No. 653 (EPA) in the amount of $325,000 against HPCI; (c) Proof of Claim No. 651 (NOAA) in the amount of $50,000 against Kaiser Gypsum; (d) Proof of Claim No. 650 (NOAA) in the amount of $50,000 against HPCI; (e) Proof of Claim No. 649 (DOI) in the amount

of $50,000 against Kaiser Gypsum; and (f) Proof of Claim No. 652 (DOI) in the amount of $50,000 against HPCI. (Id.)

Under applicable law and in accordance with the terms of the settlements with the DEQ and the United States, the Debtors received contribution protection with respect to the matters addressed in each settlement concerning the Two Sites. (McChesney Decl. ¶ 32.)

The Debtors also reached settlement agreements with the following insurers to resolve disputes with respect to environmental insurance coverage, which have been approved by the Bankruptcy Court (the "Environmental Insurance Settlements"): (a) London Market Insurers and Continental Insurance Company, Columbia Casualty Company, and National Fire Insurance Company of Hartford; (b) Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, PA; (c) Truck; (d) Westchester Fire Insurance Company and Westchester Surplus Lines Insurance Company; (e) Hartford Fire Insurance Company, First State Insurance Company, New England Insurance Company and Twin City Fire Insurance Company; (f) Munich Reinsurance America, Inc. and Executive Risk Indemnity, Inc.; (g) Transport Insurance Company, as successor in interest to Transport Indemnity Company; (h) Allstate Insurance Company, as successor in interest to Northbrook Excess and Surplus Insurance Company f/k/a Northbrook Insurance Company; (i) Westport Insurance Corporation, formerly known as Employers Reinsurance Corporation; and (j) Allianz Underwriters Insurance Company and Fireman's Fund Insurance Company. (McChesney Decl. ¶ 33.) In addition, the Debtors negotiated a further settlement

agreement with Associated International Insurance Company and Transamerica Premier Ins. Co. and TIG Insurance Company [D.I. 2136], which has been approved by the Bankruptcy Court. (Id.) Pursuant to these settlements, the insurers will pay the Debtors a total of approximately $50.8 million to buy back certain of the Debtors' rights to environmental insurance coverage free and clear of all liens, claims, encumbrances and interests. (Id.) These settlements will not affect coverage for Asbestos Personal Injury Claims. (Id.)

3. Settlement with Lehigh Hanson.

Finally, the Debtors reached an agreement with Lehigh Hanson, pursuant to which Lehigh Hanson has agreed to contribute up to $28.15 million, minus the amount of the Insolvent Insurers Proceeds to which the Debtors are determined to be entitled, for the payment of Allowed General Unsecured Claims under the Plan. (Id. ¶ 34; Plan § IV.E.)

4. Sufficient Funds to Pay All Allowed General Unsecured Claims.

As a result of all the agreements described above, the Debtors will have sufficient funds to pay all Allowed General Unsecured Claims in full. (Bittner Decl. ¶ 24; McChesney Decl. ¶ 35.) The Debtors estimate that the aggregate amount of Allowed General Unsecured Claims is approximately $72,569,631.[11] (Bittner Decl. ¶ 22; McChesney Decl. ¶ 35.) As a result of the Environmental Insurance Settlements and

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[11] This figure does not include any amounts with respect to the currently disputed Claims held by Glacier Northwest, Inc. but includes an amount of $465,140.83 to reflect the amount at which the disputed Truck Claim was resolved by the Bankruptcy Court in advance of the Confirmation Hearing.

the agreement with Lehigh Hanson, the Debtors will have available funds sufficient to pay that amount. (Bittner Decl. ¶ 24; McChesney Decl. ¶ 35.)

F. MODIFICATIONS TO THE PLAN.

The Modifications to the Plan do not materially or adversely affect or change the treatment of any Claim against or Interest in any Debtor and fully comply with all applicable provisions of the Bankruptcy Code and Rules.

G. COMPLIANCE WITH THE REQUIREMENTS OF SECTION 1129 OF THE BANKRUPTCY CODE.

1. Section 1129(a)(1)—Compliance of the Plan with Applicable Provisions of the Bankruptcy Code.

The Plan complies with all applicable provisions of the Bankruptcy Code, as required by section 1129(a)(1) of the Bankruptcy Code, including sections 1122 and 1123 of the Bankruptcy Code.

a. Sections 1122 and 1123(a)(1)-(4)—Classification and Treatment of Claims and Interests.

i. The Plan, which constitutes a separate plan of reorganization for each of the Debtors, meets the classification requirements of sections I 122(a) and 1123(a)(1)-(4) of the Bankruptcy Code. Article II of the Plan classifies Claims and Interests into seven separate categories. (Plan art. II.) In particular, Article II of the Plan segregates into separate Classes Priority Claims (Class 1), Secured Claims (Class 2), General Unsecured Claims (Class 3), Asbestos Personal Injury Claims (Class 4), Surety Bond Claims (Class 5), Intercompany Claims (Class 6) and Stock

Interests (Class 7). The number of Classes reflects the diverse characteristics of those Claims and Interests, and the legal rights under the Bankruptcy Code of each of the holders of Claims or Interests within a particular Class are substantially similar to other holders of Claims or Interests within that Class. (McChesney Decl. ¶ 37.)

ii. In accordance with section 1123(a)(2) of the Bankruptcy Code, Article III of the Plan identifies and describes each Class of Claims or Interests that is not impaired under the Plan. In particular, Article III of the Plan indicates that Classes 1-3 and 5-7 are unimpaired. (Plan art. III.)

iii. In accordance with section 1123(a)(3) of the Bankruptcy Code, Article III of the Plan identifies and describes each Class of Claims or Interests that is impaired under the Plan. In particular, section III.B.4 of the Plan states that Class 4 (Asbestos Personal Injury Claims) are impaired and provides for the treatment of that class. (Plan § III.B.4.)

iv. In accordance with section 1123(a)(4) of the Bankruptcy Code, the Plan provides the same treatment for each Claim or Interest of a particular Class unless the holder of such a Claim or Interest agrees to less favorable treatment. (Plan art. III.)

b. Section 1123(a)(S)—Adequate Means for Implementation of the Plan.

In accordance with the requirements of section 1123(a)(5) of the Bankruptcy Code, Article IV and various other provisions of the Plan provide adequate means for the Plan's implementation. Specifically, the Plan provides for: (a) except as otherwise provided in the Plan and subject to the Restructuring

Transactions, the Debtors' continued corporate existence and the vesting of all property of the respective Estates of the Debtors and any property acquired by a Debtor or Reorganized Debtor under the Plan in the appropriate Reorganized Debtor under section IV.A of the Plan; (b) the consummation of the Restructuring Transactions under section IV.B of the Plan; (c) certain real estate and lease transactions under section IV.C of the Plan; (d) the adoption of the corporate constituent documents that will govern the Reorganized Debtors and the identification of the initial boards of directors of the Reorganized Debtors under section IV.D of the Plan; (e) sufficient cash resources to make all plan distributions pursuant to section IV.E of the Plan; (f) the creation of, and transfer of certain assets to, the Asbestos Personal Injury Trust under section IV.F of the Plan; (g) the appointment of the Asbestos Personal Injury Trustee under section IV.H of the Plan; (h) the funding of the Asbestos Personal Injury Trust under section IV.K.2 of the Plan; (i) the transfer of and preservation of rights of action by the Reorganized Debtors, and the release of certain rights of action against the Debtors, under section IV.R of the Plan; (k) the release of all mortgages, deeds of trust, liens or other security interests against the property of the Estate under section IV.S of the Plan; (*l*) the authorization to execute various documents and to enter into various transactions to effectuate the Plan and the exemption from certain transfer taxes under section IV.T of the Plan; and (m) the direction to comply with QSF Regulations under section IV.V of the Plan. Accordingly, the Plan fully complies with the requirements of section 1123(a)(5) of the Bankruptcy Code.

c. Section 1123(a)(6)—Prohibition Against the Issuance of Nonvoting Equity Securities and Adequate Provisions for Voting Power of Classes of Securities.

The Plan provides that the certificates of incorporation of each Reorganized Debtor will prohibit the issuance of nonvoting equity securities to the extent required under section 1123(a) of the Bankruptcy Code. (Plan § IV.D.1.) Accordingly, the Plan fully complies with the requirements of section 1123(a)(6) of the Bankruptcy Code.

d. Section 1123(a)(7)—Selection of Directors and Officers in a Manner Consistent with the Interests of Creditors and Equity Security Holders and Public Policy.

The Plan complies with section 1123(a)(7) of the Bankruptcy Code and ensures that the selection of the officers and directors of each of the Reorganized Debtors is consistent with the interests of creditors and equity security holders and with public policy. Under section IV.D.2 of the Plan, the initial boards of directors of each of the Reorganized Debtors will consist of the directors and officers of each Debtor immediately prior to the Effective Date. (Plan § IV.D.2.) Further, this section of the Plan provides that directors and officers will serve from and after the Effective Date until a successor is duly elected or appointed and qualified or until their earlier death, resignation or removal in accordance with the terms of the certificates of incorporation and by-laws or similar constituent documents of the applicable Reorganized Debtor and applicable state law. (Id.) The Plan's provisions with

respect to the selection of directors and officers are consistent with the interests of creditors and public policy.

e. Section 1123(b)—Discretionary Provisions.

Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a plan of reorganization, but are not required. For example, a plan may impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. 11 U.S.C. § 1123(b)(1)-(2). A plan also may provide for: (a) "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate;" (b) "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest," 11 U.S.C. § 1123(b)(3)(A)-(B); or (c) "the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. § 1123(b)(4). Finally, a plan may "modify the rights of holders of secured claims . . . or . . . unsecured claims, or leave unaffected the rights of holders of any class of claims" and may "include any other appropriate provision not inconsistent with the applicable provisions of [title 11]." 11 U.S.C. § 1123(b)(5)-(6).

As described above, the Plan provides for the impairment of Class 4, while leaving all other Classes of Claims and Interests unimpaired. The Plan thus modifies the rights of the holders of certain Claims and leaves the rights of others unaffected. (Plan art. IV.) In particular, Asbestos Personal Injury Claims will be channeled to the Asbestos Personal Injury Trust for resolution as set forth in the Asbestos

Personal Injury Trust Agreement and the related Asbestos Personal Injury Trust Distribution Procedures. (Plan § III.B.4.) The Plan also provides for (a) the assumption, assumption and assignment or rejection of executory contracts and unexpired leases to which the Debtors are parties (Plan art. V) and (b) the retention and enforcement of certain claims by the Debtors (Plan § IV.R).

Finally, in accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan includes numerous other provisions necessary for its implementation that are consistent with the Bankruptcy Code, including: (a) Article IV of the Plan providing for (i) the creation of the Asbestos Personal Injury Trust and (ii) the appointment of the Asbestos Personal Injury Trustee; (b) Article VI of the Plan governing Distributions on account of Allowed Claims; (c) Article VII of the Plan establishing procedures for resolving Disputed Claims and making Distributions on account of such Disputed Claims once resolved; (d) Article IX of the Plan regarding the discharge of Claims and injunctions against certain actions; and (e) Article X of the Plan regarding retention of jurisdiction by the Bankruptcy Court over certain matters after the Effective Date. Accordingly, the Plan fully complies with section 1123(b) of the Bankruptcy Code.

f. Section 1123(d)—Cure of Defaults.

The Plan provides for the satisfaction of Cure Amount Claims associated with each Executory Contract and Unexpired Lease to be assumed pursuant to the Plan in accordance with section 365(b)(1) of the Bankruptcy Code. (Plan § V.B.) Additionally, in accordance with Article III of the Plan, certain Claims may be Reinstated. All Cure Amount Claims and

Reinstated Claims will be determined in accordance with the underlying agreements and applicable non-bankruptcy law, and pursuant to the procedures established in the Plan or, to extent applicable, any separate orders of the Bankruptcy Court. (Plan §§ III.B, V.B.) Accordingly, the Plan fully complies with the requirements of section 1123(d) of the Bankruptcy Code.

2. Section 1129(a)(2)—Compliance with Applicable Provisions of the Bankruptcy Code.

The Debtors have complied with all applicable provisions of the Bankruptcy Code, as required by section 1129(a)(2) of the Bankruptcy Code, including section 1125 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018. The Disclosure Statement and the procedures by which the ballots for acceptance or rejection of the Plan were solicited and tabulated were fair, properly conducted and in accordance with sections 1125 and 1126 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018 and the Disclosure Statement Order. Votes with respect to the Plan were solicited in good faith and in a manner consistent with the Bankruptcy Code, the Bankruptcy Rules and the Disclosure Statement Order. The Debtors, the Reorganized Debtors, Lehigh Hanson, the ACC and the FCR, their respective members and each of their respective directors, officers, employees, agents and professionals, acting in such capacity, have acted in "good faith," within the meaning of section 1125(e) of the Bankruptcy Code.

3. Section 1129(a)(3)—Proposal of the Plan in Good Faith.

Section 1129(a)(3) of the Bankruptcy Code requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). A plan is considered proposed in good faith "if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the [Bankruptcy] Code." Hanson v. First Bank of S.D., 828 F.2d 1310, 1315 (8th Cir. 1987); see also In re SGL Carbon Corp., 200 F.3d 154, 165 (3d Cir. 1999) (the good faith standard in section 1129(a)(3) requires that there must be "'some relation'" between the chapter 11 plan and the "reorganization-related purposes" that chapter 11 was designed to serve); In re Zenith Elecs. Corp., 241 B.R. 92, 107 (Bankr. D. Del. 1999) ("The good faith standard requires that the plan be proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code." (quotation marks omitted)); In re New Valley Corp., 168 B.R. 73, 80 (Bankr. D.N.J. 1994) ("It is generally held that a plan is proposed in good faith if there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and purpose of the Bankruptcy Code."). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the formulation of a chapter 11 plan. See McCormick v. Bane One Leasing Corp. (In re McCormick), 49 F.3d 1524, 1526 (11th Cir. 1995) ("The focus of a court's inquiry is the plan itself, and courts must look to the totality of the circumstances surrounding the plan . . . keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start.").

In determining whether the plan will succeed and accomplish goals consistent with the Bankruptcy Code, courts look to the terms of the reorganization plan itself. See In re Sound Radio, Inc., 93 B.R. 849, 853 (Bankr. D.N.J. 1988) (concluding that the good faith test provides the court with significant flexibility and is focused on an examination of the plan itself, rather than other, external factors), aff'd in part, remanded in part on other grounds, 103 B.R. 521 (D.N.J. 1989), aff'd, 908 F.2d 964 (3d Cir. 1990). The plan proponent must show, therefore, that the plan has not been proposed by any means forbidden by law and that the plan has a reasonable likelihood of success. See In re Century Glove, Inc., Civ. A. Nos. 90-400-SLR, 90-401-SLR, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993) ("A court may only confirm a plan for reorganization if . . . the 'plan has been proposed in good faith and not by any means forbidden by law . . . .' Moreover, 'where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied[.]'"); see also Fin. Sec. Assur. Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship), 116 F.3d 790, 802 (5th Cir. 1997) (same). Whether a plan has been proposed in good faith turns on whether it "'will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'" In re Am. Capital Equip., LLC, 688 F.3d 145, 156 (3d Cir. 2012).

The Plan serves valid bankruptcy objectives—it is the product of extensive arms'-length negotiations among the ACC, the FCR, the Debtors and numerous other parties, reflects a consensual resolution of the Debtors' asbestos and environmental liabilities and maximizes the value of assets available to satisfy claims. In re Michener, 342 B.R. 428, 434 (Bankr. D.

Del. 2006); Am. Capital Equip., LLC, 688 F.3d at 156 (explaining that the two "'recognized' policies, or objectives, [of Chapter 11] are 'preserving going concerns and maximizing property available to satisfy creditors'"). That the Plan maximizes the value of assets is demonstrated by the fact that creditor recoveries are greater than could be realized if the Debtors were to liquidate. (Bittner Decl. ¶ 20; Liquidation Analysis.[12])

To arrive at this juncture, the Debtors actively involved their creditor constituencies in the Plan-formulation process. (McChesney Decl. ¶ 39.) The Debtors provided substantial information to all constituencies and, thereafter, reached numerous settlements that will be implemented through the Plan. (Id.) As described above and in the Disclosure Statement and the McChesney Declaration, the Debtors engaged in arms'-length negotiations with many parties in interest over the course of these cases and the Plan reflects agreements among the Debtors, Lehigh Hanson, the ACC, the FCR, the EPA, the DEQ and the Debtors' insurers and other constituents. (Id.) The Debtors' good faith in proposing the Plan is evidenced by these negotiations and agreement and further by the unanimous support of the holders of Class 4 Claims, the only Class entitled to vote on the Plan. See Voting Agent Declaration; see also Eagle-Picher, 203 B.R. at 274 (finding that a plan of reorganization was proposed in good faith when, among other things, it was based on extensive arms'-length negotiations among the plan proponents and other parties in interest).

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[12] The Liquidation Analysis is attached as Exhibit IV to the Disclosure Statement and was admitted into the record at the Confirmation Hearing. [Conf. Exhibit 22-B.]

Accordingly, the requirements of section 1129(a)(3) of the Bankruptcy Code have been fully satisfied.

Truck made a number of arguments that the Plan was not proposed in good faith. For the reasons set forth below, Truck lacks standing to make these arguments, but even if Truck had standing, the arguments would fail.

Contrary to Truck's contention, the Plan does not violate the spirit and purpose of section 524(g). The Court finds no requirement that all of a debtor's asbestos liabilities must be resolved by a section 524(g) trust, as opposed to being resolved in the tort system. Here, moreover, the Debtors have effectively unlimited insurance. Under these circumstances, the fact that the Trust resolves only uninsured claims is not contrary to section 524(g).

Truck argued that the Plan represented a collusive and improper agreement to send claims back to the tort system. The argument that resolving asbestos cases in the tort system is unfair or constitutes bad faith is rejected. Bankruptcy courts routinely grant relief from the automatic stay to allow claimants and creditors to pursue insurance in state court.[13] In its

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[13] Bankr. Hr'g Tr. (8/13/2020) 29:11-19. Moreover, other Section 524(g) plans of reorganization have been approved that provided for tort claims to be sent back to the tort system. See, e.g., In re Thorpe Insulation Co., Case No. 07-19271(BB) (Bankr. C.D. Cal. May 8, 2013) (providing that asbestos claimants can commence actions in the tort system consistent with the other provisions of the plan and distribution procedures); In re Plant Insulation Co., 485 B.R. 203, 213 (N.D. Cal. 2012), rev'd on other grounds, 734 F.3d 900 (9th Cir. 2013), and aff'd, 544 F. App'x 669 (9th Cir. 2013) ("Alternatively, under the Plan, asbestos injury claimants retain their right to pursue Plant and Non-Settling Insurers by

argument, Truck relied heavily on Judge Hodges' findings in Garlock. This Court is concerned for the same reasons that the bankruptcy court was concerned in Garlock, but this Court does not read Garlock as an indictment of the tort system or a ruling that a party cannot get a fair trial in state and federal courts. Truck's arguments also hinged on speculation as to future events, such as what would happen in state courts, and are unsupported. This Court is not inclined to indict its colleagues on the state benches, nor does the Court believe that a bankruptcy court in North Carolina is necessary to protect state courts from fraud. The findings in Garlock have been widely debated, and indeed some state legislatures have taken steps to address these issues. State courts and litigants will obviously be alert to what has been proposed in this case and can take their own actions.

Bankruptcy is not intended to relieve insurers of their contractual liabilities, or to improve their position under their insurance contracts in the tort system.[14] It is not within the province of this Court to

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filing a tort action, subject to several conditions."); In re Bums & Roe Enters., Inc., Nos. 00-41610, 05-47946 (RG) 2009 WL 438694, at *4 (D.N.J. Feb. 23, 2009) ("The Trust may authorize individual claimants, whose claims are potentially covered by policies issued by CNA, to commence litigation in the tort system."); see also In re Sound Shore Med. Ctr., Case No. 13-22840 (Bankr. S.D.N.Y. Oct. 2, 2013), ECF No. 367 (permitting claims to return to tort system); In re UTGR, Inc. d/b/a Twin River, Case No. 09-12418 (Bankr. R.I. Mar. 19, 2010), ECF No. 610 (same).

[14] Further, the Truck Policies expressly state that the Debtors' bankruptcy does not relieve Truck of its obligations under the Truck Policies. Conf. Exhibit 30, 1974 Truck Policy at TRK.0000587 ("Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.").

mandate to state courts and other federal courts what kind of discovery is required in asbestos cases. The remedy Truck seeks—a requirement that before an asbestos claimant can sue in state court they must provide pre-suit discovery that is not mandated in other forums and not for the benefit of the Asbestos Personal Injury Trust—is essentially legislative in nature, and is inappropriate. The Court hereby rejects this burdensome and unprecedented attempt to impair the rights of asbestos claimants to pursue their claims in the tort system.

Finally, the Court rejects Truck's argument it was unfairly denied an opportunity to negotiate with the parties both pre- and post-petition. While the preference in bankruptcy is for parties to negotiate, there is no requirement that a plan satisfy the desires of an insurer. Furthermore, the evidence establishes that no substantive Plan negotiations occurred prepetition. Thus, Truck was not excluded. (First Day Decl. ¶ 47.) Post-petition, all parties were free to negotiate, but Truck did not. Hr'g Tr. (7/20/2020) at 153:18-154:8. Truck attempted to negotiate only after the Plan Proponents had already reached an agreement in the form of the Term Sheet. Id. at 154:2-8. The Debtors, the ACC, the FCR and Truck then participated in mediation to determine whether there was a resolution that could be reached that would involve Truck. Id. at 154:9-18. It is not surprising that Truck found it difficult to negotiate with the parties to reduce its unlimited obligations under the Truck Policies to a fixed or otherwise limited amount. That is certainly no basis for an objection. Accordingly, the requirements of section 1129(a)(3) of the Bankruptcy Code have been fully satisfied.

4. Section 1129(a)(4)—Court Approval of Certain Payments as Reasonable.

In accordance with section 1129(a)(4) of the Bankruptcy Code, all fees to which parties may be entitled in connection with the Reorganization Cases, including Professionals' Fee Claims, are subject to the approval of the Bankruptcy Court. (Plan § III.A.1.) Although the Bankruptcy Court has authorized the interim payment of the fees and expenses incurred by Professionals in connection with the Reorganization Cases, all such fees and expenses remain subject to final review for reasonableness by the Bankruptcy Court. (Id.) Finally, the Plan provides that the Bankruptcy Court will retain jurisdiction after the Effective Date to hear and determine all applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or the Plan. (Plan art. X.) Accordingly, the Plan fully complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

5. Section 1129(a)(5)—Disclosure of Identity of Proposed Management, Compensation of Insiders and Consistency of Management Proposals with the Interests of Creditors and Public Policy.

The Debtors have disclosed all information required by section 1129(a)(5) of the Bankruptcy Code, including the names of the Reorganized Debtors' officers and directors. (Disclosure Statement § III.A.2; Plan § IV.D.2.) The appointment of the proposed directors and officers, each of who is highly qualified and experienced, is consistent with the interests of the holders of Claims and Interests and with public policy.

6. Section 1129(a)(6)—Approval of Rate Changes.

Section 1129(a)(6) of the Bankruptcy Code is not applicable because the Debtors' current businesses do not involve the establishment of rates over which any regulatory commission has or will have jurisdiction after Confirmation. (McChesney Decl. ¶ 42.)

7. Section 1129(a)(7)—Best Interests of Holders of Claims and Interests.

Each holder of a Claim in the sole impaired Class (Class 4) has accepted the Plan or, as demonstrated by the Liquidation Analysis, will receive or retain under the Plan on account of such Claim property of a value, as of the Effective Date, that is not less than the amount such holder would receive or retain if the Debtors were liquidated on the Effective Date under chapter 7 of the Bankruptcy Code. (Bittner Decl. ¶ 12; Liquidation Analysis.) Thus, the Plan satisfies the requirement of section 1129(a)(7)(A) of the Bankruptcy Code.

8. Section 1129(a)(8)—Acceptance of the Plan by Each Impaired Class.

Pursuant to section 1129(a)(8) of the Bankruptcy Code, all classes of Claims and Interests have either accepted the Plan or are unimpaired. (Voting Agent Decl. ¶ 10.) Specifically, Class 4, the only class entitled to vote on the Plan, unanimously voted in favor of the Plan. (Id.) Classes 1-3 and 5-6 are unimpaired under the Plan and, therefore, are deemed to have accepted the Plan. (Plan § III.B; Disclosure Statement Order ¶¶ II.B.) Accordingly, the Debtors have satisfied section 1129(a)(8) of the Bankruptcy Code.

