

**TESTIMONY OF LEIGH ANN SCHELL, ESQ.  
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**TESTIMONY IN SUPPORT OF H.R. 4369, THE "FURTHERING ASBESTOS CLAIM  
TRANSPARENCY (FACT) ACT OF 2012"**

**BEFORE THE COMMITTEE ON THE JUDICIARY**

**SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW**

**MAY 10, 2012**

**TESTIMONY OF LEIGH ANN SCHELL, ESQ.  
KUCHLER POLK SCHELL WEINER AND RICHESON, L.L.C.**

Chairman Coble, Ranking Member Cohen, and members of the subcommittee, thank you for holding today's hearing on H.R. 4369 -- the Furthering Asbestos Claims Transparency (FACT) Act of 2012. I urge the subcommittee to support this good, common sense legislation that would ensure transparency and accountability for an asbestos compensation system that is broken. The first step toward remedying this broken system is to provide for transparency through reporting by the trusts and by providing a mechanism through which defendants can obtain information from the trusts. The FACT Act does just that.

I have practiced law in New Orleans for 23 years in the areas of product liability, environmental exposure and commercial litigation. I currently serve as Chairman of the International Association of Defense Counsel's (IADC) Legislative, Judicial and Governmental Affairs Committee. I am not being paid for my travel expenses or for my time. The views and observations that I express today are my own and not those of my clients or any other group.

I have been involved in asbestos litigation for over 20 years. During that time, I have watched the face of asbestos litigation change as companies sought bankruptcy protection. Due to the large number of bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."<sup>1</sup> One former plaintiffs' attorney described the litigation as an "endless search for a solvent bystander."<sup>2</sup> I have observed this process firsthand. The names and faces of the defendants have shifted dramatically from those who sold raw asbestos and manufactured asbestos insulation which contained the most

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<sup>1</sup> Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract at* 2001 WLNR 1993314.

<sup>2</sup> 'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey's Litig. Rep: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

dangerous asbestos fiber type,<sup>3</sup> to makers of equipment such as valves, pumps and engines some of which did not contain any asbestos at the point of sale and some of which incorporated gaskets and packing material made by others. And now, with the recent bankruptcy of Garlock Sealing Technologies, a major gasket manufacturer is no longer a viable defendant.

Before over 100 asbestos defendants sought bankruptcy protection,<sup>4</sup> those defendants, including the “traditional defendants” such as Johns-Manville<sup>5</sup>, W.R. Grace and Owens Corning, bore 95% of the tort liability to asbestos plaintiffs, leaving only 5% of the tort liability to be shared among other companies.<sup>6</sup> Now, the once peripheral, solvent defendants remaining in the tort system are left with 100% of the tort liability rather than 5% even though their actual roles in the history of asbestos exposure have not changed. The shift in the burden of bearing the tort liability is not due to a shift in culpability, but rather due to removing those most culpable from the tort playing field through the protection of bankruptcy.

While no longer available to share the tort burden, over 60 bankrupt defendants established trusts which are currently funded with approximately 36 billion dollars for the benefit of asbestos claimants.<sup>7</sup> Yet the trust system operates independently of the tort system and the

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<sup>3</sup> In the United States, amosite (an amphibole) is the most common fiber type in lung tissue in mesothelioma cases, and is considered responsible for most mesothelioma cases. Dodson, R. F., O’ Sullivan, M., Corn, C.J., McLarty, J.W., Hammar, S.P, *Analysis of Asbestos Fiber Burden in Lung Tissue from Mesothelioma Patients*, *Ultra Pathol*, 21:321-336 (1997); Roggli, V. L., Sharma, A., Butnor, K., Sporn, T., Vollmer, R., *Malignant Mesothelioma and Occupational Exposure to Asbestos: A Clinicopathological Correlation of 1445 Cases*, *Ultra Structural Pathology*, 26: 55-65 (2002).

<sup>4</sup> Over 100 companies have filed for bankruptcy protection to discharge asbestos liabilities. See Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Rand Corp. 2011), available at <http://www.rand.org/pubs/monographs/MG1104.html> p. 25.

<sup>5</sup> Johns-Manville was the largest manufacturer and seller of asbestos-containing products in the world and the holder of a substantial share of liability in the asbestos litigation system until it declared bankruptcy in 1982.

<sup>6</sup> See James Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 236-37 (2006); See also, Testimony of James L. Stengel, Esq., Hearing on Asbestos Litigation Fraud and Abuse, House Judiciary Committee: Subcommittee on the Constitution, September 9, 2011 at 10.