9. Section 1129(a)(9)—Treatment of Claims Entitled to Priority Pursuant to Section 507(a) of the Bankruptcy Code.

The Plan also meets the requirements regarding the payment of Administrative Claims, Priority Claims and Priority Tax Claims, as set forth in section 1129(a)(9) of the Bankruptcy Code.

Section III.A.1 of the Plan provides that, subject to certain bar dates and unless otherwise agreed by the holder of an Administrative Claim and the applicable Debtor or Reorganized Debtor, each holder of an Allowed Administrative Claim shall receive, in full satisfaction of its Administrative Claim, cash equal to the allowed amount of such Administrative Claim either: (a) as soon as practicable after the Effective Date; or (b) if the Administrative Claim is not allowed as of the Effective Date, thirty (30) days after the date on which such Administrative Claim becomes allowed by a Final Order or a Stipulation of Amount and Nature of Claim. In addition, Administrative Claims based on ordinary course liabilities shall be satisfied by the applicable Reorganized Debtor pursuant to the terms and conditions of the particular transaction giving rise to such Administrative Claims, without any further action by the holder of such Administrative Claims or further approval of the Bankruptcy Court.

Further, Section III.B.1 of the Plan provides that Priority Claims against any Debtor (which include Claims entitled to priority other than Administrative Claims and Priority Tax Claims) will be paid on the Effective Date in an amount equal to the Allowed Claim. Section III.A.2 of the Plan provides that, unless otherwise agreed by the holder of a Priority Tax Claim and the applicable Debtor or Reorganized

Debtor, on the Effective Date or as soon as practicable after the date when such Claim becomes an Allowed Claim, each Allowed Priority Tax Claim will receive payment in full of the allowed amount of the Priority Tax Claim.

10. Section 1129(a)(10)—Acceptance By at Least One Impaired, Non-Insider Class.

As shown in the Voting Agent Declaration and as reflected in the record of the Confirmation Hearing, at least one Class of Claims that is impaired under the Plan has voted to accept the Plan, determined without including the acceptance by any insider, with respect to all Reorganized Debtors under the Plan. (Voting Agent Decl. ¶ 10.) Specifically, Class 4 Claims (Asbestos Personal Injury Claims), which is not an insider Class and is the only impaired Class under the Plan, has voted unanimously to accept the Plan. (Id.)

11. Section 1129(a)(11)—Feasibility of the Plan.

On or about the Effective Date, non-debtor Lehigh Cement Company LLC will transfer its interest in the Real Properties located in Kosse, Limestone County, Texas and Kunkletown, Monroe County, Pennsylvania, together with its rights under certain leases with a third party related to the Real Properties, to Kaiser Gypsum. (Plan § IV.C; Bittner Decl. ¶ 30; McChesney Decl. ¶ 11.) The leases are expected to generate net cash flow for Kaiser Gypsum of approximately $68,000 in 2020 and $93,000 in 2021, as demonstrated in the projections attached Exhibit III to the Disclosure Statement and admitted into evidence at the Confirmation Hearing [Conf. Exhibit 22-A] (the "Plan Projections"). (Plan Projections; Bittner Decl. ¶ 30.)

HPCI will continue to own its non-Debtor operating subsidiaries (Hanson Micronesia Cement, Inc. and Hanson Permanente Cement of Guam, Inc.), and the Permanente Property. (Bittner Decl. ¶ 30.) HPCI is expected to generate net cash flows from the Permanente Property and the operating subsidiaries of approximately $6.5 million and $2.6 million in 2020 and 2021, respectively. (Plan Projections; Bittner Decl. ¶ 30.)

The Reorganized Debtors will have the ability to fund their ongoing operations from cash flow generated by the businesses they directly or indirectly own. (Bittner Decl. ¶ 30; Plan Projections.) Kaiser Gypsum's lease arrangements for the Real Properties will ensure that it will generate positive cash flow into the future. (Id.) HPCI's Permanente Plant lease arrangement with non-debtor Lehigh Southwest, coupled with cash flow from its non-debtor subsidiaries, similarly shows that HPCI will generate positive cash flow into the future. (Id.) Additionally, each of the Debtors is ultimately owned by Lehigh Hanson, which has the financial wherewithal to provide any additional funding needed by either entity. (Bittner Decl. ¶ 32.) Finally, the Debtors have sufficient cash and access to financing, in combination with (a) Lehigh Hanson's cash and access to financing and (b) the proceeds of insurance, to fund the obligations imposed by the Plan. (Id. ¶ 34.)

Overall, (a) the Plan provides a feasible means of completing a reorganization of the Reorganized Debtors' businesses, and (b) there is a more than reasonable assurance that the Reorganized Debtors will be able to satisfy all of their obligations under the Plan. (Id. ¶ 33.) Accordingly, the Plan satisfies the

feasibility standard of section 1129(a)(11) of the Bankruptcy Code.

12. Section 1129(a)(12)—Payment of Bankruptcy Fees.

The Plan complies with section 1129(a)(12) by providing that all fees payable pursuant to 28 U.S.C. § 1930 will be paid in cash on or before the Effective Date. (Plan § III.A.1.b.)

13. Section 1129(a)(13)—Retiree Benefits.

Section 1129(a)(13) of the Bankruptcy Code is not applicable because the Debtors do not maintain any retiree benefits, as defined in section 1114 of the Bankruptcy Code. (McChesney Decl. ¶ 42.)

14. Section 1129(d)—Purpose of Plan.

The principal purpose of the Plan is not avoidance of taxes or avoidance of the requirements of section 5 of the Securities Act of 1933. (Id. ¶ 40.)

H. THE ASBESTOS PERSONAL INJURY TRUST AND THE ASBESTOS PERMANENT CHANNELING INJUNCTION COMPLY WITH SECTION 524(g) OF THE BANKRUPTCY CODE.

The Plan comports with the Bankruptcy Code's requirements for issuance of an injunction to enjoin entities from taking legal action to recover, directly or indirectly, payment in respect of asbestos-related claims or demands against the Reorganized Debtors.

1. The Asbestos Personal Injury Trust Satisfies the Requirements of Section 524(g)(2)(B)(i) of the Bankruptcy Code.

a. ***Section 524(g)(2)(B)(i)(I)*** requires that an asbestos trust assume the liabilities of a debtor that, as of the petition date, has been named as a defendant in actions to recover damages for asbestos-related claims. 11 U.S.C. § 524(g)(2)(B)(i)(I). The Plan satisfies this requirement by its express terms, which state that "the Asbestos Personal Injury Trust shall assume liability and responsibility, financial and otherwise, for all Asbestos Personal Injury Claims." (Plan § IV.K.3.) By assuming the Debtors' asbestos liability, the Asbestos Personal Injury Trust will be responsible for resolving Uninsured Asbestos Claims and the portion of Insured Asbestos Claims that is not covered by an Asbestos Insurance Policy. (See Plan § IV.O.; Asbestos Personal Injury Trust Distribution Procedures §§ 2.2, 5.2, 5.3.)

b. ***Section 524(g)(2)(B)(i)(II)*** requires that the trust "be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends." 11 U.S.C. § 524(g)(2)(B)(i)(II). The Plan satisfies this requirement by providing that the Asbestos Personal Injury Trust will be funded in part by the Payment Note. (Plan § IV.K.2.b.) Pursuant to section 101(49) of the Bankruptcy Code, a "security" includes, among other things, a note. 11 U.S.C. § 101(49). The Payment Note requires the Reorganized Debtors to make a payment of $1 million on or before the fifth anniversary of the Effective Date. This obligation is secured by the Pledge of 100% of the equity of each Reorganized

Debtor. (Plan § I.A.104.) Accordingly, the issuance of the Payment Note, of which both Debtors are co-obligors, nominally satisfies section 524(g)(2)(B)(i)(II)'s requirement that the trust be funded "in part by the securities of 1 or more debtors and by the obligation of such debtor or debtors to make future payments, including dividends."[15]

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[15] There is an argument that the note is pretextual, given its short term and small amount. See In re Congoleum Corp., 362 B.R. 167, 177 (Barna. D.N.J. 2007). However, other courts have confirmed such plans, particularly, where, as here, the note is only a minor part of the funding to pay claims and/or where none of the affected parties object. See In re W. Asbestos Co., 313 B.R. 832, 851 (Bankr. N.D. Cal. 2003) (in the context of a plan in which an insurer was contributing approximately $740 million in cash to the asbestos trust, noting that "the Plan also provides that MacArthur will contribute to the Trust a promissory note for $500,000, payable over five years . . . [and] requires MacArthur to make payments to the Trust pursuant to the note" and concluding that the note and payment pursuant thereto "are sufficient to satisfy 11 U.S.C. § 524(g)(2)(B)(i)(II)."); In re J T Thorpe Co., 308 B.R. 782, 788-89 (Bankr. S.D. Tex. 2003) (finding that the "[p]lan complies with Section 524(g)(2)(B)(i)" when trust is "to be funded in part by a Promissory Note for $2.3 million" and "in part by proceeds received pursuant to the terms of the Asbestos Insurance Action Recoveries, the Asbestos In-Place Insurance Coverage, the Asbestos Insurance Settlement Agreements, and by the Asbestos Insurance Policies"); In re Leslie Controls, Inc., Case No. 10-12199 (CSS) (Bankr. D. Del. Jan. 10, 2011), Second Conformed First Amended Plan of Reorganization of Leslie Controls, Inc. §§ 1.93, 1.94, 9.3(h), (i) (in the context of a trust funded with, among other things, $74 million in cash, satisfying section 524(g)(2)(B)(i)(II), in part, through the contribution of a $1 million promissory note) and In re Leslie Controls, Inc., Case No. 10-12199 (CSS) (Bankr. D. Del. Jan. 10, 2011), Findings of Fact, Conclusions of Law, and Order Confirming the Second Conformed First Amended Plan of Reorganization of Leslie Controls, Inc. § U.3 (concluding that plan complies with

To the extent section 524(g)(2)(B)(i)(II) may contain a "ongoing business" requirement, the Plan satisfies it. Here, both Debtors have ongoing business operations. HPCI owns the Permanente Property, a more than 3,400 acre property in California that includes a cement plant, rock plant and quarry, which it leases to a non-debtor affiliate, Lehigh Southwest. (McChensey Decl. ¶ 10.) Lehigh Southwest pays rent, royalties and other payments to HPCI, and Lehigh Southwest is responsible for ongoing operating costs on that property, HPCI remains responsible for capital expenditures and reclamation operations related to the property. (Id.) HPCI also owns equity in operating subsidiaries that distribute and sell cement in the Pacific region. (Id. ¶ 9.) The Permanente Property and these equity interests will vest in Reorganized HPCI, which will continue to manage these assets. (Plan § IV.A.) As set forth in the Plan Projections, HPCI's net cash flows will exceed $6.5 million in 2020 and $2.6 million in 2021. (Plan Projections; Bittner Decl. ¶ 30.)

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section 524(g)(2)(B)(i)(II) of the Bankruptcy Code and confirming plan).

This Court has done so as well, albeit, in an uncontested confirmation hearing. See In re Garlock Sealing Techs. LLC, No. 3:l 7-CV-00275-GCM, 2017 WL 2539412, at *20 (W.D.N.C. June 12, 2017) (confirming plan where the trust was to be funded, in part, by deferred contributions in the amount of $60 million which was to be paid by a reorganized debtor no later than the first anniversary of the plan's effective date and cash contributions totaling $400 million (citing Plan §§ 7.3.2 and 7.8(1); Plan Ex. H, I, and J)). We need not address this issue. For not only is the Note a small part of the total funding, but the parties with an interest in the Trust (asbestos personal injury claimants, the ACC, the FCR and the Debtors) support the Plan. Truck has objected but has no interest in the Trust and thus no standing to make this argument.

Additionally, non-debtor Lehigh Cement Company LLC will transfer its interests in the Real Properties, together with its rights under certain leases related to the Real Properties, to Kaiser Gypsum. (McChensey Decl. ¶ 11; Plan § IV.C.) The leases related to the Real Properties are expected to generate net cash flows for Kaiser Gypsum of approximately $68,000 in 2020 and $93,000 in 2021, as set forth in the Plan Projections. (Plan Projections; Bittner Decl. ¶ 30.)

c. ***Section 524(g)(2)(B)(i)(III)*** requires that the trust "own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares" of each debtor." 11 U.S.C. § 524(g)(2)(B)(i)(III). The Plan satisfies this requirement. The Plan provides that, upon the Effective Date, the Asbestos Personal Injury Trust will receive a Payment Note in the principal amount of $1 million secured by a Pledge of 100% of the equity in the Reorganized Debtors. (Plan §§ IV.K.2.b, I.A.98, I.A.104.) If the Reorganized Debtors fail to pay the Payment Note in full on or before the fifth anniversary of the Effective Date, the Asbestos Personal Injury Trust can foreclose on the Pledge of the Reorganized Debtors' equity and become the 100% owner of the Reorganized Debtors. (Id.) This structure also complies with the language of section 524(g)(2)(B)(i)(III).[16]

d. ***Section 524(g)(2)(B)(i)(IV)*** requires an asbestos trust "to use its assets or income to pay claims and demands." 11 U.S.C. § 524(g)(2)(B)(i)(IV). Here, the Asbestos Personal Injury Trust will assume all liability and responsibility for all Asbestos Personal

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[16] See supra note 15.

Injury Claims (Plan § IV.K.3.) and will use its assets, which will include the Debtors' assigned asbestos insurance rights, to resolve Asbestos Personal Injury Claims and Demands in accordance with the Plan, the Asbestos Personal Injury Trust Distribution Procedures and the Confirmation Order (Plan § IV.F.), thus satisfying the requirements of section 524(g)(2)(B)(i)(IV).

e. ***The Debtors are Entitled to a Discharge***. The Debtors are entitled to a discharge under section 1141 of the Bankruptcy Code. Pursuant to section 1141(d)(3) of the Bankruptcy Code: "The confirmation of a plan does not discharge a debtor if—(A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title." 11 U.S.C. § 1141(d)(3). None of these factors is present here.

First, the Plan does not provide for the liquidation of all or substantially all of the property of the estate. The Debtors are transferring certain of their rights under insurance policies to the Asbestos Personal Injury Trust but HPCI is retaining its other assets and Kaiser Gypsum is acquiring additional assets. As described above, the Permanente Property will vest in Reorganized HPCI, and HPCI will also retain its equity interest in its subsidiaries. Reorganized Kaiser Gypsum will become the owner of the Real Properties. These assets, and the income that the Reorganized Debtors will obtain from them, is projected to be significant. Additionally, as explained above, the Reorganized Debtors will engage in business following confirmation of the Plan. Notwithstanding the foregoing,

no release or discharge of any of the Parties or any Reorganized Debtor, or any of their respective present or former directors, officers, employees, members, subsidiaries, predecessors, successors, attorneys, accountants, investment bankers, financial advisors, appraisers, representatives and agents, or the DIP Lender, in each case acting in such capacity, shall diminish, reduce or eliminate the duties or obligations of any Asbestos Insurer under any Asbestos Personal Injury Insurance Asset.

2. The Asbestos Personal Injury Trust Satisfies the Requirements of Section 524(g)(2)(B)(ii) of the Bankruptcy Code.

Section 524(g)(2)(B)(ii) of the Bankruptcy Code requires the Court to make certain factual findings to support the issuance of a channeling injunction under section 524(g)(1)(A). As set forth below, the Debtors' history, the nature of asbestos-related litigation and the facts of these Reorganization Cases all support the findings required for the issuance of the Asbestos Permanent Channeling Injunction under section 524(g)(1)(A) of the Bankruptcy Code.

a. ***Section 524(g)(2)(B)(ii)(I)*** requires the court to find that "the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction." 11 U.S.C. § 524(g)(2)(B)(ii)(I).

Here, the Debtors' asbestos-related liabilities arise from their manufacture and sale of certain products that contained asbestos. (McChesney Decl. ¶ 12.) Since 1978, one or both of the Debtors have been named in more than 38,000 asbestos-related lawsuits.

(Id. ¶ 14) As of August 31, 2016, the Debtors were defendants in approximately 14,000 pending asbestos-related bodily injury lawsuits pending in courts across the country. (Id.)

Based on the substantial number of asbestos-related personal injury lawsuits that were filed in the past and were continuing to be filed prior to the Petition Date, the Debtors would likely be subject to substantial future Demands for payment arising from the same or similar conduct or events that gave rise to the Asbestos Personal Injury Claims. (Id. ¶ 43; Fitzpatrick Decl. ¶ 36.) Accordingly, section 524(g)(2)(B)(ii)(I) is satisfied.

b. ***Section 524(g)(2)(B)(ii)(II)*** requires a court to find that "the actual amounts, numbers, and timing of such future demands cannot be determined." 11 U.S.C. § 524(g)(2)(B)(ii)(II). The Debtors are unable to predict with any degree of confidence the amounts, numbers and timing of future Demands in respect of alleged asbestos-related personal injuries. (McChesney Decl. ¶ 43.) Accordingly, section 524(g)(2)(B)(ii)(II) is satisfied.

c. ***Section 524(g)(2)(B)(ii)(Ill)*** requires a finding that "pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands." 11 U.S.C. § 524(g)(2)(B)(ii)(III). Under the Plan, all asbestos claimants, current and future, will receive equitable treatment in accordance with the Asbestos Trust Distribution Procedures. Without the Plan, there is a risk that present claimants will be treated more favorably than future claimants because the potential for uninsured judgments, including punitive damages, could leave the Debtors without sufficient assets to make equivalent

payments to future claimants. (McChesney Decl. ¶ 44; Fitzpatrick Decl. ¶ 37.) Thus, the requirements of section 524(g)(2)(B)(ii)(III) are met.

d. ***Section 524(g)(2)(B)(ii)(IV)*** requires a court to find that, as part of the confirmation process, the terms of the channeling injunction proposed, including "any provisions barring actions against third parties," are set forth in the plan of reorganization and the disclosure statement in support of the plan. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(aa). A court must also find that "a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan." 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). As part of the Confirmation process in these cases, the Debtors included the terms of the Asbestos Permanent Channeling Injunction, including provisions therein barring actions against any Protected Party, in both the Plan and the Disclosure Statement. (Plan § IX.B.2; Disclosure Statement § VII.Q.2.) The Debtors also designated Class 4 under the Plan for all Asbestos Personal Injury Claims. (Plan §§ III.B; Disclosure Statement § VII.Q.2.) The voting Claim holders in Class 4 unanimously accepted the Plan. (Voting Agent Decl. ¶ 10.)

e. ***Section 524(g)(2)(B)(ii)(V)*** requires a court to find that

> the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position

> to pay, present claims and future demands that involve similar claims in substantially the same manner.

11 U.S.C. § 524(g)(2)(B)(ii)(V). Here, the Asbestos Personal Injury Trust will pay Asbestos Personal Injury Claims in accordance with the Asbestos Personal Injury Trust Distribution Procedures set forth in Exhibit I.A.19 to the Plan, which contain mechanisms that provide reasonable assurance that the Asbestos Personal Injury Trust will value, and be in a financial position to pay, present Asbestos Personal Injury Claims and future asbestos-related Demands that involve similar claims in substantially the same manner. (Fitzpatrick Decl. ¶ 41.)

Specifically, the Asbestos Personal Injury Trust Distribution Procedures provide for the processing and payment of the uninsured portions of Insured Asbestos Claims and the Uninsured Asbestos Claims that would have been paid by the Debtors prepetition, on an impartial, first-in-first-out basis. To ensure substantially equivalent treatment of all present and future Asbestos Personal Injury Claims, the Asbestos Personal Injury Trustee will be required to determine, with the consent of the Trust Advisory Committee and the FCR, the percentage of value that holders of present and future Asbestos Personal Injury Claims are likely to receive from the Asbestos Personal Injury Trust (the "Payment Percentage"). This determination will take account of estimates of payments related to Uninsured Amounts, the value of the Asbestos Personal Injury Trust Assets, and projected expenses. Further, at least once every three years, the Asbestos Personal Injury Trustee will be required to reconsider the then-applicable Payment Percentage based on current information. In determining

whether to adjust the Payment Percentage, the Asbestos Personal Injury Trustee is obligated to assess the liability forecast on which the Payment Percentage is based against the claims filed and the Asbestos Personal Injury Trust's corresponding payment history. Each Distribution made to an asbestos claimant will reflect the Payment Percentage in effect at the time of such Distribution. To further ensure equitable treatment of similarly-situated claims, in the event the Asbestos Personal Injury Trustee determines it appropriate to increase the Payment Percentage, the Asbestos Personal Injury Trustee will be required to make supplemental payments to all asbestos claimants who previously liquidated their Asbestos Personal Injury Claims based on a lower Payment Percentage.

Accordingly, the Asbestos Personal Injury Trust Distribution Procedures provide reasonable assurance that the Asbestos Personal Injury Trust will value, and be in a financial position to pay, present Asbestos Personal Injury Claims and future asbestos-related Demands in substantially the same manner. As a result, the Plan and the Asbestos Personal Injury Trust Distribution Procedures contemplated therein satisfy the requirements of section 524(g)(2)(B)(ii)(V).

3. The Extension of the Asbestos Permanent Channeling Injunction to Third Parties Is Appropriate.

Sections 524(g)(3)(A) and 524(g)(4)(A)(ii) of the Bankruptcy Code designate certain entities that are protected by a channeling injunction entered pursuant to section 524(g)(1)(A). Specifically, section 524(g)(3)(A) provides that

> (ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect

> transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and
>
> (iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason.

11 U.S.C. § 524(g)(3)(A)(ii)-(iii). Consistent with that section, the Plan contemplates that the Asbestos Permanent Channeling Injunction will be extended to protect the following:

> Entities that, pursuant to the Plan or on or after the Effective Date, become a direct or indirect transferee of, or successor to, any assets of any Debtor or Reorganized Debtor, or the Asbestos Personal Injury Trust, but only to the extent that liability is asserted to exist by reason of such Entity becoming such a transferee or successor [Plan § I.A.109.h.]; and
>
> Entities that, pursuant to the Plan or on or after the Effective Date, make a loan to any Debtor or Reorganized Debtor, or the Asbestos Personal Injury Trust or to a successor to, or transferee of, any assets of any Debtor or Reorganized Debtor, or the Asbestos Personal Injury Trust, but only to the extent that

> liability is asserted to exist by reason of it becoming such a lender[.] [id. § I.A.109.i.].

In addition to the entities protected by virtue of section 524(g)(3)(A), section 524(g)(4)(A)(ii) provides that a channeling injunction entered pursuant to section 524(g)(1)(A):

> may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—
>
> (I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
>
> (II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
>
> (III) the third party's provision of insurance to the debtor or a related party; or
>
> (IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—
>
> > (aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

> (bb) acquiring or selling a financial interest in an entity as part of such a transaction.

11 U.S.C. § 524(g)(4)(A)(ii). As required by section 524(g)(4)(A)(ii), each Protected Party under the Plan is either identifiable from the terms of the injunction or is a member of an identifiable group. (Plan § I.A.109.) In addition, the Plan defines Protected Party to include those parties that fit within the categories listed in section 524(g)(4)(A) of the Bankruptcy Code. (Id.) Each Protected Party under the Plan therefore falls within the groups designated in sections 524(g)(3)(A) and 524(g)(4)(A)(ii) as third parties to whom a channeling injunction may be extended. Accordingly, the Court may extend the Asbestos Permanent Channeling Injunction to protect all Protected Parties from liability for any Asbestos Personal Injury Claims.

4. The Rights of Persons That Might Subsequently Assert an Asbestos Personal Injury Claim That Is a Demand Addressed by the Asbestos Permanent Channeling Injunction and Transferred to the Asbestos Personal Injury Trust Were Represented by the Future Claimants' Representative.

In accordance with section 524(g)(4)(B)(i) of the Bankruptcy Code, the FCR was appointed as part of proceedings leading to issuance of the Asbestos Permanent Channeling Injunction for the purpose of protecting the rights of all persons, whether known or unknown, that might subsequently assert, directly or indirectly, against any Debtor an Asbestos Personal Injury Claim that is a Demand addressed in the

Asbestos Permanent Channeling Injunction and transferred to the Asbestos Personal Injury Trust. Accordingly, the Debtors have met the requirements of section 524(g)(4)(B)(i) of the Bankruptcy Code.

5. Entry of the Asbestos Permanent Channeling Injunction Is Fair and Equitable with Respect to Future Asbestos Claimants.

Section 524(g)(4)(B)(ii) of the Bankruptcy Code requires a court to determine that entry of the channeling injunction, and the protection from liability that is afforded to the parties named therein, "is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party." 11 U.S.C. § 524(g)(4)(B)(ii).

On the Effective Date: (a) the Reorganized Debtors and/or Lehigh Hanson on behalf of and as a contribution to such Reorganized Debtors will pay an aggregate of $49 million in cash to the Asbestos Personal Injury Trust; (b) the Reorganized Debtors, as co-obligors, shall issue the Payment Note to the Asbestos Personal Injury Trust; (c) the Reorganized Debtors shall transfer the Phase 1 Claims to the Asbestos Personal Injury Trust, free and clear of any liens, claims or encumbrances, including any rights of setoff based on any liability of the Debtors;[17] and (d) the

[17] The Debtors or the Reorganized Debtors shall pay all Debtor Appellate Costs. The Asbestos Personal Injury Trust shall pay all Asbestos Personal Injury Trust Appellate Costs. If the Asbestos Personal Injury Trust ultimately obtains any recovery with respect to Phase 1 Claims, whether as a result of settlement or

Reorganized Debtors shall transfer the Asbestos Personal Injury Insurance Assets to the Asbestos Personal Injury Trust. (Plan § IV.K.2.)

In addition, notwithstanding any other provisions of the Plan, no release or discharge of any of the Parties, the Creditors' Committee or any Reorganized Debtor, or any of their respective present or former directors, officers, employees, members, subsidiaries, predecessors, successors, attorneys, accountants, investment bankers, financial advisors, appraisers, representatives and agents, or the DIP Lender, in each case acting in such capacity, shall diminish, reduce or eliminate the duties or obligations of any Asbestos Insurer under any Asbestos Personal Injury Insurance Asset. (Plan IV.R.3.c).

Further, under the Plan, holders of Insured Asbestos Claims may initiate, continue and/or prosecute suit against the Reorganized Debtors in the tort system to obtain the benefit of insurance coverage under the Asbestos Insurance Policies, unless and until the Asbestos Personal Injury Trust, with the consent of the TAC and the FCR, has settled (other than pursuant to the Excess CIP Agreement) all rights to coverage for Asbestos Personal Injury Claims applicable to the Asbestos Personal Injury Claim of a particular holder.[18] In the event that a holder of an Insured

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judgment that exceeds $12 million, the Asbestos Personal Injury Trust shall remit to the Debtors or the Reorganized Debtors any amounts remaining, in excess of $12 million, after the Asbestos Personal Injury Trust Appellate Costs have been deducted from the full recovery amount. (Plan § IV.K.2.c.)

[18] In the event such a settlement occurs, such holder of an Insured Asbestos Claim shall pursue payment of its Asbestos Personal Injury Claim from the Asbestos Personal Injury Trust in

Asbestos Claim commences such an action, the complaint may name the applicable Reorganized Debtor(s) as a defendant(s) and shall be deemed by operation of law to be an action against the applicable Reorganized Debtor(s). Notwithstanding the foregoing, the Reorganized Debtors shall have no obligation to answer, appear or otherwise participate in the action in any respect other than as set forth in the Plan and as may be necessary to maintain coverage under the Asbestos Insurance Policies, and any judgment that may be obtained in the action cannot be enforced against the assets of the Reorganized Debtors, other than from the Asbestos Insurance Policies. (Plan IV.O.1).

In light of the substantial contributions made to the Asbestos Personal Injury Trust on behalf of all Protected Parties, entry of the Asbestos Permanent Channeling Injunction, and the naming of the Protected Parties therein, is fair and equitable with respect to persons that might subsequently assert future asbestos-related Demands. Accordingly, the Debtors have satisfied the requirements of section 524(g)(4)(B)(ii).

I. COMPREHENSIVE SETTLEMENT OF CLAIMS AND CONTROVERSIES.

Pursuant to section 1123(b) of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the Distributions and other benefits provided under the Plan, the provisions in the Plan, including the settlement of certain estate claims set forth in Section IV.R.2 and the releases set forth in Section IV.R.3, constitute a good-faith compromise and settlement of

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accordance with the Asbestos Personal Injury Trust Distribution Procedures.

all claims or controversies relating to the rights that a holder of a Claim or Interest may have with respect to any Claim, Asbestos Personal Injury Claim or Interest or any Distribution to be made pursuant to the Plan on account of any Allowed Claim, Asbestos Personal Injury Claim or Interest.

J. SATISFACTION OF CONDITIONS TO CONFIRMATION.

1. Section VIII.A of the Plan contains conditions precedent to Confirmation that must be satisfied or duly waived pursuant to Section VIII.C of the Plan. The conditions precedent set forth in Sections VIII.A.1 through VIII.A.5 of the Plan have been satisfied.

2. Concerning the establishment of the Asbestos Personal Injury Trust and issuance of the Asbestos Permanent Channeling Injunction, the Court specifically finds:

a. The Asbestos Permanent Channeling Injunction is to be implemented in connection with the Plan and the Asbestos Personal Injury Trust.

b. The Asbestos Personal Injury Trust, as of the Effective Date, shall assume all liability and responsibility, financial and otherwise, for all Asbestos Personal Injury Claims, and, upon such assumption, no Protected Party shall have any liability or responsibility, financial or otherwise, therefor. Provided, however, the Plan provides that holders of Insured Asbestos Claims may initiate, continue and/or prosecute suits against the Reorganized Debtors in the tort system to obtain the benefit of insurance coverage under the Asbestos Insurance Policies, unless and until the Asbestos Personal Injury Trust, with the consent of the TAC and the FCR, has settled (other than

pursuant to the Excess CIP Agreement) all rights to coverage for Asbestos Personal Injury Claims applicable to the Asbestos Personal Injury Claim of a particular holder, in which event such holder shall pursue payment of its Asbestos Personal Injury Claim from the Asbestos Personal Injury Trust in accordance with the Asbestos Personal Injury Trust Distribution Procedures.

In the event that a holder of an Insured Asbestos Claim commences such an action, the complaint may name the applicable Reorganized Debtor(s) as a defendant(s) and shall be deemed by operation of law to be an action against the applicable Reorganized Debtor(s).

c. Notwithstanding the foregoing, the Reorganized Debtors shall have no obligation to answer, appear or otherwise participate in the action in any respect other than as set forth in the Plan and as may be necessary to maintain coverage under the Asbestos Insurance Policies, and any judgment that may be obtained in the action cannot be enforced against the assets of the Reorganized Debtors, other than from the Asbestos Insurance Policies.

d. As of the Petition Date, each Debtor had been named as a defendant in a personal injury or wrongful death action seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products.

e. The Asbestos Personal Injury Trust will be funded in whole or in part by securities of the Reorganized Debtors and by the obligation of such Reorganized Debtors or Debtors to make future payments, which payments may be funded by contributions from Lehigh Hanson to the Reorganized Debtors.

f. The Asbestos Personal Injury Trust, by the exercise of rights granted under the Plan, will be entitled to own, if specified contingencies occur, a majority of the voting shares of each of the Reorganized Debtors.

g. The Asbestos Personal Injury Trust shall use its assets or income to pay Asbestos Personal Injury Claims, including Demands.

h. Each of the Debtors is likely to be subject to substantial future Demands for payment arising out of the same or similar conduct or events that gave rise to the Claims that are addressed by the Asbestos Permanent Channeling Injunction.

i. The actual amounts, numbers and timing of such future Demands cannot be determined.

j. Pursuit of such Demands outside the procedures prescribed by the Plan is likely to threaten the Plan's purpose to deal equitably with Claims and future Demands.

k. The terms of the Asbestos Permanent Channeling Injunction, including any provisions barring actions against third parties pursuant to section 524(g)(4)(A) of the Bankruptcy Code, are set out in the Plan.

l. The Plan establishes, in Class 4 (Asbestos Personal Injury Claims), a separate class of the claimants whose Claims are to be addressed by the Asbestos Personal Injury Trust.

m. At least two-thirds in amount and 75% in number of those voting Claims in Class 4 (Asbestos Personal Injury Claims) have voted in favor of the Plan.

n. Pursuant to court orders or otherwise, the Asbestos Personal Injury Trust shall operate through mechanisms, such as structured, periodic or supplemental payments, pro rata distributions, matrices or periodic review of estimates of the numbers and values of Asbestos Personal Injury Claims, that provide reasonable assurance that the Asbestos Personal Injury Trust shall value, and be in a financial position to pay, Asbestos Personal Injury Claims, including Demands, in substantially the same manner.

o. Each Protected Party is identifiable from the terms of the Asbestos Permanent Channeling Injunction by name or as part of an identifiable group, and each Protected Party is or may be alleged to be directly or indirectly liable for the conduct of, Claims against or Demands on a Debtor to the extent that such alleged liability arises by reason of one or more of the following:

i. such Entity's ownership of a financial interest in any Debtor or Reorganized Debtor, or any past or present Affiliate of any Debtor or Reorganized Debtor, or any predecessor in interest of any Debtor or Reorganized Debtor;

ii. such Entity's involvement in the management of any Debtor, Reorganized Debtor or predecessor in interest of any Debtor or Reorganized Debtor;

iii. such Entity's service as an officer, director or employee of any Debtor, Reorganized Debtor, any past or present Affiliate of any of Debtor or Reorganized Debtor, or any predecessor in interest of any Debtor or Reorganized Debtor or Entity that owns or at any time has owned a financial interest in any Debtor, Reorganized

Debtor, or any predecessor in interest of any Debtor or Reorganized Debtor; or

iv. such Entity's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of any Debtor, Reorganized Debtor, any past or present Affiliate of any Debtor or Reorganized Debtor, any predecessor in interest of any Debtor or Reorganized Debtor or of an Entity that owns or at any time has owned a financial interest in any Debtor, Reorganized Debtor, any past or present affiliate of any Debtor or Reorganized Debtor, or any predecessor in interest of any Debtor or Reorganized Debtor, including (A) involvement in providing financing (debt or equity) or advice to an Entity involved in such a transaction or (B) acquiring or selling financial interest in any Entity as part of such transaction.

p. The FCR was appointed as part of proceedings leading to issuance of the Asbestos Permanent Channeling Injunction for the purpose of protecting the rights of all persons, whether known or unknown, that might subsequently assert, directly or indirectly, against any Debtor an Asbestos Personal Injury Claim that is a Demand addressed in the Asbestos Permanent Channeling Injunction and transferred to the Asbestos Personal Injury Trust.

q. Identifying each Protected Party (by name or as part of an identifiable group, as applicable) in the Asbestos Permanent Channeling Injunction is fair and equitable with respect to individuals that might subsequently assert Demands against each such Protected Party, in light of the benefits provided, or to be provided, to the Asbestos Personal Injury Trust by or on behalf of any such Protected Party.

r. The Plan and the Asbestos Personal Injury Trust Documents comply with section 524(g) of the Bankruptcy Code in all respects.

s. The Plan and Exhibits are a fair, equitable and reasonable resolution of the liability of the Debtors for the Asbestos Personal Injury Claims.

t. The FCR has adequately and completely fulfilled his duties, responsibilities and obligations as the representative for the individuals referred to in finding Section I.J.p above in accordance with section 524(g) of the Bankruptcy Code.

u. Adequate and sufficient notice of the Plan and the Confirmation Hearing, as well as all deadlines for objecting to the Plan, has been given to (i) all known creditors and holders of Interests, (ii) parties that requested notice in accordance with Bankruptcy Rule 2002 (including the ACC and the FCR), (iii) all parties to Executory Contracts and Unexpired Leases, (iv) all taxing authorities listed on the Debtors' Schedules or in the Debtors' Claims database, in each case, (v) the Department of the Treasury by service upon the District Director of the IRS, (vi) state attorney generals and state departments of revenue for states in which any of the Debtors have conducted business, and (vii) the Securities and Exchange Commission, (A) in accordance with the solicitation procedures governing such service and (B) in substantial compliance with Bankruptcy Rules 2002(b), 3017 and 3020(b). Such transmittal and service were adequate and sufficient, and no other or further notice is or shall be required.

v. The Debtors' conduct in connection with and throughout these Reorganization Cases, including, but not limited to, their negotiations with the ad hoc committee of asbestos personal injury claimants and

the prepetition future claimants' representative, and the commencement of these Reorganization Cases, as well as the drafting, negotiation, proposing, confirmation, and consummation of the Plan, and their opposition to any other plan of reorganization, does not and has not violated any Asbestos Insurer Cooperation Obligations contained in any Asbestos Insurance Policies, nor was such conduct a breach of any express or implied covenant of good faith and fair dealing. The Objecting Excess Insurers' consent to this finding in the particular facts and circumstances of these Reorganization Cases is expressly without prejudice to the rights of any party to contend that such a finding is or is not appropriate in any subsequent bankruptcy case not involving these Debtors. (This provision is referred to herein as the "Plan Finding.")

K. THE PLAN IS INSURANCE NEUTRAL.

The Plan is insurance neutral. Specifically, the Plan's insurance neutrality provision found in section IV.Q expressly preserves all "Insurer Coverage Defenses," which is defined to include "all defenses at law or in equity that any Asbestos Insurer may have under applicable non-bankruptcy law to provide insurance coverage to or for Asbestos Personal Injury Claims" and states that the transfer of insurance rights to the Asbestos Personal Injury Trust "shall not affect the liability of any Asbestos Insurer." (Plan §§ I.A.84, IV.Q.) The Plan also states that "the discharge and release of the Debtors and Reorganized Debtors from all Claims and the injunctive protection provided to the Debtors, Reorganized Debtors and Protected Parties with respect to Claims as provided herein shall not affect the liability of any Asbestos Insurer." (Id. § IV.Q.) Thus, the Plan neither increases Truck's obligations nor impairs its prepetition

contractual rights under the Truck Policies. The Plan simply restores Truck to its position immediately prior to the Petition Date.

Moreover, the Plan expressly provides that the Reorganized Debtors will continue to fulfill their cooperation obligations arising under the Asbestos Insurance Policies, including the Truck Policies. (Plan § IV.L.1 ("The Reorganized Debtors shall have a continuing obligation to satisfy the Assistance and Cooperation, Inspection and Audit, and Notice of Occurrence Provisions set out in the Asbestos Insurance Policies."), IV.L.2 ("Enforcement of Reorganized Debtors' Obligations to Cooperate with Respect to Insurance Matters")). Thus, although the Asbestos Insurers may not argue that the Debtors' conduct in filing and prosecuting these Reorganization Cases, or in pursuing and consummating the restructuring provided under the Plan, breached the Asbestos Insurer Policies, its rights to pursue coverage defenses to individual Asbestos Personal Injury Claims for any alleged post-Effective Date violations by the Reorganized Debtors remain intact. Put differently, the Plan restores each insurer to the position it was in immediately prior to the Petition Date, with its rights and obligations under the applicable Asbestos Insurer Policies left undisturbed, as if the Debtors' bankruptcy had never occurred. Such treatment does not diminish Truck's rights or increase its burdens under the Truck Policies.

Truck has limited standing to object to the Plan solely on the grounds that the Plan is not insurance neutral, including, within that limited context, that the Debtors are in violation of the Assistance and Cooperation Clause and are therefore not entitled to the Plan Finding. However, because the Plan is insurance

neutral and returns Truck to the tort system exactly as it was prepetition, Truck does not have standing to advance confirmation issues such as contentions that: the Plan is collusive and not in good faith; the Debtors are not entitled to a discharge; or the elements of 11 U.S.C. § 524(g) are not met. Nor does Truck obtain standing to object to confirmation because it is also a creditor in this case. Truck is an unsecured creditor, and unsecured creditors are unimpaired under the Plan.

Despite finding and concluding that the Plan is insurance neutral and that Truck lacks standing to object to the Plan on the grounds set forth herein, the Court has considered Truck's objections and, in light of the record before it, alternatively finds and concludes that Truck's objections lack merit and should be overruled in their entirety for the reasons stated herein and in the Bankruptcy Court's oral ruling made on the record at the hearing held August 13, 2020.[19]

1. Truck Has No Interest in the Asbestos Personal Injury Trust.

Truck objects to the Plan on the basis that the Asbestos Personal Injury Trust does not comply with the structure and funding requirements of section 524(g) of the Bankruptcy Code. Truck, however, will not be entitled to any Distributions from the Asbestos Personal Injury Trust, nor do the terms of the trust have an effect on the Truck's obligations under the

[19] The Bankruptcy Court permitted Truck to fully participate in the confirmation process, including participating in pre-hearing discovery, filing pre-hearing briefs, and in presenting argument and evidence at the Confirmation Hearing.

Asbestos Insurance Policies.[20] Due to the absence of any injury to its interests, Truck lacks standing to argue that the Asbestos Personal Injury Trust fails to satisfy the requirements of section 524(g) of the Bankruptcy Code.

2. Even If it Had Standing, Truck's Arguments about the Plan's Treatment of Its Breach Claim Are Overruled.

Truck contends that the Plan violates the Assistance and Cooperation Clause[21] in its policies (as well as an implied covenant of good faith and fair dealing), resulting in the loss of coverage under the Truck Policies. As such, Truck objects to the Plan Finding.

Addressing first this Court's jurisdiction, because the Plan Finding deals with core matters, it can be made by this Court. It is undisputed that the Debtors had insurance coverage as of the Petition Date. Accordingly, the finding is a bankruptcy matter arising in Title 11 because it would have no existence outside of bankruptcy. The actions that Truck contends violate the Truck Policies and relieve it of its obligations under those policies all relate to whether the Plan should have been confirmed, the legality of its provisions, the good faith of the Plan Proponents, and the conduct of the parties during the Reorganization Cases case. Those are all core bankruptcy matters. Travelers Cas. and Sur. Co. v. Skinner Engine Co.,

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[20] In the event the Asbestos Personal Injury Trust and Truck reach a post-Confirmation agreement, the agreement is subject to Section IV.M.3.a of the Plan and notice to the Objecting Excess Asbestos Insurers and approval by the Bankruptcy Court. (Plan § I.A.120.)

[21] Defined below.

Inc. (In re Am. Capital Equip., LLC), 325 B.R. 372, 377-78 (W.D. Pa. 2005).

These issues do not need to be decided in the adversary proceeding Truck filed in the District Court. The Truck adversary is effectively a bankruptcy confirmation objection. But it relates to core matters, meaning those issues do not need to be decided in the Truck adversary. In any case, resolving the merits of Truck's contention do not implicate any jury trial right. There is no disputed issue of fact.

That the finding addresses a state law contract is of no moment. Core proceedings often deal with state-law rights, and contract rights, in particular. Any bankruptcy plan deals with contract rights, and often modifies them. And in this case, this adjudication of these rights would not exist outside of a bankruptcy environment, so they are core.

Truck's contention that the Plan impairs its contract rights is based on a false premise: the notion that its contract gives it the right to collaterally attack elsewhere a confirmation ruling and make determinations of the propriety of the parties' conduct in the course of this case. Such rights never existed under the Truck Policies, and to the extent they did, they would be preempted by the Bankruptcy Code. See, e.g., In re Federal-Mogul Glob. Inc., 684 F.3d 355, 382 (3d Cir. 2012).

Finally, the Plan does not violate the Truck policy. Truck is an insurer who contracted to defend the Debtors' asbestos claims in the state and federal court system, and Truck is being sent back to defend these claims in the court system. This does not violate the Truck policies. Nor does the Assistance and Cooperation Clause in the Truck Policies require the Debtors

to take strategic direction from their insurer in bankruptcy. Admiral Ins. Co. v. Grace Indus., Inc., 409 B.R. 275, 283 (E.D.N.Y. 2009) ("[T]he cooperation clause only required Grace to assist in the ultimate disposition of the actual claims, not to take on a partner to make litigation decisions solely regarding Grace's own bankruptcy reorganization."). Here, that the Plan did not contain features that Truck would have preferred does not violate the terms of the Truck Policies.

L. TRUCK'S COURSE OF CONDUCT BEFORE THE BANKRUPTCY COURT.

Truck raised its confirmation objection with the Bankruptcy Court before refiling it as the Complaint (as defined below), including in its First Amended Disclosure Statement for the First Amended Truck Plan [D.I. 1204 at 2] and in a confirmation objection filed on November 6, 2018 [Conf. Exhibit 95 at 19-20]. Truck later sent a "reservation of rights" letter to the Debtors' counsel, dated April 3, 2019, asserting that the Debtors had, solely as a result of their efforts in furtherance of the Reorganization Cases, breached the "Assistance and Cooperation Clause" in the Truck Policies and threatening to deny coverage if the Debtors did not capitulate and either support Truck's competing plan or revise the Plan to benefit Truck. [Conf. Exhibit 62]. Truck raised its objection again on June 6, 2019, as a supplemental objection to a prior version of the Plan and Disclosure Statement [D.I. 1682], arguing that the Debtors must file an adversary proceeding to resolve the dispute. Then, approximately ten months after first raising its objection and on the eve of the Bankruptcy Court's September 4, 2019 ruling on Truck's and the Debtors' competing disclosure statements, Truck filed its Complaint for Declaratory

Relief [Adv. Proc. 19-3052, D.I. 1] (the "Complaint"),[22] alleging that its confirmation objection was a state-law insurance dispute that was non-core and must be tried before a jury in the District Court. Truck then filed its Motion to Withdraw the Reference of Adversary Proceeding to the Bankruptcy Court [Civ. No. 19-0467-GCM, D.I. l] and its brief in support [Civ. No. 19-0467-GCM, D.I. 1-1] ("Truck's Adversary Brief").[23] The District Court stayed the matter until the Bankruptcy Court ruled on the Plan. Order [Civ. No. 19-0467-GCM, D.I. 3].

Contrary to Truck's assertions,[24] the Complaint is not an insurance coverage action that happened to take place at the same time as the Reorganization Cases. It is a declaratory judgment action filed by the Debtors' primary general liability insurer seeking to avoid any and all liability for Insured Asbestos Personal Injury Claims under the Truck Policies (the primary asset of the Debtors' estates), based solely on the Debtors' actions in support of the Reorganization

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[22] The Complaint requests declaratory judgments that the Debtors breached their duty of assistance and cooperation, as well as the implied covenants of good faith and fair dealing, under the Truck Policies and that, as a consequence, Truck is relieved of its contractual obligations under the policies. The Complaint also requests a declaratory judgment that the Debtors are not entitled to the Plan Finding.

[23] Truck incorporated its Adversary Brief into the terms of its Objection. Objection [D.I. 2070] at 25.

[24] Truck asserts that it never raised the allegations in its Complaint as a confirmation objection. As the Bankruptcy Court found, however, Truck inserted its coverage-based arguments into the confirmation process. Bankr. Hrg Tr. 25:10-15 ("This was a variety of threats being made to block confirmation or to avoid coverage until [Truck] got what it wants in the confirmation process.").

Cases and confirmation of the Plan. See, e.g., In re Am. Capital Equip., 325 B.R. at 377-78 ("Travelers itself has framed the issues in its declaratory judgment complaint such that the claims and rights that it asserts could arise only in the context of this bankruptcy case and would not exist independent of the bankruptcy environment. As such, we find that the adversary proceeding is core."). The Plan Finding is a necessary part of the confirmation process given that the right to receive the proceeds of the Truck Policies comprises the majority of the ultimate value of the Asbestos Personal Injury Trust Assets. See id. Because of this, Confirmation of the Plan must include a ruling that Truck cannot use the Reorganization Cases and actions taken in furtherance of such cases as a defense to coverage after the Plan is confirmed or to collaterally attack the Confirmation Order with another court.

The record clearly shows that Truck's Complaint, its Objection and the Plan Finding are each inextricably intertwined with both each other and the Plan confirmation process, including findings and conclusions the Court must make regarding whether the Plan and the Plan Proponents have complied with the applicable provisions of the Bankruptcy Code under section 1129(a)(1) and (2); whether the Plan has an adequate means of implementation and was proposed in good faith and not by any means forbidden by law under sections 1123(a)(5) and 1129(a)(3); whether the Plan is feasible under section 1129(a)(1); and whether the Plan meets the requirements of section 524(g). These are all statutory-based confirmation matters that fall within the jurisdiction of this Court under 28 U.S.C. § 1334 and that must be raised in the context of the Reorganization Cases. See, e.g., Special Metals Corp., 317 B.R. at 330-331 (debtors' confirmed plan was res

judicata upon liability of insurers and precluded insurers from asserting that they had been relieved of their contractual obligations under policies). That the Plan Finding addresses a matter of state law is of no moment. See 28 U.S.C. § 157(b)(3) ("A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.")