<sup>7</sup> See Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (2010 Rand Corp.), at [http://www.rand.org/pubs/technical\\_reports/2010/RAND\\_TR872.pdf](http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf). See also, U.S. Government Accountability

individual trusts act independently of each other. With such a staggering amount of money available to asbestos claimants in the trust system, it makes no sense to require the solvent, peripheral defendants to bear full tort liability without reference to and credit for the funds available from the trusts.<sup>8</sup> And it makes no sense for the trusts not to share claims information to avoid duplicate or inconsistent recovery from the trusts themselves. The separation of the trust and tort systems not only creates a misallocation of fault to solvent defendants, it drains trust resources by allowing some claimants double recovery. Some made whole in the tort system also seek payment through the trust system. And, some file trust claims ripe with misstatements. Overpayment by the trusts and payment to those not truly entitled depletes trust funds which should be reserved for future claimants and not used to over pay or wrongly pay current claimants. Recently, the chance of double recovery has been made easier by trusts allowing claimants to delay their trust filings or to defer resolution of a filed claim.

#### I. THE SOLUTION IS TRANSPARENCY

The U.S. Government Accountability Office (GAO) issued a report in September, 2011 in the wake of growing concern about trust transparency issues.<sup>9</sup> According to the GAO, nearly all of the asbestos trusts were created pursuant to section 524(g) of the Bankruptcy Code. The GAO observed that while federal law authorizes creation of the trusts, it provides no mechanism to ensure that the trusts operate in a manner consistent with Congressional intent.<sup>10</sup> The report noted that trusts do not make claimant information, including exposure allegations, publically

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Office, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts (GAO Report), GAO-11-819, (Sept. 2011), at <http://www.gao.gov/products/GAO-11-819> at p. 3.

<sup>8</sup> While the states address credit for bankrupt shares differently, one thing is the same: the burden of proving the fault of a bankrupt entity or payment by a bankrupt entity to obtain a reduction in liability shifts to the solvent defendants whereas absent the bankruptcy the burden of proving fault would have been with the plaintiff.

<sup>9</sup> See GAO Report, *supra*.

<sup>10</sup> *Id.* at 3.

available. In fact, 65% of the trusts have included procedures in their trust distribution plans intended to prevent production of exposure allegations and other claims information.<sup>11</sup>

These Trust Distribution Procedures (TDPs) have been modified post-confirmation to include a “confidentially” provision that generally states that all information submitted to the respective trust by an asbestos claimant is to be treated as made in the course of settlement negotiations and is intended to be confidential and protected by all applicable privileges. Second, a large number of these TDPs have been modified post-confirmation to include a “sole benefit” provision that generally states that evidence submitted to the respective trust to establish proof of an asbestos-related claim is for the sole benefit of the trust, not third parties or defendants in the tort system.

For example, the Babcock and Wilcox Personal Injury Asbestos Settlement Trust’s plan now provides:

**6.5 Confidentiality of Claimants’ Submissions.** All submissions to the PI Trust by a holder of a PI Trust Claim of a proof of claim form and materials related thereto shall be treated as made in the course of settlement discussions between the holder and the PI Trust, and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including but not limited to those directly applicable to settlement discussions. **The PI Trust will preserve the confidentiality of such claimant submissions, and shall disclose the contents thereof only in response to a valid subpoena of such materials issued by the Bankruptcy Court. The PI 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 and before those courts having appellate jurisdiction related thereto.**<sup>12</sup>

Not only does the Babcock and Wilcox Trust require a subpoena for production of claims information, it requires that the subpoena issue from the Bankruptcy Court. And, the Trustee is ordered to take the initiative to challenge the subpoena. Such constraints are not surprising given

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<sup>11</sup> *Id.* at 26 and 28.

<sup>12</sup> See The Babcock & Wilcox Co., Asbestos Personal Injury Settlement Trust Distribution Procedures, Exhibit B to Plan of Reorganization, at 47-48, at <http://www.bwasbestostrust.com/files/Revised%20B%20W%20TDP%201.pdf> (emphasis added).

that plaintiffs' firms often are part of the group responsible for developing the trust's distribution procedures.<sup>13</sup>

This limitation on production is contrary to recognition by the courts of the propriety of discovery of trust materials.<sup>14</sup> For example, in New York, the Court ordered production of claims materials, reasoning that:

[W]hile the proofs of claim are partially settlement documents, they are also presumably accurate statements of the facts concerning asbestos exposure of the plaintiffs. While they may be filed by the attorneys, the attorneys do stand in the shoes of the plaintiffs and an attorney's statement is an admission under New York law. Therefore, any factual statements made in the proofs of claim about alleged asbestos exposure of the plaintiff to one of the bankrupt's products should be made available to the defendants who are still in the case.<sup>15</sup>

In spite of the common sense conclusion that factual statements in trust filings are relevant in tort cases, the written discovery propounded to plaintiffs related to bankruptcy trusts is almost always met with objection.<sup>16</sup> Second, even attempts to issue subpoenas to the trusts are vigorously opposed by plaintiffs' counsel.<sup>17</sup> Indeed, on December 28, 2011, the "three plaintiffs' firms representing all plaintiffs within the Rhode Island Asbestos Docket" filed a blanket, joint motion for a protective order asking the court to prevent "the disclosure of the terms and supporting documentation of any settlement entered into between any plaintiff and any

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<sup>13</sup> See GAO Report, *supra* at 22-23, noting that Trust Advisory Committees (TACs) are dominated by a small group of plaintiffs' firms and that TAC approval is needed to set payment percentages, modify payment percentages and approve audit methods.