II. CONCLUSIONS OF LAW.

A. JURISDICTION AND VENUE.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. The Debtors were and are qualified to be debtors under section 109 of the Bankruptcy Code. Venue of the Reorganization Cases is proper under 28 U.S.C. § 1408 and continues to be proper.

B. APART FROM ISSUES RELATED TO INSURANCE NEUTRALITY, TRUCK LACKS STANDING TO OBJECT TO THE PLAN.

While there is no requirement that a section 524(g) plan be insurance neutral, because the Plan is insurance neutral (see Section I.K. above), Truck lacks standing to object to Confirmation of the Plan. See, e.g., In re Pittsburgh Corning Corp., 417 B.R. 289, 317 (Bankr. W.D. Pa. 2006) (finding plan insurance neutral and, therefore, insurers had no standing to object to confirmation); In re Combustion Eng'g, Inc., 391 F.3d at 218, as amended (Feb. 23, 2005) (holding that insurers lacked standing insofar as the plan did not affect their rights); Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp., 518 B.R. 307, 329 (W.D. Pa. 2014) (concluding that the insurer's "arguments that it has standing are without merit" because "[t]he

plan did not dramatically increase the 'quantum of liability,' harm . . . [insurer's] contractual rights, or increase its administrative burdens"); J T Thorpe Co., No. 02-41487-H5-11, 2003 WL 23354129, at *1 (Bankr. S.D. Tex. Jan. 30, 2003) (noting that the district court had affirmed the bankruptcy court's prior ruling sustaining the debtors' objection to insurers' standing to object to the disclosure statement and the plan); In re Fuller-Austin Insulation, No. 98-2038-JJF, 1998 WL 812388, at *1 (D. Del. Nov. 10, 1998) (holding that insurers lacked standing to object to both the approval of the disclosure statement and the plan itself because the plan preserved insurers' rights in coverage litigation).[25]

Even absent insurance neutrality, Truck lacks standing to object to the structure and funding of the Asbestos Personal Injury Trust because Truck has no interest in the trust and the trust will have no effect on its legal or pecuniary interests (see Section I.K. above).[26] In objecting to the Plan on this basis, Truck

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[25] Truck holds a General Unsecured Claim against the Estates; however, that Claim will be paid in full under the Plan. Plan § III.B.3. Truck is not raising its objection as the holder of an unimpaired Claim, but as an insurer that is not satisfied with the outcome of the Reorganization Cases, despite the fact that the Plan is insurance neutral. But a debtor is not required to take on a partner in its bankruptcy case or to make litigation decisions for the benefit of insurers. See Bankr. Hr'g Tr. (8/13/2020) at 18:12-19:1.

[26] Courts consider standing on claim-by-claim basis. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servo (TOC), Inc., 528 U.S. 167, 185 (2000) (standing is determined on an ad hoc basis, and party "must demonstrate standing separately for each form of relief sought"); accord Rosen v. Tenn. Comm'r of Fin. & Admin., 288 F.3d 918, 928 (6th Cir. 2002) ("It is black-letter law that

is impermissibly asserting the rights of third-party asbestos claimants. See Combustion Eng'g, Inc, 391 F.3d at 248 ("While . . . [insurers] argue that § 524(g)(2)(B)(i)(II) is not satisfied, they do not have standing to raise this matter."); In re A.P.I., Inc., 331 B.R. 828, 867 (Bankr. D. Minn. 2005) ("[T]he insurers cannot be heard in objection to the plan on its conformity with either § 524(g)(2)(B)(i)(II) or (i)(III)."), aff'd sub nom. OneBeacon Am. Ins. Co. v. A.P.I., Inc., 2006 WL 1473004 (D. Minn. May 25, 2006).

C. ENTRY OF THE PLAN FINDING IS PROPER.

1. Truck Has Received All Necessary Procedural Protections.

Truck argues that Bankruptcy Rule 7001(2) requires that any ruling regarding its Complaint, Objection and the Plan Finding be made in the context of an adversary proceeding, not a contested confirmation hearing. Truck Adversary Brief [Adv. Proc. 19-3052, D.I. 5-1] at 2 (citing FED. R. BANKR. P. 7001(2) ("The following are adversary proceedings: . . . a proceeding to determine the validity, priority, or extent of a lien or other interest in property . . . ."). Bankruptcy Rule 7001(2) does not require this result. Neither Truck's Complaint nor Objection (a) challenges the Debtors' ownership of the Truck Policies, (b) alleges that Truck holds a competing interest in the Truck Policies or (c) argues that Truck is entitled to the proceeds of the Truck Policies. To the contrary, Truck alleges that the

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standing is a claim-by-claim issue."); Sentinel Trust Co. v. Newcare Health Corp. (In re Newcare Health Corp.), 244 B.R. 167, 172 (BAP 1st Cir. 2000) ("In bankruptcy, a party may have standing for some matters and not for others.") (citing In re Tascosa Petroleum Corp., 196 B.R. 856 (D. Kan. 1996)).

Debtors' conduct in furtherance of the Reorganization Cases breached the Truck Policies. These breach of contract claims do not require the Court to determine the validity, priority or extent of a lien or other interest in property. See, e.g., U.S. Brass Corp., 110 F.3d 1216, 1268 (7th Cir. 1997) ("The issue in these cases is the scope of the insurance policies, an issue of contractual interpretation, not their ownership.").

Because an adversary proceeding is not required, Truck's Complaint and Objection were properly considered in connection with the Confirmation Hearing. See Ralls v. Decktor Pet Ctrs, Inc., 177 B.R. 420, 428 (D. Mass. 1995) ("Matters not listed in Rule 7001 proceed via a 'contested matter' hearing."); In re Aegis Mortg. Corp., Adv. No. 08-50237, 2008 WL 2150120, at *7 (Bankr. D. Del. May 22, 2008) ("Scott cannot seek to enforce this claim for money damages through an adversary proceeding because the relief he seeks is not of a type enumerated in Rule 7001."); see also In re Duncan, 448 F.3d 725, 727 n.1 (4th Cir. 2006) (describing an adversary proceeding as an action brought "for one or more of the reasons specified in Bankruptcy Rule 7001.").

Moreover, the fundamental components of due process are the right to be heard after notice that is reasonably calculated under the circumstances to apprise a party of the pendency of a matter and adequate to afford that party of an opportunity to object. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The contested Confirmation Hearing before the Bankruptcy Court, coupled with this Court's *de novo* review process, satisfies these requirements. The record shows that Truck received notice and an opportunity to be heard, filed written objections to the Plan that mirrored those contained in the

Complaint,[27] participated in approximately six months of confirmation-related discovery that included matters surrounding the Debtors' alleged breach of the Truck Policies and presented evidence and argument at the Confirmation Hearing. See, e.g., Objection [D.I. 2070, supporting exhibits at D.I. 2072]; Conf. Exhibits 6-12 (Truck's responses and objections to discovery requests), 29-36 (the Debtors and Truck's joint exhibits), 37-74 (Truck's exhibits admitted into evidence), 55-61 (responses and objections to Truck's discovery requests); see generally Bankr. Hr'g Trans. August 13, 2020.[28]

The record clearly reflects that Truck has received all procedural protections necessary to permit this Court or the Bankruptcy Court to dispose of Truck's Complaint and Objection in the context of Plan confirmation upon *de novo* review of the Bankruptcy proposed findings of fact and conclusions of law. Truck's alleged right to a jury trial does not change this analysis. See, e.g., Barber v. Kimbrell's, Inc., 577 F.2d 216, 221 n.12 (4th Cir. 1978) ("[W]here summary judgment is properly granted, no Seventh Amendment issue arises."); Smith v. Kitchen, 156 F.3d 1025, 1029 (10th Cir. 1997) (holding that when a plaintiff fails to

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[27] Truck's Objection incorporates and repeats the same arguments it made in support of its motion to withdraw the reference regarding its Complaint. Obj. at 25.

[28] Bankruptcy Rule 9014, which governs contested matters, requires that the fundamental requisites of due process be satisfied in the same manner as in an adversary proceeding. See FED. R. BANKR. P. 9014(b) ("The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004[.]"). Bankruptcy Rule 9014 also incorporates a significant portion of the rules governing adversary proceedings. Id. Rule 9014(c), (d).

plead sufficient facts to overcome a motion to dismiss, there are "no facts to be 'tried' by a jury").

2. As a Matter of Law, the Debtors' Acts and/or Omissions Leading Up to and During the Reorganization Cases Did Not Breach the Assistance and Cooperation Clause or Any Other Express Provision of the Truck Policies.

Truck's relationship to the Debtors is governed solely by contract. Aerojet-General Corp. v. Transport Indemn. Co., 17 Cal. 4th 38, 76 (1997).[29] "[I]nterpretation of an insurance policy is a question of law." Waller v. Truck Ins. Exch., 11 Cal. 4th 1, 18 (1995); Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1264 (1992) (despite special features, ordinary rules of contract interpretation apply to insurance contracts). Where possible, the Court infers the parties' intent solely from the written provisions of the insurance policy. AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 822 (1990); see Bank of the West, 2 Cal. 4th at 1264 (where policy language "is clear and explicit, it governs").

Truck contends that, upon Confirmation, the Debtors' actions in furtherance of their Reorganization Cases will constitute a breach of the Assistance

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[29] The parties agree that as applied to coverage for Asbestos Personal Injury Claims, California law governs interpretation of the Truck Policies. See, e.g., D.I. 2438 (Court order submitted by agreement of the parties applying California law to policy dispute); D.I. 2328 at 7 (Truck conceding California law applies to application of statute of limitations under Debtors' insurance policy claims); D.I. 5-1 (Adv. Pro. Case 19-03052) at 12 (Truck stating its policy rights are controlled by California law).

and Cooperation Clause in the Truck Policies. See, e.g., Conf. Exhibit 95, Objection to Motion for Approval of Debtors' Disclosure Statement at 19-20; Conf. Exhibit 62, April 3 Reservation of Rights Letter; Complaint ¶¶ 16-17, 64-68, Prayer ¶¶ (a)-(b); Hoyt Dep. at 74:4-75:25.[30] That provision, in its entirety, provides as follows:

> **8. ASSISTANCE AND COOPERATION OF THE INSURED**
>
> The insured shall cooperate with the Company [Truck], and upon the Company's request, shall attend hearings and trials and shall assist in affecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the occurrence.

Conf. Exhibit 30, 1974 Truck Policy at TRK 0000586 (the "Assistance and Cooperation Clause").[31]

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[30] Although Truck's Objection alleges that these breaches already have occurred (see generally D.I. 2070) Truck's Rule 30(b)(6) corporate witness, Scott Hoyt, clarified that the Debtors' breach of their policy obligations only will occur at the time a plan is confirmed without fraud protection mechanisms like those imposed in In re Garlock Sealing Techs., LLC, 504 B.R. 71 (Bankr. W.D.N.C. 2014) ("Garlock"). See Hoyt Dep. at 28:6-29:7; 177:16-180:11; 192:13-195:6.

[31] The Assistance and Cooperation Clause is included within Asbestos Insurer Cooperation Obligations as that term is defined in the Plan.

This Court has jurisdiction to apply well-settled rules of insurance policy interpretation to evaluate the Assistance and Cooperation Clause and to determine whether and how they apply to the Debtors' conduct in these bankruptcy proceedings. See E.M.M.I. Inc. v. Zurich Am. Ins. Co., 32 Cal. 4th 465, 470 (2004) ("The proper question is whether the [provision or] word is ambiguous in the context of this policy and the circumstances of this case"). Although Truck argues that this involves "an inherently factual finding" or will result in a "novel legal ruling on state law insurance policy coverage issues" (D.I. 2359 at 11), Truck admits that that "[t]he relevant part of the Assistance and Cooperation provision of the Truck policies is straightforward" and that Truck "seeks only to hold the Debtors to their *enumerated* policy obligations." D.I. 2359 at 11, 13 (emphasis added). This Court can determine the Debtors' obligations under the Assistance and Cooperation Clause as a matter of contractual interpretation "solely from the written provisions of the insurance policy." AIU Ins. Co., 51 Cal. 3d at 822; Bank of the West, 2 Cal. 4th at 1264; see Bankr. Hr'g Tr. at 25:23-25 Conf. Exhibit 7, Truck's Responses and Objections to Debtors' First Set of Requests for Production ("The meaning of the [Assistance and Cooperation] Clause is set by its text and by relevant case law. The interpretation of the [Assistance and Cooperation] Clause is a legal question for the Court on which no discovery is required or appropriate.").

Truck asks the Court to construe the term "cooperate" to require Debtors to undertake, in their own bankruptcy proceedings, to secure certain disclosures that Truck claims are necessary to prevent alleged or assumed fraud. Such an interpretation offends well-settled rules of insurance policy interpretation.

First, the specific examples of things that the Debtors are obligated to do under the Assistance and Cooperation Clause establish that assistance and cooperation must be provided, when requested by Truck, in connection with Truck's defense efforts in individual suits (i.e., attending hearings and trials, affecting settlements, securing and giving evidence, obtaining the attendance of witnesses and "in the conduct of suits"). A plain reading of the Truck Policies evidences that the parties, at the time of contracting, intended the Assistance and Cooperation Clause to apply to the enumerated activities, as well as other activities of like kind, "in the conduct of suits." See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996) (applying California law, interpreting policy language narrowly in the context in which it appears); Martin Marietta Corp. v. Ins. Co. of N. Am., 40 Cal. App. 4th 1113, 1126 (1995) ("where general words follow a specific enumeration, the general words should not be construed in their broadest sense but should be read as applying to the same general class of things as the specifically enumerated things").

Although cooperation can refer to several things, it always relates to the defense of individual cases in the context of liability insurance. For instance, courts "have construed cooperation provisions to impose an obligation to: (a) provide the insurer with a full and truthful account of the occurrence, and to satisfy the insurer's reasonable request for information on the underlying details of the case; (b) assist the insurer by forwarding notices, summonses, pleadings or other suit papers, so that the insurer may promptly prepare a defense against a third-party complaint; (c) submit to an examination under oath, or otherwise make himself available for trial, as the insurer conducts his defense; and (d) cooperate in the substantive aspects of

his defense, such as filing third-party actions when requested and avoiding settlement without the approval of the insurer." Kallis, et al., Policyholder's Guide to the Law of Ins. Coverage § 24.03 (1st ed. 2019 Supp. 2012).[32]

Second, Truck contends that the Debtors have breached the Truck Policies by "colluding" with litigation adversaries (i.e., the ACC and the FCR) to negotiate and sponsor a plan that would require Truck to defend current and future Asbestos Personal Injury Claims against the Debtors without access to certain exposure evidence that Truck wants, such as Garlock-style "fraud prevention measures" that could have been included in the plan. D.I. 2070 at 27-31. However, the typical pattern giving rise to a claim of improper collusion by an insured is where, in the context of a third-party lawsuit, the insured agrees with the claimant to an amount of liability, stipulates to judgment and then assigns to the claimant the right to satisfy that judgment from an insurance policy, combined with a covenant by the claimant not to sue the insured. See, e.g., Safeco Ins. Co. of Amer. v. Parks, 170 Cal. App. 4th 992, 1013 (2009) ("[C]ollusion occurs when the insured and the third party claimant work together to manufacture a cause of action for bad faith against the insurer or to *inflate the third party's recovery* to artificially increase damages flowing from the insurer's breach . . . . The insurer may raise collusion as a defense in a subsequent bad faith action.") (emphasis added); Andrade v. Jennings, 54 Cal. App. 4th 307, 327 (1997) ("Collusive assistance in the

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[32] Truck admits that before these bankruptcy proceedings, the Debtors always had fulfilled their defense-related obligations under the Assistance and Cooperation Clause. Hoyt Dep. at 19:2-20:13, 27:13-29:7.

procurement of a judgment not only constitutes a breach of the cooperation clause but also is a breach of the covenant of good faith and fair dealing."). There is no prejudice to Truck here. Rather, the Plan returns Asbestos Personal Injury Claims to the tort system and places Truck in the same position it was in before the Debtors' bankruptcy. See Hoyt Dep. 108:17-109:15.

Third, the Assistance and Cooperation Clause is not reasonably susceptible to the meaning that Truck advocates—i.e., that the Assistance and Cooperation Clause can be used to control the Debtors' conduct in their own bankruptcy. Admiral Ins. Co. v. Grace Indus., Inc., 409 B.R. 275, 283 (E.D.N.Y. 2009) ("[T]he cooperation clause only required Grace to assist in the ultimate disposition of the actual claims, not to take on a partner to make litigation decisions solely regarding Grace's own bankruptcy reorganization."). Belying Truck's novel argument, case law interpreting and applying this standard form policy language repeatedly and consistently measures cooperation in the context of individual suits.[33]

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[33] For instance, an insurer's duty to indemnify is excused only if its ability to provide a defense in an underlying case has been substantially prejudiced by an insured's failure to cooperate. Truck Ins. Exch. v. Unigard Ins. Co., 79 Cal. App. 4th 966, 976 (2000); Campbell v. Allstate Ins. Co., 60 Cal. 2d 303, 307 (1963). In such a case, the insurer would have to prove that if the insured had cooperated, there was a substantial likelihood the trier of fact would have found in the insured's favor. Billington v. Interins. Exch. of S. Cal., 71 Cal. 2d 728, 737 (1969). Because of this, prejudice resulting from an insured's alleged failure to cooperate cannot be determined until the outcome of the underlying case is known. United Servs. Auto. Ass'n v. Martin, 120 Cal. App. 3d 963, 966 (1981) ("Logically, the required showing of prejudice

3. As a Matter of Law, the Debtors' Acts and/or Omissions Leading Up to And During the Reorganization Cases Did Not Breach the Covenant of Good Faith and Fair Dealing Implied Into the Truck Policies.

Truck's argument that, upon Confirmation, the Debtors' actions in furtherance of their Reorganization Cases will constitute a breach of the covenant of good faith and fair dealing implied by law into the Truck Policies is even weaker.

Under California law, "[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." Comunale v. Traders & Gen. Ins. Co., 50 Cal.2d 654, 658 (1958). However, the duty of good faith and fair dealing cannot impose upon an insured any obligation that differs from the insured's express obligations under the policy.

Moreover, the California Supreme Court has rejected the concept of "reverse bad faith" asserted against a policyholder as a defense to coverage. See Kransco v. Amer. Empire Surplus Lines Ins. Co., 23 Cal. 4th 390, 407 (2000), as modified (July 26, 2000); see also Endurance Amer. Specialty Ins. Co. v. Lance-Kashian & Co., CV F 10-1284 LJO DLB, 2010 WL 3619476 (E.D. Cal. Sept. 13, 2010); Hale v. Provident Life & Acc. Ins. Co., 2003 WL 1510463 (Cal. Ct. App. Mar. 25, 2003). Indeed, Truck (through its coverage counsel) admits that such a claim cannot stand under

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cannot be made while the main tort action is still pending, its outcome uncertain, and therefore declaratory relief against the injured persons at this stage is inappropriate.").

California law. Hoyt Dep. at 126:10-16 ("Q. . . . you are aware that the California Supreme Court has rejected the concept of reverse bad faith as a defense [to] coverage in California, yes? A. I believe that is correct.").

Finally, the covenant of good faith and fair dealing implied into the Truck Policies requires any policy interpretation to be consistent with Truck's obligations-i.e., Truck must refrain from doing anything that would injure the Debtors' right to receive the benefits of the insurance agreement (Waller, 11 Cal. 4th at 36), requiring Truck to "'give at least as much consideration to the welfare of its insured as it gives to its own interests.'" Vu v. Prudential Property & Cas. Ins. Co., 26 Cal. 4th 1142, 1150 (2001) (citation omitted); Egan v. Mut. of Omaha Ins. Co., 24 Cal.3d 809, 818-19 (1979) ("For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it again must give at least as much consideration to the latter's interests as it does to its own."). Bankruptcy is not intended to relieve insurers of their contractual liabilities or to improve their position under their insurance contracts in the tort system.

In sum, as a matter of law, the Debtors' conduct in connection with and throughout these Reorganization Cases does not and has not violated any Asbestos Insurer Cooperation Obligations, including the Assistance and Cooperation Clause contained in the Truck Policies, nor was such conduct a breach of any implied covenant of good faith and fair dealing in those policies.

D. MODIFICATIONS TO THE PLAN.

The Modifications (i) do not adversely change, in any material respect, the treatment under the Plan of any Claims or Interests and (ii) comply in all respects with Bankruptcy Rule 3019. Pursuant to section 1127(b) of the Bankruptcy Code and Bankruptcy Rule 3019, the Modifications do not require additional disclosure under section 1125 of the Bankruptcy Code or the re-solicitation of acceptances or rejections of the Plan under section 1126 of the Bankruptcy Code, nor do they require that holders of Claims against or Interests in the Debtors be afforded an opportunity to change previously cast acceptances or rejections of the Plan as Filed with the Bankruptcy Court. Disclosure of the Modifications through the Debtors' service of its motion to modify the Plan [D.I. 2342] and as made on the record at the Confirmation Hearing constitute due and sufficient notice thereof under the circumstances of the Reorganization Cases. Accordingly, the Plan (as modified) is properly before the Court and all votes cast with respect to the Plan prior to the Modifications shall be binding and shall be deemed to be cast with respect to the Plan as modified.

E. EXEMPTIONS FROM TAXATION.

Pursuant to section 1146(a) of the Bankruptcy Code, the following shall not be subject to any stamp Tax or similar Tax: (i) the creation of any Encumbrances; (ii) the making or assignment of any lease or sublease; (iii) the execution and implementation of the Asbestos Personal Injury Trust Agreement, including the creation of the Asbestos Personal Injury Trust and any transfers to or by the Asbestos Personal Injury Trust; (iv) any Restructuring Transaction; or (v) the making or delivery of any deed or other instrument of transfer under, in furtherance of or in connection with

the Plan, including any merger agreements, agreements of consolidation, restructuring, disposition, liquidation or dissolution, deeds, bills of sale or assignments, applications, certificates or statements executed or filed in connection with any of the foregoing or pursuant to the Plan.

F. COMPLIANCE WITH SECTION 1129 OF THE BANKRUPTCY CODE.2

As set forth in Section I.G above, which is incorporated fully herein, the Plan complies in all respects with the applicable requirements of section 1129 of the Bankruptcy Code.

G. COMPLIANCE WITH SECTION 524(g) OF THE BANKRUPTCY CODE.

As set forth in Section I.H above, which is incorporated fully herein, the Plan complies in all respects with the applicable requirements of section 524(g) of the Bankruptcy Code.

H. TRANSFER OF BOOKS AND RECORDS TO THE ASBESTOS PERSONAL INJURY TRUST.

Section IV.J. of the Plan provides that, prior to the Effective Date, the Debtors will establish a repository containing all their the books and records that are necessary for the defense of Asbestos Personal Injury Claims, and shall make that repository available to the Entities that are responsible for the processing or defense of Asbestos Personal Injury Claims, and that are entitled to review, copy or use such documents. The transfer of these materials is essential to the Plan and to the implementation of the Asbestos Personal Injury Trust and the preservation of its assets. (McChesney Decl. ¶ 49.) To the extent the Debtors or Reorganized Debtors, as applicable, provide the

Asbestos Personal Injury Trust access to any privileged books and records, such access shall not result in the destruction or waiver of any applicable privileges pertaining to such books and records, and each of the Reorganized Debtors and the Asbestos Personal Injury Trust shall retain the right to assert any applicable privilege with respect to such books and records.

I. APPROVAL OF THE SETTLEMENTS AND RELEASES PROVIDED UNDER THE PLAN.

The settlement of certain estate claims set forth in section IV.R.2 of the Plan and the releases set forth in Section IV.R.3 of the Plan, including the releases of nondebtor parties pursuant to the general releases in Section IV.R.3.c, are (i) integral to the terms, conditions and settlements contained in the Plan, (ii) appropriate in connection with the Debtors' reorganization and (iii) supported by reasonable consideration. In light of all of the circumstances, settlement of certain estate claims in Section IV.R.2 of the Plan and the releases in Section IV.R.3 of the Plan are fair, equitable and in the best interests of the Estates.