<sup>14</sup> See, e.g., *In re Asbestos Litig.*, MDL No. 2004-03964 (Tex. Harris County Cir. Ct. Jan. 16, 2009) (letter ruling); see also *Volkswagen of Am., Inc. v. Superior Ct. of San Francisco*, 43 Cal. Rptr. 3d 723 (Cal. Ct. App. 1st Dist. 2006).

<sup>15</sup> See Shelley et al., *supra*, at 274 (quoting *Negrepoint v. A.C.&S., Inc.*, No. 120894/01 (N.Y. Sup. Ct. Dec. 11, 2003)).

<sup>16</sup> See, e.g. Plaintiffs' Responses to Defendant's First Set of Interrogatories, Requests for Admission and Requests for Production at pp. 6-10, Attachment A.

<sup>17</sup> Plaintiffs' Motion to Quash Ford's Subpoena to the Johns-Manville Bankruptcy Trust and Opposition to Letters Rogatory with Incorporated Memorandum in Support, *William Oddo, Jr. v. Asbestos Corporation LTD, et al.*, No. 2011-058853, Civil District Court for the Parish of Orleans, Div. 14-1 filed January 13, 2012, Attachment B.

named or unnamed defendant or bankruptcy trust.”<sup>18</sup> And, finally, if any information is successfully gathered through traditional discovery, it is only available to the defendants in that particular case and is not available to other trusts or to other interested parties.

A. ACCESS TO TRUST INFORMATION IS NEEDED BY PLAINTIFFS, DEFEDANTS AND THE TRUSTS THEMSELVES.

A look at recent examples from my law firm, as well as those from around the country, shows that supplying inconsistent information to the trusts and to the tort system is both widespread and detrimental to plaintiffs and defendants alike. In one of our cases, misrepresentations were made on behalf of the plaintiffs in 16 trust claim forms. In *Mary A. Robeson, et al v. Ametek, Inc. et al*, the forms were completed by counsel on behalf of Mr. Robeson’s son, David Thomas Robeson, Sr. Most of the claims forms denied that David Robeson’s father had been a smoker. The forms also gave details of numerous exposure situations complete with identification of specific products by brand name. On January 24, 2011, David Robeson was deposed solely related to his knowledge of the contents of the bankruptcy trust claims forms. In stark contrast to the information submitted on the claims forms, Mr. Robeson testified affirmatively that his father had in fact been a smoker; that he had no knowledge about the exposures claimed; and that plaintiffs’ counsel had never had contact with his father to obtain information.<sup>19</sup>

Currently, in the *Oddo* case pending in Orleans Parish, there has been significant obfuscation of Mr. Oddo’s application to the Johns-Manville trust. We issued discovery on the matter, and Plaintiffs stated in Answers to Interrogatories that no application had been

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<sup>18</sup> Plaintiffs’ Joint Motion for a Protective Order Regarding Settlements and Bankruptcy Claims, State of Rhode Island Superior Court, *In Re Asbestos Litigation*, filed December 28, 2011, Attachment C.

<sup>19</sup> See Transcript of Deposition of David Thomas Robeson, Sr. taken January 24, 2011 in *Mary A. Robeson et al v. Ametek et al*, Civil District Court for the Parish of Orleans, No. 2004-15722, Div. E, Attachment D. (Exhibits available upon request.)

made. When we issued a subpoena to Johns-Manville, Plaintiffs (successfully) moved to quash it.<sup>20</sup> Our writ application is pending before the Fourth Circuit Court of Appeal. On appeal, Plaintiffs represented in their briefing that no application had been made to Johns-Manville. Contrary to this assertion, we obtained written correspondence from Johns-Manville confirming that not only had a claim been made, but that it had been settled and paid.<sup>21</sup>

These experiences are not limited to my office or to Louisiana. Recently, in Oklahoma, CertainTeed Corporation (CertainTeed) moved to strike the testimony of a witness, moved for sanctions and moved to delay a trial until the Plaintiff, Lorraine Bacon, could complete all bankruptcy trust filings because she had failed to disclose 19 bankruptcy trust claims and the 11 signed affidavits from product identification witnesses submitted with them until ordered to do so by the Court. The 11 affidavits from witnesses were relevant to accurately assess Mr. Bacon's exposure history. Further, Ms. Bacon had made 14 additional trust claims but "deferred" resolution of those claims. CertainTeed argued that resolution of the 14 claims was necessary prior to trial because Oklahoma law (O.S. Sec. 832(H)) provides that the tort claim should be reduced to the extent of any amount stipulated in a release or covenant. CertainTeed introduced an affidavit stating that Ms. Bacon would receive an additional \$313,000 if she elected to receive the minimum amounts available from the 14 claims she deferred.<sup>22</sup> If that amount is sought after Ms. Bacon is made whole by the tort judgment, the payment to her is an overpayment which depletes trust assets that should remain available for future claimants.

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<sup>21</sup> April 5, 2012 letter from Claims Resolution Management Corporation attached to Second Motion to Supplement the Record, No. 2012-C-0415, Louisiana Fourth Circuit Court of Appeal, Attachment E.

<sup>22</sup> See, Memorandum in Support of Defendant CertainTeed Corporation's Motion to Strike the Testimony of Jasper Hubbard and for Sanctions Due to Plaintiff's Discovery Abuses, Memorandum in Support of Defendant CertainTeed Corporation's Motion to Delay Trial until Plaintiff Completes her Bankruptcy Trust Claims, and Affidavit of Bradley Drew, Managing Director at PACE Claims Service, a subsidiary of Navigant Consulting, Inc. dated December 21, 2011, all from *Lorraine Bacon v. Ametek, Inc. et al*, No. CJ-08-238, In the District Court for McIntosh County, State of Oklahoma, Attachment F. (Exhibits available upon request.)

In 2010, Garlock objected to the confirmation of Pittsburgh Corning Corporation's bankruptcy plan moving for access to 2019 statements filed by plaintiffs' firms with the goal of determining whether plaintiffs who had sued Garlock but did not identify exposure to a Pittsburgh Corning product were participating in the bankruptcy. Garlock was denied access to the statements but was allowed to view ballots cast by personal injury plaintiffs on Pittsburgh Corning's proposed plan. The master ballot required the filing attorney to certify under penalty of perjury that the claimants he listed had been exposed to a Pittsburgh Corning product. Garlock reported that a random sampling of discovery responses by asbestos plaintiffs who sued Garlock showed significant inconsistencies in the plaintiffs' tort claims versus their bankruptcy filings. Of 255 Garlock mesothelioma plaintiffs who filed claims with Pittsburgh Corning's bankruptcy trust, only nineteen had disclosed their exposure to Pittsburgh Corning products to Garlock in tort suits.<sup>23</sup> In its own bankruptcy filing, Garlock advised that it had entered settlements of over \$100,000 each with 37 of the sampled plaintiffs. Only 6 of those plaintiffs had mentioned exposure to a Pittsburgh Corning product in their tort suit. Yet the attorneys for each of the 37 plaintiffs certified in the Pittsburgh Corning bankruptcy that their client did have such exposure.

While the *Kananian* decision has been talked about for some time, it illustrates that abuse of the trust process has the potential to impact both defendants and bankruptcy trusts.<sup>24</sup> In that case, Cleveland, Ohio Judge Harry Hanna barred a prominent California asbestos personal injury law firm from practicing before his court after he found that the firm and one of its partners

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<sup>23</sup> See Steve Korris, *Asbestos Exposures Contradict in Civil and Bankruptcy Courts, Garlock Says*, LegalNewsline.com, Feb. 7, 2011, at <http://www.legalnewsline.com/spotlight/230977-asbestos-exposures-contradict-in-civil-and-bankruptcy-courts-garlock-says>.

<sup>24</sup> No. CV 442750 (Ohio Ct. Com. Pl. Cuyahoga County).

violated rules of the court forbidding dishonesty, fraud, deceit, and misrepresentation.<sup>25</sup> Judge Hanna concluded that the lawyers had “not conducted themselves with dignity” and had “not honestly discharged the duties of an attorney in this case.”<sup>26</sup> An Ohio Court of Appeals and the Ohio Supreme Court let Judge Hanna’s ruling stand.<sup>27</sup> Judge Hanna said later, “In my 45 years of practicing law, I never expected to see lawyers lie like this.”<sup>28</sup> Judge Hanna added, “It was lies upon lies upon lies.”<sup>29</sup>

Judge Hanna’s ruling received national attention for exposing “one of the darker corners of tort abuse” in asbestos litigation: inconsistencies between allegations made in open court and those submitted to trusts set up by bankrupt companies to pay asbestos-related claims.<sup>30</sup> As the *Cleveland Plain Dealer* reported, Judge Hanna’s decision ordering the plaintiff to produce proof of claim forms “effectively opened a Pandora’s box of deceit . . . Documents from the six other compensation claims revealed that [plaintiff’s lawyers] presented conflicting versions of how

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<sup>25</sup> See *Ohio Judge Bars Calif. Firm from His Court*, Nat’l L.J., Jan. 22, 2007, at 3 (“An Ohio state court judge has barred Novato, Calif.-based Brayton Purcell and one of its lawyers from appearing in that court due to their alleged dishonesty in litigating a mesothelioma case.”); Thomas J. Sheeran, *Ohio Judge Bans Calif. Lawyer in Asbestos Lawsuit*, Cincinnati Post, Feb. 20, 2007, at A3 (“A low-key judge fed up with disrespectful behavior and alleged lies by an attorney created a stir with a courtroom ban on the lawyer from a nationally known San Francisco-area law firm that handles asbestos-related lawsuits coast-to-coast.”); see also Editorial, *Going Too Far*, Columbus Dispatch, Feb. 7, 2007, at 8A (praising Judge Hanna for “draw[ing] nationwide attention to such underhanded behavior.”).