III. CONCLUSION.

For the foregoing reasons, the Bankruptcy Court submits these Proposed Findings of Fact and Conclusions of Law to the District Court and recommends confirmation of the Plan. A proposed form of Confirmation Order is attached to these Proposed Findings of Fact and Conclusions of Law as Annex A.

These Findings and Conclusions have been signed electronically. The Judge's signature and the Court's seal appear at the top of the document.

United States
Bankruptcy Court

TRUCK INSURANCE EXCHANGE

FARMERS INSURANCE GROUP

Symbol of Superior Service

KAISER CEMENT AND GYPSUM CORP.

Policy #350-60-00

* * *

The Truck Insurance Exchange (an inter-insurance exchange, hereinafter sometimes referred to as Company) agrees with the insured, named in the Declarations made a part hereof, in consideration of the payment of the total premium when due and in reliance upon the statements in the Declarations and subject to the Limits of Liability, Exclusions, Conditions and other terms of this policy:

INSURING AGREEMENTS

I. COVERAGE:

To pay on behalf of the insured all sums which the insured shall become obligated to pay, as damages or otherwise, by reason of the liability imposed upon him by law, assumed by him under contract as defined, or by reason of any other legal liability of the insured however arising or created or alleged to have risen or to have been created because of:

1. Personal injury, sickness, disease, including death;

2. Injury to or destruction of property including all loss resulting therefrom.

II. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS:

With respect to such insurance as is afforded by this policy, the company shall:

1. Investigate and defend any claim or suit against the insured alleging such injury, sickness, disease, or destruction and seeking reimbursement or damages on account thereof, even if such claim or suit is groundless, false or fraudulent. Except as respects malpractice liability the company may make such

investigation, negotiation and settlement of any claim or suit as it deems expedient. As respects malpractice liability and employee benefits liability the company will neither settle nor compromise any claim or suit covered hereunder, except with the written consent of the insured.

2. (a) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the insured in the event of automobile accident or automobile traffic law violation during the policy period, not to exceed $250 per bail bond, but without any obligation to apply for or furnish any such bonds;

(b) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all

* * *

(b) Automobile. except where stated to the contrary, the word "Automobile" means a land motor vehicle or trailer as follows:

(1) Owned Automobile—an automobile owned by the named insured.

(2) Hired Automobile—an automobile used under contract in behalf of, or loaned to, the named insured provided such automobile is not owned by or registered in the name of (i) the named insured or (ii) an executive officer thereof or (iii) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile.

(3) Non-Owned Automobile—any other automobile.

The following described equipment shall be deemed an automobile while towed by or carried on an automobile not so described, but not otherwise; if of the crawler-type, any tractor, power crane or shovel, ditch or trench digger; any farm-type tractor; any concrete mixer other than of the mix-in-transit type; any grader, scraper, roller, or farm implement; and, if not subject to motor vehicle registration, any other equipment not specified below, which is designed for use principally off public roads. The following described equipment shall be deemed an automobile while towed by or carried on an automobile, as above defined solely for purposes of locomotion, but not otherwise; if of the non-crawler type, any power crane or shovel, ditch or trench digger, and any air-compressing, building or vacuum cleaning, spraying or welding equipment or well drilling machinery.

(c) Semi-Trailer. the word "trailer" includes semi-trailer.

(d) Two or More Automobiles. the terms of this policy apply separately to each automobile insured hereunder, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability.

(e) Use. use of an automobile or watercraft includes the loading and unloading thereof.

(f) Owned Watercraft. watercraft owned by the named insured.

(g) Hired Watercraft. watercraft used under contract in behalf of, or loaned to, the named insured provided such watercraft is not owned by or registered in the name of (1) the named insured or (2) an executive officer thereof or (3) an employee or agent of the named insured who is granting an operating allowance of any sort for the use of such watercraft.

(h) Non-Owned Watercraft. any other watercraft.

(i) Occurrence. except with respect to malpractice liability, the word "occurrence" means an event, or continuous or repeated exposure to conditions which results in personal injury or property damage during the policy period. All such exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence.

With respect to malpractice liability the word "occurrence" shall be deemed to mean a claim

or suit for injury occurring during the policy period and covered hereby.

(j) Personal Injury. means bodily injury, sickness or disease, including death at any time resulting therefrom, and also includes mental injury, mental anguish and shock, malpractice, false arrest, malicious prosecution, willful detention or imprisonment, libel, slander or defamation of character, invasion of privacy, wrongful eviction or wrongful entry, wrongful conversion of disparagement, humiliation or discrimination, and employee benefits liability.

(k) Malpractice. means malpractice, error or mistake in rendering or failing to render professional services in the practice of the insured's profession as a physician, surgeon, dentist, or nurse, but only while acting in his or her capacity as an employee or agent of the named insured including any emergency treatment rendered outside the scope of such employment.

(*l*) Employee Benefits Liability. means liability arising out of any negligent act, error or omission of the insured, or any other person for whose acts the insured is legally liable in the administration of the insured's employee benefit programs.

4. SEVERABILITY OF INTERESTS

The inclusion of more than one corporation, person, organization, firm or entity as insured under this policy shall not in any way affect the rights of any such corporation, person, organization, firm or entity as respects any claim, demand, suit or judgment made or brought by or in favor of any other insured, or by or in favor of any employee of such other insured. This policy shall protect each corporation, person, organization, firm or entity in the same manner as though a separate policy had been issued to each; but nothing herein shall operate to increase the company's liability as set forth elsewhere in this policy beyond the amount or amounts for which the company would have been liable if only one person or interest had been named as insured. Limits of liability afforded hereunder shall apply first to the named insured under this policy and remainder, if any, to additional insureds.

5. FINANCIAL RESPONSIBILITY LAWS

When this policy is certified as proof of financial responsibility for the future under the provisions of the motor vehicle financial responsibility law of any state or province, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the policy period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for

any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

The Company agrees that this policy shall be deemed endorsed to comply with the minimum requirements of any Motor Vehicle "No Fault" or "Modified No Fault" Federal law or the minimum requirements of any Motor Vehicle "No Fault" or "Modified No Fault" law of any state, province or territory in which the Named Insured has resident employees.

6. NOTICE OF OCCURRENCE:

When an occurrence takes place, written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable after the named insured's Insurance Manager has knowledge thereof when, in his opinion, it is likely to result in a claim under this policy. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting time, place and circumstances of the occurrence, the names and address of the injured and of available witnesses.

7. NOTICE OF CLAIM OR SUIT:

If claim is made or suit is brought against the insured, the insured shall promptly forward to the company or its authorized agent every demand, notice, summons or other process received by him or his representative.

8. ASSISTANCE AND COOPERATION OF THE INSURED:

The insured shall cooperate with the company, and upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the occurrence.

9. ACTION AGAINST COMPANY:

No action shall lie against the company unless, as a condition precedent thereto, the insured or his legal representative shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a codefendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

10. OTHER INSURANCE:

If the insured has other insurance against a loss covered by this policy, the insurance under this policy shall be excess insurance over all such other valid and collectible insurance; but if the carrier or carriers of such other insurance shall deny liability therefor in its entirety or as to any portion of such other insurance, then and in that event this company shall handle such loss or claim under this policy in the same manner and to the same extent as though such other insurance did not exist, and the insured shall assign to this company all rights against the carrier or carriers of such other insurance, and execute all papers necessary to secure to this company such rights or shall in its own name whenever requested by the company, and at the company's expense, institute any demand or legal proceedings which this company deems necessary against the carrier or carriers of such other insurance.

With respect to the insurance afforded under Insuring Agreement III 4, no insurance is afforded by this policy with respect to any loss against which other insurance is available to the insured, where, but for the existence of this policy, such other insurance would apply as primary insurance to such loss. If for any reason other than the existence of this policy such other insurance is not available to the insured as respects such loss, or after such other insurance available to the insured has been exhausted, then, in either event, this policy shall apply.

11. SUBROGATION:

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights. The company waives its right of subrogation (1) against any person, firm or corporation, subsidiary of, or allied or affiliated with the insured, (2) against any person, firm or corporation, with which the insured is appreciated as a joint venturer or * * *

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ATTORNEYS AND COUNSELORS OF LAW

SENT VIA EMAIL & FIRST-CLASS MAIL

April 3, 2019

Gregory M. Gordon
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Re: All Asbestos Bodily Injury Claims Against Kaiser Tendered to Truck Insurance Exchange for Defense and Indemnity

Subject: Truck Insurance Exchange Reservation of Rights Letter

Dear Messrs. Gordon and Cook:

Truck Insurance Exchange's ("***Truck***") defense of all asbestos bodily injury claims ("ABIC") is subject to reservation of the right to deny coverage. As you are aware, the Assistance and Cooperation provision of Truck's 1964-1983 insurance policies for Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc. (collectively, "***Kaiser***"), obligates Kaiser "to cooperate with the company . . . and [to] . . . assist in

effecting settlement, securing and giving evidence." The purposes of this obligation include assisting the insurer in presenting "an effective defense" *(Bely v. Clarendon Am. Ins. Co.,* 158 Cal. App. 4th 615, 626 (2nd Dist. 2007)), enabling "the insurer to quickly and accurately assess potential liability . . . and settle meritorious claims" *The Cooperation Clause and Communications Between Insurers and Their Insured,* Jeremy M. Moen, ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, March 3-5, 2017 and "to protect the insurer's interests and to prevent collusion between the insured and the injured party." *Waste Management Inc. v. International Surplus Lines Ins. Co.,* 579 N.E. 2d 322, 327 (1991).

As you are further aware, in *In re Garlock Sealing Technologies, LLC bankruptcy case,* 504 B.R. 71 (Bankr. W.D.N.C. 2014) ("Garlock"), the bankruptcy court found that there had been widespread improper manipulation of exposure evidence by asbestos plaintiffs and their lawyers that had resulted in inflated judgment and settlement amounts. These improper practices undoubtedly also impacted Kaiser's asbestos liabilities. Kaiser's filing of its own bankruptcy case in the very same court that issued the Garlock ruling presents a clear opportunity to present a plan of reorganization that would include affirmative exposure disclosures by asbestos claimants and authorizations to obtain relevant exposure information from other asbestos trusts that would mitigate against further fraudulent conduct. The Kaiser bankruptcy also presents the opportunity through claims resolution procedures in a plan of reorganization to settle significant numbers of the Kaiser asbestos claims without the ongoing costs inherent in litigation.

Truck has filed a plan of reorganization on Kaiser's behalf that is designed (1) to obtain the disclosures and authorizations necessary to prevent further fraudulent conduct by asbestos plaintiffs and their lawyers and (2) to implement claims resolution procedures that would facilitate settlements outside the tort system. 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.

Therefore, Truck's defense of Kaiser in all ABIC is subject to its reservation of rights in this letter. And nothing herein, or in Truck's actions to defend the ABIC should be construed as a waiver by Truck of this reservation or its other rights under its policies or law. Truck reserves the right to supplement this reservation.

Sincerely,

/s/ Scott R. Hoyt
Scott R. Hoyt
Counsel for Truck Insurance Exchange

Transcript of Deposition of Charles E. Bates, Ph.D.
Conducted on March 5, 2020

[9] CHARLES E BATES, Ph.D., being first duly sworn by the Notary, testifies as follows:

EXAMINATION BY COUNSEL FOR THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS

BY MR. WEHNER:

Q Good morning, Dr. Bates. My name is Jim 10 Weimer. I'm with Caplin & Drysdale and I represent the Official Committee of Asbestos Personal Injury Claimants.

You have, I am sure, had your deposition taken before?

A I have.

Q So you're familiar with the deposition process?

A I am.

Q If you need to take a break at any time, I'm perfectly happy to do so. I like taking breaks myself; so—

A Thank you.

Q —just let me know.

A I will.

Q I'm going to be today following the **[10]** convention that I think you use in paragraph 24 of your report, using the name Kaiser to mean both Kaiser Gypsum and Hanson Permanente Cement. Is that okay with you?

A Yes, it is.

Q I don't think that my questions are going to turn on a distinction between the two, but if they do and you think it's relevant, let me know.

A All right.

MR. WEHNER: If you can mark that as Exhibit 74.

(Bates Exhibit 74, Expert Report of Charles E. Bates, Ph.D. February 20, 2020, marked for identification.)

Q Dr. Bates, I've marked as Exhibit 74 a document entitled "Expert Report of Charles E. Bates, Ph.D." Could you identify that document for us, please?

A This appears to be a copy of my expert report that I submitted in this matter.

Q Great. I would like to start in the back of the report with your CV at Appendix B. Do you have that?

A I do.

Q I am looking at section B.1 and there you **[11]** have listed three degrees and a seminar.

My question is: Do you have any other degrees other than those listed in Education?

A Not at the level of these. Obviously, high school and so on.

Q Right.

A But starting from this time period from the bachelor's degree, these are the degrees I have.

Q And have you had any college level or higher academic training other than that listed here?

A Well, I've taken advanced courses in measure theory and statistics when I was in graduate school and when I was on the faculty at Johns Hopkins University. They did not lead to degrees. Those were just part of my own research program.

Q I'm sorry, could you tell me again what the subject matter of that coursework was?

A The first one I mentioned was called measure theory. It's about the foundations of probability and statistics and the underlying mathematical foundations of that for defining what is a measured space and so on, more advanced [12] **courses on statistics, just supplementing my education in that area while I was on the faculty at Johns Hopkins University.**

Q Aside from that work in the statistical area and the stuff listed here under B.1 Education, do you have any other college level or higher academic training?

A As directed coursework, no. Just my own research.

Q What is your current position?

A I am the chairman of Bates White, LLC, an economic consulting firm based in Washington, D.C.

Q I take it you founded Bates White?

A I did.

Q When did that happen?

A In July of 1999.

Q And has the business of Bates White been largely the same throughout that period?

A Yes. I mean, it's grown and developed. The concentration areas have expanded beyond what it was that I did at that time, but it is essentially the same business.

Q Here in the CV you have—at Appendix B you have a section B.3, "Selected asbestos and product liability experience." Do you see that?

* * *

[41] **Judge Whitley. I was just an observer. I was not a participant.**

Q I would like to turn to page 9 of your report in section 4. Let me know when you get there.

A I'm there.

Q Okay. In paragraph 27 you have a sentence, "Kaiser principally manufactured low-dose chrysotile cement products and wallboard accessories." Do you see that?

A I do.

Q What is a low-dose product?

A It's a product whose—by the nature of the asbestos content has low toxicity, if any.

Q Do you know the percentage composition of any Kaiser asbestos-containing product?

A That's a different question, but I don't off the top of my head. I've heard numbers, but I wouldn't recall.

Q For any Kaiser product do you know how much asbestos is in that product?

A Again, I've heard descriptions of that, but I don't have numbers on the top of my head.

Q Did you use any such numbers in doing this report?

[42] **A Not in doing this report. Just my general characterization and understanding of the nature of the products.**

Q And so what's the basis for your understanding that Kaiser manufactured what you call a low-dose product?

A My discussions over a number of years in working on the epidemiology of asbestos-related disease, discussions with industrial hygienists, multiple industrial hygienists, on the nature of the toxicity on various asbestos products.

Q Are you going to be delivering as part of your expert opinion in this case an opinion about the nature of asbestos exposure from Kaiser products?

A No. This is just part of my understanding of background of the nature of the products for my studying of the claims history and the understanding of the way the litigation environment has worked with regard to Kaiser Gypsum.

Q The toxicity of Kaiser products is not something you've studied?

A Not specifically, just an understanding of it from—as I described before.

[43] Q An understanding from what?

A Again, from my study of the epidemiology of asbestos-related disease, the exposures of various kinds of products in industries, and my work with industrial hygienists in supporting the development of those models.

Q Your general understanding?

MR. KRAKOW: Objection; form.

A General and specific, yes.

Q But you don't have any specific knowledge about Kaiser products?

A No. I said what I don't have is a specific recollection of, as I sit here, of Kaiser products. I have a general understanding about the relative toxicity of various types of asbestos-containing products and where the Kaiser products sit within that spectrum.

Q Can you name the brand name of a Kaiser product?

A I don't know that I could.

Q Do you know how many asbestos-containing products Kaiser made?

A Not specifically, no.

MR. WEHNER: We have been going now for about an hour. Do you mind taking a quick break?

[44] MR KRAKOW: Sure.

(Recess 10:15 a.m.-10:34 a.m.)

BY MR. WEHNER:

Q Back from our break, Dr. Bates.

If you could turn to page 11 of your report, I have some questions about some items on there. Do you have it?

A I do.

Q If you could direct your attention to paragraph 30, please, there you reference that Judge Hodges'

estimation order discussed 15 examples founded in extensive discovery about those cases. Do you see that sentence?

A I do, I see the sentence.

Q The 15 examples you're referring to are cases that Judge Hodges' estimation order examined. Is that correct?

A I'm not sure what you mean by examined. He referenced 15 cases in which full discovery was granted by Judge Hodges.

Q How would you describe what those 15 cases were that Judge Hodges addressed in the estimation order?

A Well, those were 15 cases in which Judge Hodges granted, over the objections of the [45] **Asbestos Claimants Committee's lawyers, discovery on the underlying law firm and practice including the underlying depositions of the plaintiffs' attorneys and their business practices in prosecuting asbestos personal injury cases.**

Q Did you in your work in Garlock examine those 15 cases?

A Yes.

Q And you have data about those 15 cases?

A There is data that was compiled on those cases, yes.

Q And is that data contained in the Garlock analytical database?

A At least to some extent, yes, they are identified which 15 cases they are, the information

that is consistent with types of information in the data that's used in the analytical database on those cases is in that—that database. It doesn't include things like the videotaped depositions or that kind of information. It's the kind of information that's consistent with the rest of the analytical database.

Q Did you examine whether any of those 15 cases were cases in which Kaiser was also named?

[46] **A I believe—well, I make reference here to the fact that two of them are the same—two of the five cases that we had in the Bestwall matter. I don't recall if they are actually the same cases. I believe there's an overlap with those 15 cases, but I have to double-check.**

Q So sitting here today, you don't know whether or not any of the 15 examples that Judge Hodges examined in his estimation order also named Kaiser?

A Allow me to double-check for a second and see if I can.

I am not—I think—I think that two of them are part of the same case, but I'm not certain.

Q So possibly two of the 15 also name Kaiser?

A Yeah, there are several of them that could. I don't—I'm not seeing the—recalling the information on whether those specific cases. I know more generally what the overlap is, but I'm not recalling about the 15 cases themselves.

Q Is it important in understanding what application the Garlock estimation order has with respect to Kaiser to see if any of those 15 cases **[47]** are also cases against Kaiser?

A No.

Q Why not?

A Because there is a broader overlap of cases, 80 percent of the cases in Kaiser during the same time period over which we could possibly have an overlap, overlap with the Bestwall—excuse me, the Garlock data. There are several hundreds of cases that are in the products review that we did in the Garlock example which allows for comparison of what was disclosed as part of the underlying tort with what was subsequently claims that were filed against trusts and so on which were there.

That's part of the whole point, which is the 15 cases themselves are just some exemplar cases on which full discovery was made. But as was clear from Judge Hodges' order and as well as the analysis that we did, it wasn't based on just 15 cases, it was based on a much broader array of cases.

So it's irrelevant whether those specific 15 cases are in the overlap or not.

Q The particular examples that Judge Hodges discusses in the Garlock estimation order don't **[48]** have anything to say about Kaiser. Is that right?

A Judge Hodges had nothing to say about Kaiser, but the cases, the practices that are described by Judge Hodges in reference to Garlock also, as this analysis shows, are apropos for Kaiser.

Q Right. My question was more whether these particular 15 cases have any relevance to Kaiser.

A They do in the sense that they are exemplars of a particular type of practice, behavior by plaintiff law firms, and those practices were also shown and revealed in cases against Kaiser, that's what the analysis shows. So they are representative of the practices that affect Kaiser as they did Garlock.

Q But if Kaiser is not named as a defendant in these 15 examples, the issues that are described in the estimation order could not have affected Kaiser itself in those cases, would you agree?

A No, that's completely wrong.

Q Why is that wrong?

A Again, to repeat what I just said, the practices that are exemplified by those particular cases are shown to be also practices that are [49] **revealed by the analysis of hundreds of other cases in which we know there is a sizeable overlap with the cases with—of which Kaiser. So the behavior that's exemplified there is the same behavior that is exemplified in the cases against Kaiser. So it's the opposite of what you said.**

Q Did you examine whether Kaiser was named in those 15 cases?

A Again, it's in the data that I have. I didn't pay particular attention to that factor because the more important part is what I just described, which is the behavior that they exemplify is the same behavior and practice that was germane to the defense of the Kaiser claims.

Q In paragraph 32 you discuss the concept of driver cases. What do you understand a driver case to be?

A Well, as I describe here, Mr. Magee, EnPro's general counsel, who oversaw the defense of the Garlock cases, used that term to describe the phenomenon that he experienced in settling the cases, which is through the settlement and the resolution of cases of particular concern to them and demands for high values associated with those claims, affected their perception of what they [50] **needed to pay to settle the broader inventory of claims with particular law firms because of their uncertainty about what could be embedded within those cases and the amount of work that they would have to do to engage in the discovery on those cases. So that they would, in fact, felt that in dealing with the particular cases at hand, which were the focus of their attention, it also affected their perception of what they had to pay, if you will, drove up the price of what they had to settle for other cases, and that's what he meant by that, and I understand that that's the language that Judge Hodges adopted in his estimation ruling.**

Q Is the concept of a driver case something that you use in your expert work for asbestos defendants?

MR. KRAKOW: Object to form.

A No, it's not a distinction that I made. I understand that of—what the defense attorneys mean by that and how it affects it. I'm looking at the more overall economic principles underlying it. But I understand what the defense attorneys mean by that.

Q Do you, when you're doing your work for [**51**] asbestos cases—I'm sorry, for asbestos defendants, identify using data-driven techniques, driver cases?

A I think some analyses that I do identify cases that the lawyers would call driver cases. I never call them that. I segment cases by resolution amount and I look at the high value cases. I think they are important cases to pay attention to and understand why the particular relationship between those values and other values of other cases is not something that I pay particular attention to.

It's—it's a terminology and a description that comes from the experience of the defense attorneys, not the analysis that I do.

Q So you have not, I take it, identified any cases that were brought against Kaiser as driver cases?

A As I said, that's not a way in which I do the analysis. I look at high value cases. I think if you were to take those cases and ask the people who resolved the claims if they understood cases that way, they would describe it that way, but that's not something I would do.

Q In the second half of paragraph 32 on page **[52]** 11 you discuss jurisdictions like New York City, which the effect of driver cases has further increased. Do you see that?

A I do.

Q Have you examined in this matter the effect of rules in New York City on the amounts that Truck paid on the Kaiser cases?

A I do not think I've isolated out cases for New York City. The focus of the litigation is more West Coast than East Coast, but I haven't done a separate analysis of that here. It's an example.

Q In your conversations with Mr. Mareno of Truck, did Mr. Mareno identify any cases to you as driver cases?

A No.

Q Did he identify any cases to you as driver cases but not use the phrase "driver cases"?

A That's not the way our discussion went with them.

Q You didn't have discussions about specific cases?

A Not that I recall, and that is—that wasn't the nature of our discussions with him. That's not the way he described things.

[53] Q Let's turn now to section 5 of your report. You've got that in front of you?

A I do.

Q I direct your attention to paragraphs 36 and following in that section, section 5. My question about that section is: Is there anything in this report which you did not present in the Garlock matter?

MR. KRAKOW: As to those specific paragraphs?

Q Yes, paragraphs 36 and on in section 5.

A I'm trying to understand your question. Could you clarify? I'm not sure what you're asking.

Q You're recounting a lot about what happened in Garlock. Is any of the information that you are discussing here information that was not presented to Judge Hodges?

A Paragraph 36 is discussing Kaiser, not call out and discuss Kaiser, did not analyze

anything having to do with Kaiser in the Garlock matter. Certainly did not discuss the extent to which the things—the practices that we uncovered, the analysis we did in Kaiser to the Garlock court.

[54] **There are not new analyses done here or new methodologies applied in analyzing the Kaiser cases that were not part of the type of work and type of analyses that we did in the Garlock matter. They were not—the scope of what we were asked to do was to find out to the extent to which what we did in Garlock, you know, the analyses we did in Garlock with regard to these issues, if we repeated those analyses on the overlap of the claims with Kaiser, to what extent they applied and what they showed.**

Q My question here is really looking at this particular section of your report, and you correctly point out that there is some references to Kaiser in paragraph 36, so let's start with paragraph 37, from paragraph 37 through paragraph 48, is there anything in here that was not presented to Judge Hodges or is a report of what Judge Hodges said or ruled?