<sup>26</sup> *Kananian v. Lorillard Tobacco Co.*, No. CV 442750, slip op. at 19 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 19, 2007), at 2007 WL 4913164; see also Paul Davies, *Plaintiffs’ Team Takes Hit on Asbestos*, Wall St. J., Jan. 20, 2007, at A4 (“In a harshly worded opinion . . . Judge Harry Hanna listed more than a dozen instances where attorneys . . . either lied to the court, intentionally withheld key discovery materials, or distorted the degree of asbestos exposure alleged.”).

<sup>27</sup> See *Kananian v. Lorillard Tobacco Co.*, No. 89448 (Ohio Ct. App. Feb. 21, 2007) (dismissing appeal as moot, sua sponte), review denied, 878 N.E.2d 34 (Ohio 2007).

<sup>28</sup> James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court over Deceit*, Cleveland Plain Dealer, Jan. 25, 2007, at B1.

<sup>29</sup> *Id.*

<sup>30</sup> Editorial, *Cuyahoga Comeuppance*, Wall St. J., Jan. 22, 2007, at A14; see also Kimberly A. Strassel, *Opinion, Trusts Busted*, Wall St. J., Dec. 5, 2006, at A18 (“[One] law firm filed a claim to one trust, saying Kananian had worked in a World War II shipyard and was exposed to insulation containing asbestos. It also filed a claim to another trust saying he had been a shipyard welder. A third claim, to another trust, said he’d unloaded asbestos off ships in Japan. And a fourth claim said that he’d worked with ‘tools of asbestos’ before the war. Meanwhile, a second law firm, Brayton Purcell, submitted two more claims to two further trusts, with still different stories. . . . [Brayton Purcell then] sued Lorillard Tobacco, this time claiming its client had become sick from smoking Kent cigarettes, whose filters contained asbestos for several years in the 1950s.”).

Kananian acquired his cancer.”<sup>31</sup> Emails and other documents from the plaintiff’s attorneys also showed that their client had accepted monies from entities to which he was not exposed, and one settlement trust form was “completely fabricated.”<sup>32</sup> The *Wall Street Journal* editorialized that Judge Hanna’s opinion should be “required reading for other judges” to assist in providing “more scrutiny of ‘double dipping’ and the rampant fraud inherent in asbestos trusts.”<sup>33</sup>

The situation is no different in New York where DaimlerChrysler Corporation (Chrysler), sought leave to renew its post-trial motions after discovering almost one year after a jury verdict was rendered that the plaintiff had made sworn admissions to five asbestos bankruptcy trusts certifying exposure to products made by Johns-Manville (brakes), Amatek, Celotex, Eagle-Picher and Combustion Engineering. At trial, plaintiff denied exposure to Amatek, Celotex, and Eagle-Picher products and mentioned only one category of Johns-Manville product (building material).<sup>34</sup> Chrysler argued that the verdict should be overturned and the case re-tried because the concealed exposure should have been considered by the trial court.

In a Maryland case, *Warfield v. AC&S, Inc.*,<sup>35</sup> defendants aggressively pursued discovery of trust claims. They were forced to file motions to compel, despite the fact that prior rulings made it clear that trust claims materials must be produced.<sup>36</sup> At a hearing on the matter, plaintiff’s counsel explained that he had been slow in producing the trust materials because he disagreed with the Court’s prior ruling, some two years previously, and went on to complain that

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<sup>31</sup> McCarty, *supra*, at B1.

<sup>32</sup> Daniel Fisher, *Double-Dippers*, *Forbes*, Sept. 4, 2006, at 136, 137.

<sup>33</sup> Editorial, *Cuyahoga Comeuppance*, *Wall St. J.*, Jan. 22, 2007, at A14.

<sup>34</sup> See, *D’Ulisse v. Amchem Products, Inc., et al.*, Index No. 113838104, Supreme Court, State of New York, Attachment G.

<sup>35</sup> No. 24X06000460, Consolidated Case No. 24X09000163, Jan. 11, 2011 Mesothelioma Trial Group (M 112).

<sup>36</sup> See Defendant Union Carbide’s Emergency Motion for Sanctions and/or Related Relief and to Shorten Time for Response, filed Jan. 10, 2011, in *Warfield*, Case No. 24X06000460; see also April 14, 2009 transcript of hearing in *Smith*, Consolidated Case No. 24X08000004, at 65:8 – 77:10 (finding that bankruptcy forms and the information contained therein was “clearly” discoverable and relevant to the case).

the court had “opened Pandora’s Box” by requiring their disclosure.<sup>37</sup> The reason for the counsel’s reluctance to produce the trust materials became clear when the documents were produced shortly before trial—there were substantial and inexplicable discrepancies between the positions taken in court and before the trusts. Despite specific and explicit discovery requests, the plaintiff had failed to disclose nine trust claims. In addition, the exposure period alleged in the litigation was significantly and materially different from the exposure period alleged in the trust claims. In the tort system, Warfield claimed under oath that his he was exposed to asbestos between 1965 and the mid-1970’s only. This time period focused liability on the solvent defendants in the case and conveniently avoided the application of a Maryland statutory damage cap that would apply to later exposures. Before Warfield’s testimony limiting the time frame of his alleged exposure, he had submitted 8 of his 9 trust claims certifying exposure from 1947 to 1991, which if claimed in the tort suit would have triggered the statutory damage cap.<sup>38</sup>

In another Maryland case, “*Edwards*, the plaintiff had, prior to trial, failed to disclose whether or not he had filed any claims with bankruptcy trusts. In addition, as trial drew near, plaintiff amended his discovery responses to assert that the only asbestos-containing material to which he had been exposed was that of the only remaining solvent defendant.”<sup>39</sup> Two weeks prior to trial, however, the plaintiff produced claims materials relating to trusts. “Again, there was a clear inconsistency in the alleged exposure. Significantly, most of the trust forms had been filed in 2008, before the initial discovery responses.”<sup>40</sup>

In Virginia, Judge Thomas D. Horne described an asbestos case pending before him as the “worst deception” used in discovery that he had seen in his 22 years on the bench. In *James*

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<sup>37</sup> January 11, 2011 transcript of hearing in *Warfield*, at 66:5 – 109.8.

<sup>38</sup> See Sept. 9, 2011 Statement of James L. Stengel at 2011 WLNR 24791123.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

*L. Dunford v. Honeywell Corp.*, et al, No. CL-25113, Circuit Court County of Loudoun, three US automakers presented multiple examples of misrepresentations made in a case in which the plaintiff asserted that his illness was due to exposure only to friction products. It turned out, however, that the plaintiff had made numerous trust claims certifying exposure to products made by many of the traditional defendants and had even filed a separate tort suit against the traditional defendants. After hearing the evidence, Judge Horne dismissed the plaintiff's claim with prejudice finding it a fraud upon the Court.<sup>41</sup>

The examples above show that incidents of false claims and lack of necessary information are not isolated. Trust claims information sought by the FACT Act is not privileged nor is it work product. Submissions to the trusts are not prepared in anticipation of litigation nor are they private communications between an attorney and his client. They are claims for payment. The limited reporting requirement in the FACT Act does not require reporting medical information or confidential social security numbers—only the claimant's name, exposure history and basis for any payment from the trust. That information should be made available.

## **II. ASBESTOS LITIGATION IS A BIG BUSINESS IN WHICH OVERSIGHT AND TRANSPARENCY ARE NEEDED.**

The asbestos litigation is the longest-running mass tort in U.S. history. And, it's not going away anytime soon. In 2011, a number of insurers substantially increased reserves for asbestos litigation.<sup>42</sup> According to the GAO Report, without oversight, trusts paid approximately \$17.5 billion to 3.3 million claimants through 2010.<sup>43</sup> And currently, the trust system is funded with in excess of \$36 billion.

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<sup>41</sup> See Transcript of Hearing on Motion for Sanctions, *James L. Dunford v. Honeywell Corp.*, et al, No. CL-25113, Circuit Court County of Loudoun, December 10, 2003, Attachment G.

<sup>42</sup> Ben Berkowitz, *Travelers Latest to Add to Asbestos Reserves*, Ins. J., Oct. 19, 2011, at <http://www.insurancejournal.com/news/national/2011/10/19/220721.htm>.

<sup>43</sup> See GAO Report, *supra* at 3.

Seeking a share of the pie, plaintiffs' firms are advertising night and day on television and on the internet for clients to make trust claims and file tort suits. An online advertising study found "mesothelioma" to be the most expensive Google AdWord, with the phrase "asbestos law suits" ranked number three, and "asbestos law firm" ranked number nine.<sup>44</sup> The financial wherewithal of the trial bar to afford an unending stream of television advertisements and readily spend almost \$100 every time someone clicks on a "mesothelioma" link on Google is proof that the asbestos litigation business is booming.

The history of abuse in the asbestos compensation system is long. It began with the onslaught of unimpaired claims which were curbed when the abuses of the mass screening facilities were discovered. This multi-billion dollar industry should be regulated starting with transparency so that we can begin to reconcile the tort and the trust systems to fairly compensate entitled claimants for their injuries while preserving assets for future claimants.

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<sup>44</sup> *Search Engine Optimizer (SEO): What Are the Most Expensive Keywords in Adwords?* (2009), available at <http://www.quora.com/Search-Engine-Optimization-SEO/What-are-the-most-expensive-keywords-in-AdWords>.

# Exhibit

A

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2011-12719

SECTION 14

DIVISION "I"

JULIAN RIVERA

vs.

AVONDALE INDUSTRIES, INC. f/k/a NORTHROP GRUMMAN SHIPBUILDING, INC.,  
n/k/a HUNTINGTON INGALLS, INC., ET AL.