A You said through paragraph 48?

Q Yes.

A Give me a minute then to take a look at this.

There is nothing new in this part. It's providing the context over much of what analysis [55] **we did. It's laying the foundation for the analysis we did of Garlock to apply that to the Kaiser situation.**

Q So from paragraph 37 through 48 there is nothing that was not presented to Judge Hodges or is an explanation of what he ruled?

A An explanation of—it's reporting on what he ruled and an explanation of some of the evidence that was presented to him, which I believe is the foundation for some of what he said. It's the work we did that is the foundation of that and it provides the context and foundation for the work that we do here.

Q But all of that was presented to Judge Hodges?

A Correct, that's like I said.

Q Let's turn to section 6. Do you have it?

A I do.

Q Looking at paragraph 49, and there is a sentence about six lines down that says, and I'm starting in the middle of the sentence, ". . . Kaiser too was greatly impacted by the strategic withholding of exposure information by plaintiffs." Do you see that?

A I do.

[56] Q Beyond what you present in this report, have you done any quantitative analysis of the impact of withholding of exposure information by plaintiffs on Kaiser?

A Yes, I've analyzed the relationship between the cost of resolving claims, the amounts by which costs here, meaning the amounts by which Garlock—excuse me, Kaiser—well, the amounts that Truck paid to resolve Kaiser claims prior to the Bankruptcy Wave and after the Bankruptcy Wave, and I've taken a look at those analyses, yes.

Q Are you referring to Table 4 when you're talking about that in section 7.B?

A No, that's perhaps a piece of it. I'm also referring to just my—the analyses I have not done specifically for this report, but my understanding of the resolution amounts and settlement amounts of Kaiser claims over time.

Q Those are not analyses that you decided to put in this report?

A Yeah, I didn't consider those separate analyses. Those were just informing my understanding of Kaiser and what happened to Kaiser.

I mean, they underlie—we have the—we

* * *

[65] correct figure—

A I'll take your representation for this purpose.

Q —for the total number?

A If we get to someplace we need to check it, we will, but let's just proceed.

Q Kaiser mesothelioma claims filed after June 5, 2010 would not be found in the Garlock analytical database. Is that correct?

A Correct.

Q Why is that?

A That is the date cut-off—let me make sure we visit your question, be a little more precise. June 5, 2010 is the date of the Garlock bankruptcy filing. It is the cut-off date of claims filed

against Garlock that we've included in the analytical database on that.

It is possible that there are claims that were amended, say, to add Kaiser after filings after that date that would have been in that data, that's a technical point here that may or may not be relevant.

So technically it is possible that there is some claim that was filed against Kaiser after that date that's in this database, but I would not [66] **expect that to be a material count in any meaning of the word. But generally you would not expect to find the Kaiser claims that are tiled after this date to name simultaneously with Garlock because post—post the June 5th Kaiser claims would not have—would not have been included in the Garlock database, even if they named them on their complaint post that date.**

Q And indeed, after June 5, 2010 because of the bankruptcy, Garlock was no longer in the tort system, Garlock would not be named in any of the complaints?

A Whether they were named in the complaints or not, they would not have been in that record and they wouldn't have been—the litigation against Garlock would have been stayed even if they were named in the complaints.

Q Let's move on to paragraph 52, the next one down. If you could direct your attention to the second sentence, you say, "It is, however, the pattern I would expect to see if the actual cause of mesothelioma for Kaiser claimants was high-dose asbestos insulations." Do you see that?

A I do.

Q And the pattern you're referring to there **[67]** is the fact that there is an 80 percent overlap. Is that right?

A Correct.

Q Are you offering an opinion in this report about the merits of mesothelioma claims against Kaiser?

A No.

Q What do you mean by the actual cause of mesothelioma for Kaiser claimants?

A I'm positing a hypothetical here, all right, that if the actual—if the actual cause was high-temperature insulation, that is routinely—for which Garlock gaskets are routinely used in the presence of when it's on, involves the use of say steam lines or other high-temperature fluids that go through those kinds of pipes, it is—those insulation products are often highly toxic forms of mesothelioma, and if they are the actual cause of those diseases on those cases as opposed to the lower-dose products, this is the pattern of filings that you would expect to see.

Q And why is that?

A Well, if the actual cause was the insulation, and you had individuals who could [68] **identify Garlock gaskets, identify Garlock gaskets and then name them, and if you essentially named the Kaiser products as well, then that would explain the association.**

Q Would it depend on the circumstances in each particular case?

A Sure. I mean, to state it the other way, if the cause of mesothelioma, primary cause of

mesothelioma for the Kaiser products was joint compound by people who worked in construction, all right, and the primary cause of disease was either high-temperature insulation or gaskets in these other areas, you would expect to see much lower overlap between because these are products that are used in different settings, one in essentially construction settings, the other one used in industrial settings in the presence of pipes.

And these are not populations of people who typically do the same thing, the same skills, the same crafts, so there is not much of an overlap there, so you would expect to see a much smaller overlap involved with the people who have reasons to have, at one time or another, worked in both industries. It's not the way the populations in employment tends to work.

[69] **On the other hand, if the actual cause of the disease is the asbestos insulation, then since the people who happen to also have been exposed to joint compound or worked in the presence of joint compound, would have been a highly-selected group of those individuals who were also the ones who worked in the environments of the high-temperature insulation.**

So in the one case you'd expect to see a large overlap if it was actually caused by the asbestos, because the only ones in the joint compound who would have the mesothelioma—or not the only ones, but the high proportion of them that have mesothelioma would have been caused by the insulation, that's why you would see the strong association there.

Whereas, if they were not caused by—if the joint compound independently produced large volumes of mesothelioma, you'd expect to see much smaller overlap because those two employed groups overlap a lot less.

Q And have you done any work to determine with respect to Kaiser claims to what degree those employment groups overlap?

A Not specifically with Kaiser, but as part [70] **of our work on developing the epidemiological models, we have essentially a matrix of employment industry which would cross, which I don't have the specifics of it, but I know that there is not a large overlap of those populations.**

Q And this employment matrix is something that Bates White has?

A It's just part of our work on the epidemiology of asbestos-related diseases that comes through our works with primarily it would be the output of work from industrial hygienists who inform us on the levels of exposure in various industry groups, and then employment data that we would compile in building those models to show how those groups, how particular groups of people working in particular occupations, what's the prevalence of them in various industries.

Q And is that employment data that Bates White maintains something that's informing this report?

A Not specifically. I mean, I haven't done any specific analysis of that. It's just part of my general knowledge acquired over the last 25 years of working on the epidemiology of asbestos-related diseases.

[71] Q Did you consult that material when you did this report?

A No.

Q I would like to turn to paragraph 54 in section 7.

A Oh, paragraph 54.

Q Paragraph 54 in section 7.

A I'm looking at page 54, excuse me.

Q If you go to page 54, then I'm missing some of your report.

A Well, I was, too, and that was the confusion. I got the wrong—paragraph 54.

Q Got it?

A Yes, I do.

Q In approximately the middle of paragraph 54 you have a sentence, "The analyses presented in this section are an approximation based on the overlap between the Garlock analytical database and the Kaiser claims database."

My question is: What do you mean by an approximation in this sentence?

A Well, as you're aware, we don't have the same discovery in this matter as we have in Garlock database, so we don't have the full scope of the trust data for all of the Kaiser claims. [72] **As we noted, there is an 80 percent overlap during that period of time for which it's possible to have an overlap.**

So that particular—later then we have 85 percent overlap, and that particular—by the approximation I mean that's not a hundred

percent, that overlap during that time period, and it's not the entire corpus of the Kaiser claims because it doesn't include the claims after the bankruptcy of Garlock, so that's what I mean by an approximation.

Q Let's move down to the next paragraph, paragraph 55, and in this paragraph you begin discussing your analysis of exposure omissions by Kaiser claimants using available trust claims and ballots data. Is that right?

A Yes.

Q In the third sentence in paragraph 55 you say, "I classify a defendant as omitted from a claimant's testimony if such defendant's name or products were not identified as sources of the 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." Do you see that?

[73] **A I do.**

Q Can you tell us generally what claim file materials refer to here?

A They are outlined in some detail here, but primarily you can think of that as interrogatory and deposition responses in the underlying cases for which those documents were available in the review we did of the Garlock cases.

They would also include responses that individuals put into their PIQ, plaintiff information questionnaire, as part of the Garlock discovery process.

Any source that we would have like that that was part of the claim files that were available or

information turned over by plaintiffs' law firms about the plaintiffs.

Q What is the date cut-off for claim file materials?

A It was not a date file cut-off that was exercised. I mean, there is a—we could look into the data to see what the last time—well, I'm not sure we would know. That's probably in the underlying files the last time any of that information was provided. But they would have been the claim files that were available as of the [74] **time that the litigation was stayed, though it's possible that underlying defense counsel would have added information to those files subsequently for some other purpose.**

But the personal information questionnaire data on the pending mesothelioma claims came several years later, so . . .

Q What year was the personal information questionnaire, or PIQ?

A It took place over a period of time, I don't recall exactly, 2011 or 2012 period.

Q 2011, 2012?

A Yeah, something like that, and I think that, yeah, we'd have to go back and look exactly.

Q The claim files materials that you reference here would not contain any material after the date of the Garlock estimation decision. Is that correct?

A Well, as I just described, generally I wouldn't expect it to, though it's possible those files were maintained by, in some cases by underlying defense counsel, and whether they

added additional information after that date for some purpose I wouldn't know, but I wouldn't expect it to be much, not a—

[75] Q How would anyone put any more information in the Garlock analytical database after the date that Judge Hodges ruled in 2013?

A Well, he didn't rule in 2010.

Q 2013 I had said.

A I'm sorry. After 2013? No.

Q Yeah, after 2013.

A I thought that you were referring to the—

Q Okay. I'm sorry.

A —petition date.

Q No, no, not the petition date.

I'm saying there wouldn't be anything in the claim file materials you reference here that were dated after 2013 certainly?

A Certainly not, no. It would have been before that.

Q In classifying 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 material, but the claimant voted in such defendant's bankruptcy or filed a trust claim in the defendant's asbestos trust is consistent with how you analyzed that material in the Garlock case. Is that correct?

[76] **A Yes.**

Q Do you know if counsel for Kaiser has ever used information about bankruptcy ballots in defending an asbestos personal injury case against Kaiser?

A I do not.

Q Can you identify any asbestos personal injury case for any defendant in which bankruptcy ballots were used in any way?

A I do not.

Q You cannot?

A Cannot.

Q I'm going to direct your attention a little further down that paragraph where you discuss Table 1. In the second-to-last line of paragraph 55 appearing on page 24, you reference 205 overlapping Kaiser claims. Do you see that?

A I do.

Q And these are Kaiser claims for which Garlock discovery data was available. Is that right?

A Correct.

Q Are these mesothelioma claims?

A They are.

Q So this 205 is a subset of the 3875 **[77]** overlapping mesothelioma claims we discussed earlier. Is that correct?

A Yes.

Q So of the 3,875 Kaiser mesothelioma claims filed before June 5, 2010 that you found in the Garlock analytical database, you had discovery data available on them for 205 of them. Is that correct?

A Correct.

Q So each of the 205 overlapping Kaiser claims for which Garlock discovery was available that you reference here in paragraph 55, each of those claims was filed before June 5, 2010. Do I have that right?

A Yes, you do, yes.

Q I'm going to turn to page 25 and just direct your attention to Table 1. Table 1 is a breakdown of your analysis of those 205 claims. Is that right?

A Correct.

Q Did the analysis that you describe here in Table 1 take into account the date that the claim was resolved against Kaiser Gypsum?

A For this analysis? No.

Q Why not?

[78] **A Two-part answer. First, that wasn't the analysis that we had done in Garlock and we were replicating the analysis that we had done in Garlock.**

Second of all, I don't know what the relevance of that would be here and it didn't—isn't something that would occur to me to do.

Q Did any of the cases, the 205 cases which are going into this analysis, continue against Kaiser Gypsum past the date that you had discovery information available?

A It's possible. I didn't look at that.

Q Would that be relevant to the analysis?

A Potentially.

Q How?

A I mean, I think what you're suggesting is that perhaps there was additional discovery that was added to the claims after the time period for Garlock petition date that was added by further discovery in the prosecution of the claim against Kaiser that would have modified this.

Q This analysis would not take that into account?

A It would not take that into account. It would be discovery that was available at the time [79] **that Garlock, the information that we had from the analysis of the Garlock files. We didn't have access to the Kaiser files, so we could not have done that.**

Q Let's move on to paragraph 56. In paragraph 56 you reference the RFA lists. Can you just explain briefly what the RFA lists are?

A RFA stands for request for admissions. It was initially a list that was compiled by attorneys at Robinson Bradshaw, probably in consultation with some of my staff over what information was and wasn't available, but it was primarily cases in which Garlock, counsel for Garlock, felt that or suspected that they were not getting the full story of the exposure of the plaintiffs based on their experience in defending those claims, tend to be limited to some of the higher-value claims because those are the ones for which they had the most contentious litigation.

Q You might reference it in here, but I apologize, I don't have the cite, approximately how many claims were on the RFA list?

A Just over 200.

Q I have the figure 210 in my mind. Does that sound correct?

[80] **A It's pretty close. I mean, it's right around that number. Plus or minus a few for anomalies that came up, so . . .**

Q Do you like another number better than 210?

A No, I don't think there is anything—material difference between the 210 or 208.

Q How many of the claimants on the Garlock RFA list also had a claim against Kaiser?

A Just over 40.

Q If we quickly flip to your paragraph 62, you have a number, I think it's 48?

A 48.

Q Is that the right number?

A I believe so, yes.

Q So 48 of the RFA claims were also filed against Kaiser?

A Correct.

Q And of those 29 were dismissed, according to paragraph 62. Is that correct?

A Correct.

Q Three are still open to this day, right?

A Well, they were open as of the date that I have data.

Q Okay. And 16 of the cases were resolved **[81]** against Kaiser. Is that correct?

A That's the record that I have.

Q So 16 of the 210 Garlock RFA cases were paid Kaiser cases. Is that right?

A That's my understanding.

Q I direct your attention to Table 2 on page 26. Can you briefly describe what Table 2 shows?

A So this is a comparison between claims for analyses done on claims in the RFA list. The—in particular, within the claims on the first row with numbers on it is the numbers that were reported as part in my Garlock rebuttal report, which showed that of the individuals who were on the RFA list, those individuals in aggregate reported a total of 604 exposures. Different individuals had different numbers of exposures, but those are identifiable exposures that they made to asbestos-containing products.

And in contrast, we identified that those individuals in total voted for or submitted trust claims for 1800 different exposures based on 1800 different product exposures for different manufacturers.

In contrast, of course, because there is a smaller overlap with the Garlock list, as we just [82] **identified, we found that approximately the same ratio of identified exposures from discovery to the exposures that were subsequently admitted to in the filing of trust claims or ballots of, you know, in the limited set that was for Kaiser.**

To the right of that that follow, the last three columns essentially show you the, for those individuals and each of the claimants within those individuals, the average number of exposures that were identified by each individual, the

number they actually disclosed, which in the case of the Garlock data was 22 and in the case of the Kaiser data was 24, and within those on average how many votes or ballots did we see—ballot votes or trust claims did we see that were not part of their identified exposures, and we say that that's 9 in the case of Garlock and 11 in the case of Kaiser claims.

Identifying some of those companies as being associated primarily with the manufacture of insulation products, we can see that typically they—within this data they did not identify four or five, depending on whether they are looking at Garlock or Kaiser, I don't view those numbers as being materially different for this [83] **purpose because of the nature of the sample, but they admitted four or five of the particularly toxic insulation products.**

Q Looking at the second row of Table 2, the data in here is an aggregate of the 48 claims that we just discussed that were found on the RFA list. Is that correct?

A Yes.

Q And so the data here includes claims that were resolved by Kaiser for no money. Is that correct?

A Yes.

Q In fact, most of these claims were resolved for no money. Is that correct?

A Correct.

MR. WEHNER: Let's go off the record for a second.

(Discussion off the record.)

(Recess 11:55 a.m.-1:03 p.m.)

BY MR. WEHNER:

Q We're back on the record.

A Just confirm for you earlier, you asked me the overlap on the 15 claims with Kaiser, it's three of the 15 claims on the RFA list are also in the Kaiser claim.

[84] Q So three of the 15 claims that Judge Hodges discussed in the estimation order were also claims filed against Kaiser?

A The three claims to which he referenced are also the three RFA claims for which we have full discovery are also in Kaiser data, yes.

Q That is, they were also claims brought against Kaiser?

A Correct.

Q So of the 15 claims discussed by Judge Hodges in the estimation order, three were also claims that were asserted against Kaiser?

A Correct. I mean, the only difference I'm taking in the language is the 15 that he referenced being their own.

Q Right. Of those three claims that were among the 15 that Judge Hodges discussed in the estimation order, do you know how they were resolved against Kaiser?

A No. But remember that the 15 cases on the RFA lists are cases that were targeted against Garlock, so as such, they aren't cases that are likely to also have been targeted against Kaiser.

So I suspect they could be either lower dollar settlements or dismissals and it wouldn't [85] **be surprising to me, but I don't know.**

Q I thought we had an 80 percent overlap between Kaiser and Garlock?

A That's namings.

Q Namings?

A But within a—but if you're referring to my reference about Kaiser, as the litigation progresses, as the litigation is developed, that's part of the plaintiffs' strategy of how they prosecute the claim. It is not uncommon for them to select a defendant to target in this case and a different defendant to target in that case, even though it names both of them, and it simplifies their presentation of their case and their story that they tell if they target one of them as being who they are going after to get a high-dollar settlement on a particular case.

The omissions—the pattern of omission of evidence can support either one, but how they actually choose to pursue their case, target their case, is generally one to focus on a particular defendant and let somebody—let the other defendants off relatively cheaply to help simplify their case.

Q So just to clarify, you don't know how [**86**] these three cases were resolved—

A I don't.

Q —against Kaiser?

A I don't.

Q All right. If we could turn back to your report, specifically we are in section 7.A, and if I could direct your attention to Table 3. Do you have that?

A I do.

Q This table analyzes the same 48 claims that the previous table analyzes. Is that correct?

A No.

Q How many claims does this analyze?

A This is a couple hundred claims, the broader overlap of claims.

It's helpful here probably to distinguish there's two numbers which are close to 200 and it winds up getting confusing about which is which.

Q Right.

A There is about 200, just over 200 RFA claims, we talked about that number exactly of which the overlap with Kaiser is 47.

Q Right.

A There is a broader group of claims which a [87] **more fuller—which claim file review is done on in Garlock. It's over 900, less than a thousand, in that range, for which we had deposition, interrogatories and other discovery on those cases, mostly comprised of settled cases but not exclusively, but we could do the products review on those cases and feel confident that we had a full disclosure of those, and of those there is slightly over 200 of those cases of which Kaiser was named on.**

So 200 shows up in two different places, but it's not the same thing. This is the case for which we had both the products review cases done on Garlock and the DCPF trust data, ballot data that we got, then limited to the cases that overlapped with Kaiser, which is just slightly over 200 cases.

Q So in Table 3 you are analyzing 205 cases?

A Approximately.

Q Of those 205, do you know how many were resolved with a non-zero payment by Kaiser?

A I do not.

Q Did you exclude non-zero payments from the 205?

A For Kaiser?

[88] Q Yeah.

A No. Again, I would not be surprised for the reason that I just gave you. Remember, these are cases for which Garlock had accumulated files on, so these are cases it was litigating and there are more likely to be types of cases for which Kaiser—excuse me, Garlock was targeted and not dismissed early on.

Q Let's move on to section 7.B, and specifically I'm looking at paragraph 61 and the Table 4 that's directly below it. Do you see that?

A I do.

Q The Table 4 analyzes 857 claims. Is that correct?

A I believe so, yes.

Q And these are claims that were resolved by Kaiser between 2005 and 2010. Is that correct?

A Correct.

Q And did you exclude cases which were resolved by Kaiser for zero dollars from this analysis?

A No.

Q There is a sentence that I just would like some clarification on, which is in paragraph 61. **[89]** It is the sentence second—sorry, third sentence that says, "Kaiser claimants who resolved their tort claims before filing against a DCPF trust on average extracted more than 60 percent higher amounts from Kaiser than those who resolved their Kaiser claims after filing with DCPF trusts."

Do you see that?

A I do.

Q I'm unclear after reading that sentence whether the before/after distinction you're making is before or after filing against a single DCPF trust or before or after filing against all DCPF trusts?

A The initial, even one.

Q Even one, right.

A So the earliest filing date against a DCPF trust as compared with the Kaiser resolution date.

Q Have you analyzed whether additional filings with DCPF trusts have additional effects?

A I have not.

Q Would you have any expectations about how that analysis would come out?

A I don't think we even have the data to do that analysis, so, because 1 think the data discovery from the trust was quite limited, and [90] **I'm not sure that we have the data to even do it, but I don't have a particular expectation.**

Q Do you have the data filing against each DCPF trust for which you have data?

A I don't know if we have it by individual trust or whether we just have it from the initial one. Ideally we would have it from both, I would hope we have it from all of them when they were filed, but I'm not sure because I didn't do that analysis this way—that way. I did it using the first one.

Q Let's move on to section 7.C, and specifically I'm going to direct your attention to Table 5. Do you have it?

A I do.

Q This chart includes data from resolutions against Kaiser after 2010, right?

A Yes.

Q This includes resolutions up and through the extent of your Kaiser data, 5/2016, right?

A Yes.

Q And what you have done here is just divide up the resolutions by law firm, right?

A Correct.

Q Is $346,282,555 the total amount Kaiser **[91]** has paid to all claimants?

A This is limited to mesothelioma claims?

Q Right. Thank you, these are only meso claims.

A Only meso claims, mesothelioma claims.

Q Right. The RFA claims in Garlock are all meso claims, right?

A The claims that we're dealing with in Garlock were only analyzing, other than a few preliminary tabulations, it was a mesothelioma estimation trial and our analysis was regarding mesothelioma claims.

Q Right. So the claims we have talked about as RFA claims, approximately 210 are all meso claims?

A Correct, that's the intention, yes.

Q What's that?

A There may have been a claim or two that turned out subsequently to not be mesothelioma, but it would be in one or two.

Q If we turn back to paragraph 62, the RFA claims resulted in a payment by Kaiser of 3.2 million. Is that correct?

A Yes.

Q So of the $346,282,555 Kaiser paid to **[92]** mesothelioma claims, the RFA claims accounted for 3.2 million of that. Is that right?

A Probably the more relevant comparison is of the subtotal 199—199,907,588, because those are the total of the RFA claims down below, are law firms that are not in the RFAs.

Q Right. But your argument is that the RFA claims behavior there has implications for claims beyond the RFA claims, right?

A Correct.

Q So of the total amount that Kaiser paid to meso claims, 346 million and change, 3.2 million were paid by claims which were RFA claims?

A In the overlapping set with Garlock. All of the claims above the 199 are with lawyers who are RFA lawyers.

Q Right. But—

A So this was discovery on lawyers' practices, not about claims per se, right. So these are—so in the overlap for the RFA claims that were the examples of claims for analysis claims for those law firms, that's 3.2 million of their total resolutions of 199 plus million, $200 million.

Q Apart from identifying law firms who

* * *

[109] **understanding that comes from having interviewed defense attorneys over a number of years and the—their expression of frustration over the way in which the exposures to products were, asbestos products were described prior to the Bankruptcy Wave of the early 2000s and subsequent to that, which is—the word "frustrate" is a characterization of their emotional reaction to that, and a description of the fact that it increases the—the nature of the way in which they previously had defended the cases had to change, that strategy of defending cases of relying on the individuals' own expression of their exposures was not expressed in the same way anymore and it frustrated their prior defenses of the cases and increased their costs to defend.**

Q Did you interview any defense lawyers, in connection with your preparation of this report, did you

interview defense lawyers who participated in the defense of Kaiser claims?

A Not beyond what I've already described.

Q Which defense lawyers did you interview in connection with this report who defended Kaiser's asbestos claims?

A I described my interview of the individual [110] **who managed that defense in Greg Mareno.**

Q Do you know whether or not Mr. Mareno is a lawyer?

A I already answered that question. I do not.

Q So if you would accept my representation that Mr. Mareno is not a lawyer, are there any lawyers who you spoke with who participated in the defense of Kaiser claims?