**PLAINTIFF'S RESPONSES TO DEFENDANT WARREN PUMPS, L.L.C.'S  
FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION  
OF DOCUMENTS, AND REQUESTS FOR ADMISSIONS**

COMES NOW, Plaintiff, through undersigned counsel, and files these Answers and Responses to Defendant Warren Pumps, L.L.C.'s First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions. Plaintiff specifically reserves the right to supplement these answers as necessary pursuant to the Article 1428 of the Louisiana Code of Civil Procedure. Plaintiff respectfully shows as follows:

**PRELIMINARY STATEMENT**

Plaintiff expressly reserves the right to amend, add to, delete from, or otherwise modify or supplement each and every response to these and any other discovery requests propounded upon him throughout the discovery process and to make such claims and contentions as may be appropriate when Plaintiff has concluded all discovery and have ascertained all relevant facts. To the extent that any or all of the Interrogatories, Requests for Production of Documents and/or Requests for Admissions call for information prepared in anticipation of litigation or for trial, or which is otherwise protected from disclosure by the work product doctrine, the attorney-client privilege, or any other privilege, Plaintiff will not supply or render information protected from discovery by virtue of such doctrine or privileges. No response herein is, nor should be construed to be, a waiver of the protection by such doctrine or privilege.

**GENERAL OBJECTIONS**

Plaintiff makes the following objections that are applicable to each of these Interrogatories, Requests for Production of Documents, and Requests for Admissions (hereinafter referred to as "Discovery Requests"):

1. Plaintiff objects to the extent these discovery requests seek disclosure of information and documents exempt from discovery on the following privilege grounds:

- a. Seek attorney work product or subject matter falling under the attorney-client privilege;
- b. Seek the identity, mental impressions or opinions of non-testifying experts whose opinions or mental impressions have not been reviewed by a testifying expert; and
- c. Seek privileged party communications.

2. Plaintiff further asserts that any inadvertent production of any documents, which are privileged under these or any other privilege is not intended and shall not constitute a waiver of any privilege or any other applicable objection to the production of any such document, the subject matter thereof, or the information contained therein, nor shall it constitute waiver of the right of the Plaintiff to object to the use of any such document or its contents during subsequent proceedings herein.

3. The discovery requests seek information, which has yet to be determined as discovery in this litigation is ongoing, and the requested information will be provided in accordance with the Court's Scheduling Order.

4. Additionally, Defendants improperly request information of the Plaintiff's lawyers and the Plaintiff's lawyers' law firm. This request is improper and contrary to the parameters of litigation. Plaintiff's counsel is not a party to this litigation and discovery requests directed toward them are improper. Accordingly, the discovery is as responded to by Plaintiff's counsel on behalf of Plaintiff.

#### **REQUESTS FOR ADMISSIONS**

##### **REQUEST FOR ADMISSION NO. 1**

Admit you have no evidence any product manufactured, distributed or sold by Warren Pumps contained asbestos.

##### **RESPONSE TO REQUEST FOR ADMISSION NO. 1:**

Subject to the general objections set forth above, denied.

##### **REQUEST FOR ADMISSION NO. 2:**

Admit you have no evidence any product manufactured, distributed or sold by Warren Pumps released asbestos fibers.

##### **RESPONSE TO REQUEST FOR ADMISSION NO. 2:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 3:**

Admit you have no evidence that Julian Rivera breathed asbestos fibers released from any product manufactured, distributed or sold by Warren Pumps.

**RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 4**

Please admit that you are not aware of Julian Rivera handling and/or working around asbestos-containing products produced, sold or manufactured by Warren Pumps.

**RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 5:**

Admit you have no evidence that any asbestos fibers released from a product manufactured, distributed or sold by Warren Pumps was a producing cause of the injuries you allege in this lawsuit.

**RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 6:**

Admit the normal operation of any product manufactured, distributed or sold by Warren Pumps did not cause a release of asbestos fibers.

**RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 7:**

Admit the normal repair or maintenance of any product manufactured, distributed or sold by Warren Pumps did not cause a release of asbestos fibers.

**RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 8:**

Admit that you are not alleging a manufacturing defect in any product manufactured, sold or distributed by Warren Pumps.

**RESPONSE TO REQUEST FOR ADMISSION NO. 8:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 9:**

Please admit that you are not asserting strict liability claims against Warren Pumps.

**RESPONSE TO REQUEST FOR ADMISSION NO. 9:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 10:**

For any product manufactured, sold or distributed by Warren Pumps that you claim injured Julian Rivera, admit it did not have a failure to warn defect.

**RESPONSE TO REQUEST FOR ADMISSION NO. 10:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 11:**

Admit you have no evidence that supports any claim that Warren Pumps engaged in a fraud or conspiracy.

**RESPONSE TO REQUEST FOR ADMISSION NO. 11:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 12:**

Admit that Julian Rivera did not serve aboard a U.S. Navy vessel prior to 1988.