A I do not believe so.

Q When did Mr. Mareno begin overseeing the defense of—managing the defense of Kaiser claims?

A I don't recall. It's been a number of years.

Q Do you know whether he was involved overseeing the defense of any of the claims that are subject to your matching with the Garlock database?

A I do not.

Q Do you know whether he began managing claims before—Kaiser asbestos claims before 2013?

A I do not.

Q Did Mr. Mareno discuss with you the **[111]** specifics of defending any of the claims that were subject to your matching exercise with Garlock?

A No.

Q So sitting here today, you don't know with respect to any Kaiser claim that's subject to your Garlock matching exercises, the extent to which the lawyers defending those claims requested information about the plaintiffs' exposure to other products?

A No, I didn't look at the claims. I don't have the underlying claim files here. I don't have access to those files.

Q So you don't know whether exposure omissions frustrated Kaiser's defense of the claims that are subject to your matching exercise, do you?

A I disagree with that. I think they were frustrated by the change in the practices because of the examination of the claims history, the resolution history, and the description of the people who manage that today through Greg Mareno about the history of defending those cases and what changed.

Q What did Greg Mareno tell you about the history of defending those cases and what changed?

[112] **A I think, as I've described already, that they also had the experience in defending the cases, his understanding of it, whether it was his own experience or whether it comes from the people he worked with, which was that prior to the Bankruptcy Wave, the defense of the cases was a simpler matter, simply relying on the admissions of the individual plaintiffs on their alternative exposures.**

Q Did you ask Greg Mareno whether prior to 2010 Kaiser requested alternate exposure evidence from the plaintiffs?

A I didn't ask him that specific question, no.

Q Do you know with respect to Garlock—pardon me. Strike that.

Did you take any notes of your conversation with Mr. Mareno?

A No.

Q Who else was present during your conversations with Mr. Mareno?

A I have had a number of conversations with him, telephone calls. I don't recall who else may have been with me at the time.

Q How many conversations have you had with
* * *

Transcript of Deposition of Lester Brickman, Esquire

[10] LESTER B. BRICKMAN after having been first duly sworn or affirmed to testify to the truth, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS JAMES WEHNER:

Q. Good morning, Mr. Brickman.

A. Good morning.

Q. I'm Jim Wehner from Caplin & Drysdale. I represent the Official Committee of Asbestos Personal Injury Claimants.

Could you give your full name to the court reporter.

A. Lester Brickman.

Q. And could you give your current address, please.

A. 175 West 13th Street, Apartment 2D, New York, New York, 10011.

Q. And, Mr. Brickman, you're familiar with the deposition procedure. Is that correct?

A. Yes.

Q. When was the last time you were deposed; can you recall?

[11] **A. It would have been in Garlock, so that's what, five, six years, seven years ago.**

Q. Do you have any medical conditions that will affect the deposition today?

A. No.

Q. Are you taking any medications that would affect the deposition today?

MR. WEHNER: Let's mark as Exhibit 67 the expert report of Lester Brickman.

(Exhibit 67 Expert Report of Lester Brickman, Esq., February 20, 2020 marked for 12 identification and attached to the transcript.)

MS. MORRISON: Would it be possible to move the mic a little bit closer to the witness so we can hear the questions, but it's hard to hear the answers.

MR. WEHNER: Sorry, it does not move, so he'll just have to try to speak up a bit, but it's fixed on the table.

BY MR. WEINER:

Q. Mr. Brickman, could you identify for us Exhibit 67?

A. Yes. This is my expert report which I prepared in this bankruptcy proceeding, including exhibits.

[12] Q. There are a number of—yeah, as you pointed out, exhibits to the report. One is your CV at Exhibit C. Is that correct?

A. Yes.

Q. And then at Exhibit B you have a Statement of Qualifications. Is that right?

A. Yes.

Q. What's the relationship between those two documents?

A. They're both exhibits.

Q. Okay. I'm trying to get a sense of whether there's anything in Exhibit B that's not in Exhibit C. In other words, were you trying to pull out stuff of particular relevance to this matter in Exhibit B that is also in Exhibit C?

A. Exhibit B, which is titled Statement of Qualifications of Lester Brickman, is something I prepared and have updated from time to time indicating my knowledge—and my experience and knowledge with regard to asbestos litigation, and particularly asbestos bankruptcy proceedings.

Q. So this Statement of Qualifications is asbestos-specific?

A. Yes, asbestos-specific. It is so defined or stated in the actual report.

* * *

[45] **counsel for Truck, I assume. So this is one of those documents.**

Q. I'm sort of stepping back to the materials that you received from Truck for the purposes of working on this report. And my question is: Were you provided, generally speaking, a set of documents that were Bates labeled?

A. No. This is—these are the documents I was provided. There are some other pages which are not—don't have any numbers on them in the sense of data that reflect the back and forth between counsel about this is what I would like to get and here I'm providing it and so on.

Q. So this is not—Exhibit 71 is Bates labeled TRUCK0003123. Do you see that?

A. Yes.

Q. This isn't the 3,123rdb document you received from Truck; is that correct, or page?

A. I didn't receive anything directly from Truck.

Q. Did you receive any other documents with a TRUCK Bates label?

A. I don't believe so.

MR. KRAKOW: Lester may be able to go all morning, but I could use a break.

[46] MR. WEINER: Fine.

(A recess was taken.)

BY MR. WEHNER:

Q. Let me know when you're ready to roll.

A. Okay. I have a clarification, subject that we were focusing on right before the break, which is those two list—data lists that were emailed to me.

The Chapter 11 refer—the column under Chapter 11 refers to the—to a subcategory of the 14,000 claims that were pending at the time of the Kaiser bankruptcy. Of those 14,000—approximately 14,000, 301 of those claims were pending in those 17 states that had passed transparency statutes.

So I hope that clears up the matter because I kind of got it muddled.

Q. So with respect to that column Chapter 11 you said they are pending in those states. Are those current claims? Let me rephrase that so that we don't have further confusion.

The 301 claims that are counted there, are those claims that have been closed and are done with or are they ones that are in some **[47]** sense still open, they have not yet been resolved?

A. These were the claims that were stayed at the time of the bankruptcy filing in those one—well, in those 17 states.

Q. And have those claims taken the steps they need to to lift the automatic stay?

A. The information under Open indicates that five have done so.

Q. So the distinction between the two columns is the open ones have taken steps to lift the automatic stay and the Chapter 11 cases have not taken those steps. Is that your testimony?

A. The ones that were—

MR. KRAKOW: Objection, form.

A. The ones that were stayed by the bankruptcy filing are the ones that are listed under Chapter 11.

Q. And the ones that are listed under Chapter 11 continue to be stayed, in your understanding. Is that correct?

MR. KRAKOW: Object to the form.

A. I don't know. I don't know what their status is. This was the status at the time of the bankruptcy. However, the chart says that five of these were reactivated after the stay was listed, [48] **so I can't go beyond the chart. Of the 301, five have been reactivated, according to this data.**

MR. KELLY: Can you state the exhibit for the record that you've been referring to. Is that—

MS. ZIEG: 71.

MR. KRAKOW: 71.

Q. Apart from Exhibit 70 and Exhibit 71, what information did you receive from Truck or its counsel?

A. Well, I've already indicated that I've received nothing directly from Truck. This came—this material came to me I believe from Mr. Krakow in an email.

Was I provided with any other data or information? Well, certainly I was provided with information about the bankruptcy filing and so on, but I was provided with a substantial number of litigation documents to bring me up to speed in terms of what had occurred, but no other data beyond this Exhibit 70 and 71 in whatever form.

Q. Were you provided any database of claims against Kaiser?

A. No.

Q. Have you ever heard the term "BIAC"?

[49] **A. A buyout?**

Q. BIAC. B-I-A-C, all caps.

A. No.

Q. You just mentioned that you were provided litigation documents. Can you describe those litigation documents?

A. Well, I presume they're listed in Exhibit A, the materials I relied on. There was a transcript of a hearing, as I recall, in September 2019. I

also requested certain litigation documents which were provided to me. These were involving Maremont. I had a number of the Garlock documents already, but I think there may have been some Garlock documents that were also provided to me. There were U.S. trustee filings that were provided to me.

Offhand I can't think of others, but undoubtedly there was some more.

Q. If we turn in your exhibit to Exhibit A, Materials Relied Upon, and turn to page 3, and then further focus on the second bullet and what follows it. Are these materials that were provided to you by Truck or its counsel?

A. I've already indicated that I've received nothing directly from Truck. So I already [50] **had the Kananian case; I'd written extensively about it. So it was not provided to me, that I recall. The other bullets right below that refer to this litigation, and I was provided—one is a transcript—I guess all three are transcripts. Those were provided to me.**

Indeed, as I look at the remainder of this page, all but the very last one were provided to me.

Q. So on page 3, the materials denoted by the second bullet down to the second to last bullet were materials provided to you by Truck's counsel. Is that correct?

A. Yes.

Q. Is there anything else in Exhibit A that was provided to you by Truck's counsel?

A. Yes, there's material about Maremont that I requested that was provided to me.

Q. Where is that listed?

A. On page 4, first, second, third bullets. The fourth bullet I believe I already had but it was also provided to me, as was the fifth bullet. The remainder of one, two, three, four, five remaining items were materials that I had used in my scholarship, and they're listed here because I [51] **cited to them in the report.**

Q. In your earlier answer where you said that Truck's counsel provided you litigation documents, are these documents listed on page 3 and page 4 that we just identified the litigation documents you were referring to?

A. Yes.

Q. So to just wrap it up, apart from Exhibit 70 and 71 and the litigation documents we just looked at on pages 3 and 4 of your Exhibit A, did Truck's counsel provide you any other materials for the purposes of your report?

A. I don't recollect any other material. I should make clear that this material that I requested be provided to me.

Q. Did you ask for any materials from Truck that they did not provide?

A. I don't believe so.

Q. Apart from the docketed materials that are listed on page 3 of Exhibit A from the Kaiser Gypsum case, did you review any other filings from the Kaiser Gypsum case?

A. I don't recollect any other materials.

Q. Did you review in the course of your **[52]** work for Truck any pleadings, transcripts or filings from any asbestos personal injury cases against Kaiser?

A. No.

Q. Did you conduct any interviews of any kind for the purposes of this expert opinion?

A. No.

Q. Did you speak with any of the attorneys that defended or defend Kaiser in asbestos personal injury or wrongful death lawsuits?

A. No—wait. At one point there was a phone conversation I thought counsel for Truck was on that, but I don't recall any discussion of substance. But I have a vague recollection that there was somebody on the phone that was a counsel for Truck.

Q. Did you discuss with any attorneys that defend Kaiser in asbestos personal injury or wrongful death lawsuits their defense strategy in those cases?

A. No.

Q. Have you done any analysis of costs incurred to defend Kaiser Gypsum against asbestos personal injury lawsuits?

A. Specifically Kaiser Gypsum?

[53] Q. Correct.

A. No.

Q. You have not been provided any information about the money expended by Kaiser Gypsum or Truck in defending asbestos personal injury lawsuits. Is that correct?

A. I **don't recall any specific information that would be responsive to your question, but there may have been some reference to defense costs in the documents that I read, but at the moment I do not recall whether that was true or not.**

Q. I'm going to turn to page 5 of your report. I'm looking at Paragraph 7. Do you see it?

A. Yes.

Q. In this paragraph you have some information about the disease mesothelioma.

A. Yes.

Q. Do you see that? Would you characterize this paragraph as background or is this part of your opinion?

A. I would characterize it as background.

Q. For example, the second to the last sentence says, "Approximately 80 percent of those **[54]** who develop pleural mesothelioma have a history of such asbestos exposure; the other 20 percent are considered idiopathic, that is, having no know cause."

You are not going to be opining in this matter about the causes of mesothelioma. Is that correct?

A. Yes.

Q. You don't have any medical training, correct?

A. Correct.

Q. On pages 6 and 7 of your report, you discuss silicosis litigation that occurred in the early 2000s. Do you see that?

A. What paragraph number are you looking at?

Q. I'm looking at Paragraph 10; down at the bottom of page 6, "eruption of silicosis claims."

Do you see that?

A. Yes.

Q. Are silicosis claims still filed today?

A. I have no knowledge of whether they are or are not.

[55] Q. On page 9 of your report, in 2 Paragraph 14, you have a discussion of false memory implantation. Do you see that?

A. Yes.

Q. Is false memory implantation something that occurs in asbestos personal injury litigation today?

A. I believe that it probably is occurring in at least some cases based upon testimony of plaintiffs and specifically denials of certain exposures. Relying to some extent on Fred Baron's statement that the way Baron & Budd law firm prepared its asbestos clients to testify was how "any lawyer in the country that is worth a damn works."

Q. Now, the materials you are citing are from 1998, correct?

A. Yes.

Q. Is false memory implantation something that you've studied in the last 20 years?

A. Not specifically, but it is an explanation of how plaintiffs who testify in tort cases that they did not have exposure to specific products having already signed statements under penalty of perjury that they had meaningful and [56]

credible exposure to those very products or signed those statements during the course of a litigation, of a tort litigation, or signed them shortly thereafter.

Q. Are you aware of any instance of false memory implantation that affected any claim against Kaiser Gypsum?

A. I don't have any information about specific claims against Kaiser Gypsum.

Q. On page 11 of your report you describe a phenomenon called the Bankruptcy Wave. You see that?

A. Yes.

Q. When did the Bankruptcy Wave occur?

A. In the years 2000 through 2002.

Q. What relevance does the Bankruptcy Wave that occurred in 2000 to 2002 have for asbestos litigation today?

A. Major relevance. More specifically, the Bankruptcy Wave in the dates I've described took out of the litigation many of the leading defendants. By leading defendants I mean companies that had provided most of the compensation to claimants, mesothelioma claimants in particular.

And what we saw—what I saw and

* * *

[77] your opinion about how trustees are selected?

A. Well, it's more of a confirmation than it is an informing. I'd already been informed when I saw this—in fact—although I watch Billions, I don't remember this precise episode, but when I

read Fisher's article, I went back and got a copy of the script and so on and cited to it. It's obviously not direct evidence but it sure seems to mirror reality. I wouldn't stake my life on it, but, as I said, I think you can't read that and not come away with the view that this mirrors reality.

Q. Let's turn to page 17 of your report. You have a discussion in Paragraph 24 about the fact that asbestos trusts can receive subpoenas. Your see that?

A. I see Paragraph 24.

Q. Okay. It has a discussion about subpoenas and asbestos trusts?

A. Yes.

Q. Do you have any understanding of how often asbestos trusts receive subpoenas?

A. No.

MR. WEINER: If you don't mind, I wouldn't mind taking a short break. So let's go off the record.

[78] (A lunch recess was taken.)

BY MR. WEHNER:

Q. Welcome back from lunch, Mr. Brickman.

If you would turn to page 3 of your report. I want to direct your attention to a sentence at the top of page 3 that begins, "It is my further conclusion."

A. Yes.

Q. Do you see it?

A. Yes.

Q. Here you say, "It is my further conclusion that because the joint plan proposes to resolve all insured

asbestos bodily 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 values of such claims for at least the better part of the last 20 years."

I want to focus on this sentence a little bit. The first question I have is: When you say, "Many of those claims are likely to be infected," what do you mean by "many"?

A. I don't have any percentages in mind. "Many" is as close as I can come to expressing my [79] **opinion.**

Q. You haven't done any work to quantify what percentage of claims are going to be infected. Is that correct?

A. Yes.

Q. Next question I have is with respect to the word "likely" in that same phrase: "Many of those claims are likely to be infected."

My question is: What does "likely" mean there?

A. It means that—well, it means that—I can't really—as I said, I can't quantify it. My belief is—my opinion is that many of these claims are likely to be infected. I just can't break that down any further in the absence of quantifiable information.

Q. In the balance of that sentence you say—sorry, let me start that question over.

In the back end of that sentence you reference, "The same improper evidence suppression scheme that has inflated the value of such claims for at least the better part of the last 20 years."

You see that?

A. Yes.

Q. In that phrase, are such claims **[80]** claims against the debtors?

A. I'm referring to claims in the tort system.

Q. Asbestos bodily injury claims in the tort system generally?

A. When you say generally, I don't know what that is, so I would just stop right before "generally."

Q. I mean as opposed to claims against the debtor specifically. You look confused. Let me try a different—let me try a different question that—

A. Let me try to—the language I use, "against the debtors in the tort system," the debtors are not in the tort system, so that may be a confusing terminology.

I'm referring—when I say, "The claims are likely to be infected," et cetera, I'm talking about in the tort system. So that—as indicating Garlock, the settlement amounts are inflated, and so that's the principal purpose—that's the principal thrust of that sentence, that this is the scheme to use improper evidence suppression technique to inflate the value of the tort system claims.

[81] Q. The reason I'm focusing on that last part of the sentence is that you could read it to imply that you have determined that an evidence suppression scheme has inflated the value of claims against the debtors for at least the better part of the past 20 years.

And my question is, just trying to understand what you mean by that phrase, "and such claims," and I think I am understanding you to mean that you're referencing here the general scheme that all asbestos bodily injury claims in the tort system are inflated.

MR. KRAKOW: Objection, form.

A. I said many of these claims—

Q. Yeah.

A. —are inflated.

Q. Right, many of those claims.

A. That's the intention of my—

Q. You have not done a study on claims against the debtors, Kaiser Gypsum particularly, that has determined that those claims in particular are inflated. Is that correct?

A. I haven't done a study, but I'm aware of studies that have shown that there's extensive fraud being practiced against the debtors—against [82] **the trusts, set up by the debtors, so that—as the Kananian case is the prime example of how trusts are being defrauded, set up by debtors, by filing of inconsistent claims with regard to work histories.**

Q. You have not studied the value of claims against Kaiser Gypsum. Is that correct?

A. Correct.

Q. You have not looked at databases of the values of claims against the debtors in this case. Is that correct?

A. Correct.

Q. And it is not part of your opinion that the debtors specifically have suffered from this claim invasion—inflation effect. Is that correct?

A. I'm stating that trusts are being adversely affected by the scheme, defendants in the tort system. To the extent that debtors may be liable to the trusts, if the trusts run out of money, then debtors could be adversely affected also.

Q. I may have thrown you off by asking about the debtors. Let me just step back and say, let me use the phrase "Kaiser Gypsum." And when I say Kaiser Gypsum, I mean the two debtors in this **[83]** case, which is Kaiser Gypsum and Hanson Permanente Cement.

Is that agreeable?

A. Yes.

Q. So you have not studied asbestos personal injury claims against Kaiser Gypsum specifically?

A. Correct.

Q. I'm going to direct your attention a little further down in Paragraph 4 on page 3. The last sentence in that paragraph says, "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."

Do you see that?

A. Yes.

Q. You use the word "to strip Truck of protection." At this time does Truck enjoy any protection from the tort system?

A. Well, when I use the term "strip Truck of protection," I'm looking at the joint plan which specifically exempts Truck or removes Truck from the protections being afforded to the trust. [84] **The identical protections afforded to the trust are what I think are necessary to reduce the likelihood of fraud against Truck in the tort system.**

Q. So it's not so much that something is being taken away from Truck, but Truck is not getting something that the debtors is getting. Do I have that correct?

A. Yes.

Q. I'm going to go back to later in your report, page 21.

I direct your attention to Paragraph 31—

A. Yes.

Q. —the first sentence. It says, "The 2014 findings of Judge Hodges in the Garlock estimation proceeding have been widely recognized for revealing the startling degree of exposure evidence suppression in the asbestos litigation and the unfair outcomes that result from that practice."

Do you see that sentence?

A. Yes.

Q. The sentence is constructed in the passive. I just want to ask you who is doing that recognizing. Who is recognizing the Garlock estimation proceeding?

* * *

[93] **A. I don't know. I would speculate that there are tort reform groups, but that's speculation.**

Q. Looking back over the last five years, so just a little after Garlock. Are you aware of any defendant in an asbestos personal injury case alerting the presiding court that the plaintiff has concealed exposure evidence?

A. I'm aware that there have been claims made in the course of litigation or initiated by insurance companies claiming that they were defrauded by this scheme to suppress exposure evidence. I don't know what the resolution of those claims have been.

In one of my articles, fairly recent, I—it may even be the RICO article, but I'm not sure—I cited to a bunch of cases in which debtor—not debtors, defendants and/or insurers were making claims based on Garlock. Again, I haven't followed the course of those litigations.

Beyond that, I don't really know how—I have no further—anything to add to my response.

Q. The claims that you were referring to, are those the RICO actions, the ones that you **[94]** could recall?

A. Not exclusively, no. There had been RICO actions. I wrote extensively about the John Crane RICO action, but I'm referring to fraud-type claims.

Q. You say it's in one of your recent articles?

A. Yeah, it may be in RICO, but I'm not sure. If not, it's in one of the prior ones about the effect of Garlock on the litigation.

Q. And these are claims made by insurance companies?

A. Some of them, some of—some of them were made by insurance companies, some were made by defendants who had been—you know, had adverse outcomes in litigation.

Q. If we looked at your RICO article, would that refresh your recollection?

A. Well, I can quickly see if it does.

Well, I don't see it in the Table of Contents. So as I sit here today, I don't have more recollection about where—which article it appears in.

Q. Could it be in Fraud & Abuse in Mesothelioma Litigation?

[95] **A. Maybe, I don't know.**

MR. WEHNER: Let's mark that as Exhibit 73.

(Exhibit 73 Article by Lester Brickman called Fraud & Abuse in Mesothelioma Litigation marked for identification and attached to the transcript.)

Q. We marked as Exhibit 73 an article by Lester Brickman called Fraud & Abuse in Mesothelioma Litigation.

Do you recognize that article as your law review article?

A. Yes.

Q. If you could just take a look at that and see if it reminds you anything more about the cases you're remembering.

A. I don't see it here, so I can't identify at this point where—which of the articles had that,

fairly brief, two or three pages on the litigation spawned by the—Judge Hodges' findings.

Q. Just to remind you of my question. The question is: Are you aware of any defendant in an asbestos personal injury case alerting the presiding court, the court that's deciding the **[96]** asbestos case, that the plaintiff was concealing exposure evidence in the last five years?

A. Specifically aware, no.

Q. If you could just give me just a minute to look through my stuff and see if I got anything more.

MR. KRAKOW: You want to go off the record?

MR. WEHNER: Yeah, let's go off the record.

(A recess was taken.)

BY MR. WEHNER:

Q. Let's turn back to page 2 of your report, Mr. Brickman, Exhibit 67. If you could look up at the top. I have a question about the sentence that begins three lines down: "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 the claimant's exposure to asbestos manufactured, distributed or sold by multiple entities other than Kaiser and HPCI."

Do you see that sentence?

* * *

[105] Is that correct?

MR. KRAKOW: Objection, form.

A. Yes.

Q. And I believe you said the use for this the information on this exhibit was Paragraph 16 of your report.

A. Yes.

Q. And I believe it's the sentence that starts on page 12 and then carries over to page 13 where you say, "According to the data provided by Bates White, Kaiser was named as a defendant in mesothelioma lawsuits an average of 48 times per year from 1993 to 1999. From 2000 to 2009 this average soared to 434 mesothelioma lawsuits per year, and then further increased to 604 mesothelioma lawsuits per year from 2010 to 2016."

A. Yes.

Q. And this chart is that information?

A. Yes.

Q. Did you make any comparisons of the number of mesothelioma claims that were diagnosed in each of the periods you identify in Paragraph 16?

A. No.

Q. My question was a little complicated, so I want to make sure I break it down for you.

[106] So with respect to the period from 1993 to 1999, did you request information about the number of mesothelioma claims that were diagnosed in the United States?

A. I did not. I have some general understanding of the volume of mesothelioma.

Q. What about from 2000 to 2009, did you ask or were you provided information about the number of mesothelioma claims diagnosed in the United States?

A. Same answer.

Q. What about for the period 2010 to 2016?

A. Same answer.

Q. In Paragraph 21 of your report, you say that some 'baker's dozen or so law firms that represent the majority of asbestos claimants in the tort system also represent the majority of claimants in asbestos-related bankruptcy proceedings."

What are those leading asbestos firms?

A. I identified them in the article that I'm taking it from. So I don't claim to have them—

Q. Well, there's no cite there.

[107] **A. Well, it can be provided. It was taken right out of one of my articles, almost verbatim.**

Q. Do you know which law firms are on the claimants' committee in the Kaiser Gypsum case?

A. No.

Q. So you have done no comparison to see if these dozen or so law firms are the same law firms that are involved in the Kaiser Gypsum case?

A. No.

Q. You also in that same sentence make a statement that—it's that same—sorry, that same paragraph, not the same sentence. The last sentence on this same page 15, you say, "Essentially, it is the TACs that exercise effective control over the TDPs after they have been initially drafted by the ACC and adopted as part of the plan of reorganization."

Have you ever been involved in the drafting of the TDP?

A. No.

Q. On what basis do you make this statement that the TDPs were initially drafted by the ACCs?

A. I don't recall where I obtained that [108] **from. It may well be that the joint plan is drafted by the bankruptcy counsel for the ACC, and the ACC then approves it, but I'm not sure where that information comes from as I sit here today and think about where that came from.**

Q. Are you just making an assumption that the ACC initially drafts the TDP?

A. That may be an assumption. It may also be not as precise as I should have been in terms of how—the role of the T—by the ACC—with regard to the role of the ACCs in actually dealing with the creation of the TDPs.

Since they've become fairly standardized, my thought is that they probably come from the bankruptcy counsel, initially.

Q. When you say they're standardized, what was the last TDP that you reviewed?

A. Kaiser's.

Q. Kaiser Gypsum's?

A. Yes, Kaiser Gypsum.

Q. And do you view Kaiser Gypsum as the standard TDP?

A. No. It deviates in some respects. So I point out some of the deviations in this report, and I didn't seek to do a line-by-line * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

– x

In re

KAISER GYPSUM COMPANY, INC., et al.,

Debtors.

– x

Bankruptcy Case No. 16-31602

Oral deposition of SCOTT HOYT, taken pursuant to notice, was held at the law offices of GIBSON DUNN, 200 Park Avenue, New York, New York, commencing February 26, 2020, 9:07 a.m., on the above date, before Leslie Fagin, a Court Reporter and Notary Public in the State of New York.

* * *

[4] SCOTT HOYT called as a witness,

[5] having been duly sworn by a Notary Public, was examined and testified as follows:

EXAMINATION BY MR. COOK:

Q. Mr. Hoyt, good morning.

A. Good morning.

Q. I have marked as Exhibit 38 and 39, two deposition notices.

Would you take a look at those for me?

A. I have.

Q. Do you recognize Exhibit 38, the 30(b)(6) deposition notice?

A. Yes.

Q. Do you recall when you first saw this?

A. About the time it was served, I got it by email.

Q. Is it your understanding—if you refer to page 10 and page 11 of Exhibit 38, there are a list of 16 topics.

Is it your understanding you are the designee on behalf of Truck Insurance

* * *

[22] have to see the settlement agreements to be 100 percent sure, but I will take your word for that, it was 25 percent, I believe that's correct.

Q. Fireman's Fund had 25 percent; The Home, 10; and National Union, 10 percent.

Does that refresh your recollection?

A. Yes.

Q. In the mid 1990s, a dispute arose between Truck, Fireman's Fund and Kaiser about who was going to control the defense and settlement of asbestos bodily injury suits against Kaiser, correct?

A. Correct.

Q. Did you represent Truck in connection with that arbitration?

A. No, I believe I was—there was a period of time when I was off the representation.

Q. Were you involved in the arbitration?

A. I may have been a witness in that arbitration, I believe.

[23] Q. Do you recall the outcome of the arbitration?

A. I was at the time, I'm not sure I remember completely the outcome. I want to say there was—I don't remember if it resulted in a settlement or arbitration award, I just don't remember.

Q. Do you recall that one of the results of that arbitration was Truck was deemed to have the authority to make decisions about settling cases?

A. That seems correct, especially given Truck's policy wording, I believe that's the outcome.

Q. And another component of that outcome was if Truck had the right to control the defense of asbestos bodily injury claims against Kaiser, correct?

A. Correct.

Q. Were you involved at all in presenting Truck's claims for reinsurance of its asbestos liabilities for Kaiser?

A. Are you referring to a particular timeframe?

[24] Q. We know there was an MOU entered into with Truck's reinsurers about Kaiser's asbestos liabilities, my recollection was it was 1984?

A. I had nothing to do with that.

Q. Do you recall when you first became involved again with Kaiser, the Kaiser account on behalf of Truck?

A. It's around 2000.

Q. How long before the filing of the Truck v. Kaiser complaint?

A. Shortly before.

Q. So that was filed in April of 2001?

A. Yes.

Q. And have you represented Truck in its coverage litigation since 2001?

A. Yes.

Q. Do you still represent Truck in coverage litigation?

A. Yes.

Q. What did you do to prepare to testify today as Truck's designee on the topics listed in exhibit 38?

A. Well I believe I already outlined **[25]** for you some of that in terms of the documents I looked at, my recollection from historic representation of Truck.

Q. Let me make sure I understand. The questions I had asked, and I thought the testimony we were talking about when you referred to having reviewed the BIAC report and some Bankruptcy Court proceedings, I asked what you did in order to make inquiry or rely upon in preparing the interrogatory responses

and my question now is more pointed to what you did in connection with coming here to testify today, and, particularly, as to the topics listed in Exhibit 38, so I just want to make sure we are clear, those are two different things?

A. They may be, but the preparation was overlapping for those. In addition, I went through a number of my file materials, correspondence, memos, notes.

Q. What was the purpose of going through file materials, correspondence, emails and notes?

A. To refresh my recollection on the **[26]** areas of deposition inquiry.

Q. Did your review of these materials, in fact, refresh your recollection?

A. Yes.

Q. Do you have those materials with you?

A. No, they're voluminous.

Q. Did you create notes or annotations of anything in order to help you prepare to offer testimony today?

A. Yes.

Q. Do you have those notes with you?

A. I do.

Q. What was the purpose of putting those notes together?

A. Just to jot down my thoughts, impressions—my thoughts and impressions concerning the topics of inquiry.

Q. Was it intended to serve for you as an aid memoir as you testify today?

A. Not as I testified, but in preparing to testify.

MR. COOK: I'm going to ask all those materials be produced, including **[27]** the notes. I'm going to anticipate there will be an objection to that, but I think the foundation for producing documents that he has looked at to refresh his recollection and that he has testified have, indeed, refreshed his recollection are discoverable.

MR. KRAKOW: You are right. We do object.

MR. COOK: The request has been made.

Q. Let me ask you this, Mr. Hoyt. In terms of Exhibit 38, if you will turn to that, specifically on page 10, I want to look at the subject matters of testimony, paragraph 3.

A. Yes.

Q. Any alleged breaches of Kaiser policies by any of the debtors, apart from the information that we just talked about in response to interrogatory No. 1.

Have you identified, in preparing to testify today, any other breaches that Truck believes one or both of the debtors **[28]** have engaged in?

A. Not other than are laid out in our objection filed and our interrogatory responses.

Q. So with respect to the assistance and cooperation clause, you are not aware of any instance in which Truck has asserted or believed that one or both of the debtors have violated that clause before this context of the bankruptcy?

A. Correct.

Q. Beyond the documents that you reviewed and the notes—

A. Let me have that question read back.

(Record read.)

A. That's correct.

And I should clarify, the position really is that if this plan is confirmed, Kaiser will have breached the assistance and cooperation clause because the plan does not include any safeguards or disclosure requirements with regard to fraud, so the point is, Kaiser could still add those into **[29]** its plan and perhaps not be in violation of breach of the assistance and cooperation clause, but it seems determined to go forward with the plan without those safeguards and protections and should it do so, our position is that will be an actual breach.

Q. I appreciate the clarification.

Let me ask you, I asked you about the context of the bankruptcy. In fact, let me see if I can be a little more specific about the first time that Truck expressed that its belief there had been a breach by the debtors of that policy provision. We will look at your April 2019 reservation rights letter. It's already been marked as Exhibit 16.

You are familiar with that?

A. Yes.

Q. Some time before that, Truck had expressed, for the first time, maybe six months before, that they believed that this would be—that Kaiser's approach to both the Truck plan and to its own plan constituted a breach or would constitute a

* * *

[46] out false and fraudulent claims.

Q. When did that conversation begin, when?

A. It began when you called me at the end of the January 2014 and asked me, what do you think Truck would say about Kaiser exploring bankruptcy and specifically some kind of consensual prepackage deal.

Q. It's your testimony that Truck began at that time to assert the fraud protections or fraud disclosures that it now has included in its objections as of Monday?

A. Truck engaged in discussions with Kaiser about an interest in some kind of an approach that would take advantage of the Garlock decision that had fraud protections, correct.

Q. When did Truck first express that to Kaiser?

A. I think it was mutually discussed at our first meeting in June, June 3rd of 2014 at Jones Day in Los Angeles, a meeting you were at, that Mr. Hyer was at, David Neale was at, Dennis Patterson and me and I **[47]** think one of the topics was Garlock and everybody felt like Kaiser and Truck were being the subject of fraudulent claims, inflated claims in the tort system and that one of the ways to address that would be a Garlock-type approach.

Q. I'm going to limit my questions to the time period before January 2014.

How did Truck determine, prior to that time, whether a suit that it was defending for Kaiser was false or fraudulent?

A. Through regular discovery in the underlying—in the cases, Truck would attempt to discover the exposure of claimants to the products of other companies and so forth, but it was forwarded in that endeavor, apparently and the fraud involves concealment, nondisclosure, so it was difficult, outright impossible,

really, through normal discovery, to try to weed out which claims were overinflated by distorting the significance of exposure to Kaiser's product versus the products of others.

Q. Do you have any specific instances **[48]** of an ABIC claim alleged against Kaiser in which Truck determined that the suit was false or fraudulent?

A. I would think there were suspicions. I can't identify a particular claim where Truck was able to actually say, look, we found trust submissions by this claimant that show they lied about their exposure history or whatever, I can't recall a claim like that. I know that it was suspected that that was happening and Kaiser suspected it, as well as Truck.

Q. Who at Kaiser expressed to you this suspicion that there were false or fraudulent claims being brought against Kaiser?

A. Are we talking before my conversation with you on January 2014?

Q. All these questions were before January '14.

You told me someone at Kaiser was suspicious. Who expressed those suspicions?

A. I got that through the claims handling people at Truck and their conversations with the individuals, **[49]** their counterparts at Kaiser. I don't have any specific conversations I can identify.

Q. Do you have specific employees at Truck that you believe had those conversations?

A. Dennis Patterson for one.

Q. Mr. Patterson is no longer around?

A. No, he is deceased.

Q. What about Phil Miller?

A. Probably.

Q. You don't know?

A. I don't know of any particular conversations, but I generally recall that there was widespread skepticism about, for example, after the bankruptcies, of a number of the other manufacturers in the asbestos industry, the testimony shifted to identifying primarily Kaiser and others that remained solvent, so I remember discussions like that.

And isn't it interesting how, all of a sudden, these claimants are claiming all of their disease or injury exposure was from the solvent companies.

[50] Q. Let's be clear, before January 2014, who expressed that skepticism?

A. I did, Dennis Patterson did.

Q. What about, did you ever express that skepticism to anyone at Kaiser?

A. You and I may have even had conversations like that.

Q. I'm not interested in what we may have done. I'm interested in what you recall. You are the witness.

A. I believe you and I had discussions like that.

Q. Tell me what you recall saying to me about your skepticism.

A. Again, I don't remember particular conversations, I just generally remember the skepticism about the plaintiff's bar in the asbestos field shifting the focus of their client's testimony to focus on exposure, claimed exposure to products of only the solvent companies in the asbestos field.

Q. You are aware of circumstances where that kind of behavior has been identified right outside the Kaiser claims **[51]** pool?

A. Right, in Garlock, for example.

Q. Are you aware of any circumstance where that kind of behavior has been identified in the ordinary course of defending and litigating either silica or asbestos cases?

A. Well, in silica, Judge Jack identified a decision.

Q. And Truck never obtained discovery; from any claimant alleging bodily injury against Kaiser of any of this kind of behavior that you are referring to?

A. I don't believe it was able to.

Q. Was not able to send discovery or not able to successfully identify this behavior?

A. Both.

Q. Why wasn't it able to send discovery?

A. I think Lester Brickman and his expert report identifies, better than I can, in detail, why you can't get this kind of discovery from the trust generally or from **[52]** the plaintiff's bar.

Q. Let me ask you about, you were referring very specifically to your skepticism about plaintiffs identifying products and being encouraged to identify, exposures.

Why wasn't Truck able to take discovery of plaintiffs exposure evidence in each of the cases it defended for Kaiser?

A. I didn't say it wasn't able to take discovery. I'm saying it wasn't able to get truthful responses or to

actually get a revelation of the type of misconduct that was suspected.

Q. In the tens and thousands of cases, you never obtained any—that Truck defended, you never obtained any evidence of the kind of fraud or manipulation you are referring to?

MR. KRAKOW: Objection to form.

A. I'm not sure Truck was actively involved in defending tens and thousands of claims, a lot of these claims settled without any significant defense or discovery **[53]** whatsoever.

Q. Do you have an idea of how many claims Truck has defended for Kaiser?

A. Again, it depends on what you are using that word to describe, thousands of them were settled without any significant defend or discovery. If you are talking about discovery, which we have been, I don't have any idea of how many actually involve discovery to the claimants.

Q. Well, if they settled after they had been tendered to Truck based on Truck's right to investigate, negotiate and settle cases as it deems expedient, is what you are telling me that Truck's investigation deemed many of these small dollar values and that's why they were settled shortly after they were filed? I'm not sure I understand why that's not a part of Truck's defense to investigate, negotiate and settle cases.

MR. KRAKOW: Objection to form.

A. I didn't say it wasn't part of the defense, but the questions you have been asking me deal with discovery and why didn't **[54]** we find out through discovery this fraud was going on.

Q. Right.

A. So I'm assuming we are talking about cases where actual discovery had been propounded and responded to and, yet, thousands of those cases were dismissed before that ever happened.

Q. A case in which Truck decided not to take discovery.

A. That it was cheaper to settle within Kaiser's deductible many times.

Q. Do you have a sense of how many cases then Truck decided to put effort into a defense spend as opposed to settling soon after filing?

A. No.

Q. No estimate at all?

A. No.

MR. KRAKOW: Whenever you are at a breaking point.

MR. COOK: Let's take a break.

(Time noted: 10:09 a.m.)

(Recess.)

[55] (Time noted: 10:20 a.m.)

A. I think I misspoke when I said that starting with our conversation in 2014 and the early meetings, we talked about Garlock fraud protections. I think the discussion was getting a more actual value on the claims than Kaiser was getting historically in the tort system and the benefit of Garlock and as I recall, you and I talked shortly after Garlock, at least the initial decision in Garlock came down, I think some weeks before we talked.

I think I misspoke when I said we talked specifically about fraud protections. I don't think we talked specifically about fraud protections, but we talked about a mutual interest in obtaining a Garlock-type valuation approach and I think I conflated it because, at least in my mind, shortly after, that correlated to me with the inflated values in the tort system, in part because of the fraud in the tort system.

Q. Do you recall when you first came to understand Mr.—you are not a bankruptcy **[56]** lawyer?

A. Absolutely not.

Q. You do insurance coverage work?

A. Yes.

Q. When did you first come to understand that the Garlock case had, as part of its implementation, these fraud protections you've been referring to?

A. When I read that part of the decision that addressed that or the discussion in that case about that and I, at some point, read Lester Brickman's testimony in Garlock concerning that fraud and—

MR. KRAKOW: The question was about fraud protection measures.

A. That's when I believe I first learned of those.

Q. Fraud protection measures?

A. The issue.

Q. And your initial information came from reading the Garlock decision itself?

A. I can't remember whether it was that or an article about Garlock. I read an article by Mark Plevin, also about the **[57]** implications of Garlock, so I don't remember if it was the decision or article.

Q. Do you recall how long after January 2014, in the initial discussion between you and I about a possible bankruptcy, that you first became aware of the fraud protections like those implemented in Garlock?

A. No.

Q. Have you undertaken to look for any communication from you to anyone at Kaiser that refers to expressly the fraud protection such as those that were implemented in Garlock?

A. I don't believe so.

Q. Are you aware of any communications from you or anyone else representing Truck to Kaiser or any of its representatives concerning those fraud representations—I'm sorry, those fraud prevention mechanisms, such as those applied in Garlock?

A. Communications between someone at Kaiser and myself?

Q. Correct.

* * *

[70] A. I generally recall conversations here and there with the claim handlers, that they believe they were not getting a true picture of the claimant's exposure history and I don't remember how that was generated, whether it was by a specific claim or by general knowledge from seminars discussing things like the Baron and Budd script, stuff that was coming out showing how the plaintiff's bar was manipulating the work history and exposure evidence of the claimants in order to inflate the values of their tort recoveries.

Q. Is it fair to say whether a claims handler identified a case as false or fraudulent, you would be able to identify that?

MR. KRAKOW: Objection to form.

A. I don't understand.

Q. I've asked you whether or not there was any identification of a claim that Truck believed was false or fraudulent, you referred to various conversations.

I want to find out whether there **[71]** was any actual claim ever identified where a claims handler concluded it was a false or fraudulent claim?

A. I don't recall any specific claim.

Q. Did you do anything to inquire about that in order to testify here today?

A. No.

Q. Is it your belief, if there was such a claim, you would have known about it?

MR. KRAKOW: Objection to form.

A. I don't know.

Q. On those cases that Truck defended, did Truck have the option to subpoena third parties, such as asbestos trusts, to find out what kind of submissions claimants were making?

MR. KRAKOW: Objection to form.

A. Did it have the opportunity—

MR. KRAKOW: The question is the option.

A. Is that the question, the option?

Q. Yes.

A. Anything is possible, I suppose.

Q. Did it ever subpoena third party **[72]** discovery from any asbestos trusts in discovery from any asbestos with a claim it was defending for Kaiser?

A. Not to my knowledge.

Q. Do you know why?

MR. KRAKOW: Objection to form.

A. For all of the reasons laid out in Dr. Brickman's expert report, it would be futile.

Q. When did you reach the conclusion it would be futile?

A. I'm trying to remember what year it was. It was sometime in the course of the bankruptcy process of Kaiser.

Q. After September 2016?

A. I just don't remember exactly when.

Q. Take a look at topic No. 14 in the 30(b)(6) deposition notice, Exhibit 38.

Do you see that?

It reads, Any asbestos personal injury claim in the tort system against Kaiser in which Kaiser or its representatives or insurers, including Truck, issued a subpoena to an asbestos trust including **[73]** which trusts were subpoenaed, the responses to those subpoenas and the uses of those responses in the proceeding.

Are you aware of any information responsive to that topic?

A. No.

Q. Let me reiterate—

A. I should say that I believe inquiry was made. I don't remember if it was in the course of the interrogatory responses or whatever, but I believe, at some point, inquiry was made through Bob Manlowe about

whether discovery had been directed to trusts. He would be more knowledgeable about that than I am, but my recollection is that that was at least investigated.

Q. Mr. Manlowe has not been designated as the designee on topic 14 to testify here today?

A. No.

Q. And you haven't done anything or you are not aware of any information responsive to No. 14?

A. No. And what I'm telling you, I

* * *

[202] determined.

Q. This has already been marked as Exhibit 3 to a deposition, but I would like to show you the affidavit of David Neale. It's already marked as Exhibit 3.

So Mr. Neale, you reviewed this affidavit in preparation for your deposition today, is that correct, sir?

A. Yes.

Q. And Mr. Neale talks about, in paragraph 3, talks about a June 3, 2014 meeting with representatives of Kaiser in Los Angeles?

A. Correct.

Q. It also says he was joined at that meeting by, among other people, you, is that correct, sir?

A. Yes.

Q. Paragraph 6 says, in the second paragraph, The Garlock estimation ruling had just been injured in January 2014.

Do you see that, sir?

A. Yes.

Q. So the Garlock estimation decision **[203]** was discussed at this June meeting?

A. I believe so, yes.

Q. And Truck was aware of the Garlock estimation decision prior to the June meeting, isn't that correct?

A. Yes.

Q. Truck expressed the belief that the Garlock decision had significance for Kaiser's asbestos liability, isn't that correct?

MR. KRAKOW: You are referring to Mr. Neale's affidavit?

MR. HORKOVICH: I'm asking his recollection of the meeting.

A. My recollection of the meeting is that Garlock was discussed and that a Garlock-type result would be beneficial to both Truck and Kaiser and that there should be some attempt to try to reach some type of prepackaged deal on that basis.

Q. How long before the June 3, 2014 meeting was Truck aware of the Garlock estimation ruling?

A. A matter of months.

[204] Q. So what is the latest you think that Truck was aware of the Garlock estimation ruling?

A. I think I was aware of it by February, somewhere in that timeframe, and probably would have brought it to the attention of Truck somewhere in that timeframe.

Q. Since Truck became aware of the Garlock estimation ruling, in or around February of 2014, has

Truck directed defense counsel defending underlying asbestos claims to take any additional discovery?

A. I don't know what you mean, additional discovery.

Q. Well, as a result of the Garlock estimation decision, did Truck direct its defense counsel to take any further steps in the defense of the underlying claims that the defense counsel were defending?

A. Based on Garlock?

Q. Yes, sir.

A. Not that I am aware of.

Q. That's true, up to today, isn't **[205]** that correct?

A. Yes.

Q. Since the Garlock estimation decision—strike that.

Since Truck became aware of the Garlock estimation decision in and around February 2014, are you aware of any counsel defending Kaiser in asbestos personal injury cases undertaking additional discovery to obtain information about exposures that you contend that Garlock decision demonstrated was being withheld?

A. You are talking about discovery, for example, to asbestos trusts?

Q. That would be one example, yes, sir.

A. I am not aware.

Q. Since the Garlock estimation decision—strike that.

Since Truck became aware of the Garlock estimation decision in and around February of 2014, are you aware of any counsel that Truck has defending Kaiser subpoenaing any asbestos trusts?

[206] A. No.

Q. Since the Garlock estimation decision—strike that.

Since Truck became aware of the Garlock estimation decision in and around February 2014, are you aware of counsel that trust has defending Kaiser taking discovery from any outside sources, other than the claimants themselves?

MR. KRAKOW: I think you misspoke, counsel, I think you said, the trust has defending.

MR. HORKOVICH: Thank you. Let me try again.

Q. Since Truck became aware of the Garlock estimation decision in and around February of 2014, are you aware of any defense counsel that Truck has selected to defend claims against Kaiser taking discovery from any sources, other than the claimants themselves?

A. Yes.

Q. Give me some examples.

A. Coworkers, children, spouses, **[207]** whether they're claimant or not, sales records, geographic-type information.

Q. Is that the type of information that those defense counsels would have sought prior to 2014?

A. Most likely.

Q. Is there any discovery, additional discovery beyond that that defense counsel didn't seek, prior to

2014, that defense counsel hired by Truck then did seek after the Garlock estimation decision came out?

A. I'm not aware of any.

Q. Did the Garlock estimation decision effect how Truck defended Kaiser in any asbestos personal injury cases in any way?

A. No.

Q. Kaiser is not the only policyholder of Truck that is facing asbestos liabilities, is that correct?

A. Correct.

Q. Did the Garlock estimation decision change anything about how asbestos defendants defended by Truck generally defended asbestos personal injury claims?

[208] A. No.

Q. Truck controls settlements, is that correct, sir?

A. Yes.

Q. After the Garlock estimation decision, did Truck reduce settlement offers on asbestos personal injuries cases against Kaiser Gypsum?

MR. KRAKOW: Objection.

You are asking, reduce from what to what?

MR. HORKOVICH: Well taken.

Q. Are you aware of any circumstance in which there were settlement discussions going on in February '14 of any claims against Kaiser?

A. I have no recollection of any particular. I'm sure there were.

Q. After the Kaiser estimation decision came out, did Kaiser go back in any instance, in any individual claim against Kaiser, and said, we offered you X number of dollars yesterday, but, now, the Garlock estimation decision is out and we are going **[209]** to offer you less?

A. I think you may want to rephrase that. I think you put Kaiser in there and you meant Truck.

Q. I'm sorry.

After the Garlock estimation decision came out, did Truck reduce any settlement offers that were outstanding on any asbestos personal injury case against Kaiser?

A. Not that I am aware of.

Q. Does Truck maintain a matrix as to how much it believes certain injuries are worth after asbestos exposure for policyholders of Truck; that lung cancer is worth X amount of dollars and mesothelioma cases are worth Y amount of dollars?

A. No.

Q. After Truck became aware of the Garlock estimation decision in around February of 2014, shouldn't Truck have offered less money if it believes the claimants were withholding exposure information? * * *