**RESPONSE TO REQUEST FOR ADMISSION NO. 12:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 13:**

Admit that Julian Rivera did not conduct repair service of any U.S. Navy vessel prior to 1988.

**RESPONSE TO REQUEST FOR ADMISSION NO. 13:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 14:**

Admit that asbestos-containing block insulation was a substantial factor in causing your alleged asbestos related disease.

**RESPONSE TO REQUEST FOR ADMISSION NO. 14:**

Objection. This request is vague and ambiguous. Further objection, this is an improper Request for Admission and bears upon facts which can only be determined by the jury.

**REQUEST FOR ADMISSION NO. 15:**

Please admit that you were aware of the relationship between asbestos and lung disease prior to one year before Plaintiff's Petition for Damages was filed.

**RESPONSE TO REQUEST FOR ADMISSION NO. 15:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 16:**

Please admit that Julian Rivera was aware of his own potential or purported exposure to asbestos prior to one year before Plaintiff's Petition for Damages was filed.

**RESPONSE TO REQUEST FOR ADMISSION NO. 16:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 17:**

Please admit that you do not have any evidence to support any allegations that Warren Pumps intentionally, recklessly and/or negligently failed to disclose, warn or reveal critical medical and safety information to Julian Rivera regarding asbestos hazards in general and regarding any alleged specific hazards at his worksite(s).

**RESPONSE TO REQUEST FOR ADMISSION NO. 17:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 18:**

Please admit that you are not making a claim against Warren Pumps in this lawsuit.

**RESPONSE TO REQUEST FOR ADMISSION NO. 18:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 19:**

Please admit that you have no evidence that Warren Pumps failed to report the results of product testing on asbestos containing products or concealed information regarding health hazards inherent in asbestos-containing products.

**RESPONSE TO REQUEST FOR ADMISSION NO. 19:**

Subject to the general objections set forth above, denied.

**REQUEST FOR ADMISSION NO. 20**

Please Admit that asbestos-containing joint compound was a substantial factor in causing your alleged asbestos related disease.

**RESPONSE TO REQUEST FOR ADMISSION NO. 20:**

Objection. This request is vague and ambiguous. Further objection, this is an improper Request for Admission and bears upon facts which can only be determined by the jury.

**REQUEST FOR ADMISSION NO. 21**

Please admit that Plaintiff, or someone acting on Julian Rivera's behalf, entered into settlements with the following entities, their trusts or claims administrator:

- a. A-Best Products Co.
- b. Armstrong Contracting & Supply (AC&S)
- c. Amatex Corporation
- d. American Shipbuilding
- e. API, Inc.
- f. AP Green Industries, Inc.
- g. AP Green Refractories Company
- h. Armstrong World Industries, Inc.
- i. Artra Group Inc. (Synkoloid)
- j. Asbestec Industries
- k. Asarco
- l. Atlas Corporation
- m. Babcock & Wilcox Company
- n. Bethlehem Steel
- o. Brauer Supply
- p. Brunswick Fabrications
- q. Burns & Roe Enterprises
- r. CE Thurston & Sons, Inc.
- s. Celotex Corporation
- t. Chemetron Corporation
- u. Clemtex
- v. Combustion Engineering
- w. Congoleum Corporation
- x. Cranc Packing Company
- y. Dana Corp.
- z. DDI Industries
- aa. Delaware Insulations
- bb. Kellogg Brown & Root
- cc. Dresser Industries
- dd. Halliburton
- ee. Eagle Pitcher
- ff. E. J. Bartells
- gg. Federal Mogul Corporation
- hh. Fibreboard Corporation
- ii. Flexitallic
- jj. Flintkote
- kk. Forty-Eight Insulations
- ll. Fuller Austin Insulation
- mm. GAF Corporation
- nn. Ruberoid
- oo. Gatke Corporation
- pp. GI Holdings
- qq. H&A Construction
- rr. Harbison Walker Refractories Company
- ss. Harnischfeger Industries
- tt. Hillsborough Holdings
- uu. Connecticut Valley Claims Services (HK Porter Trust)
- vv. Claims Resolution Management Corp. (Johns-Manville Trust)
- ww. JT Thorpe
- xx. Kaiser Asbestos Trust (Kaiser Aluminum and Chemical)

yy. Keene Corporation  
 zz. Kentile Floors  
 aaa. Lone Star Steel  
 bbb. Lykes Brothers Steamship  
 ccc. MH Detrick  
 ddd. MacArthur Companies  
 eee. Muralo Company  
 fff. National Gypsum  
 ggg. Nicolet  
 hhh. North American Asbestos Corporation  
 iii. North American Refractories Company (NARCO)  
 jjj. Owens Corning Fiberglass  
 kkk. Pacor (Philadelphia Asbestos Corporation)  
 ll. Pittsburg Corning Corporation  
 mmm. Plibrico  
 nnn. Porter Hayden  
 ooo. Prudential Lines  
 ppp. Quigley  
 qqq. Raytech Corporation  
 rrr. Raybestos Manhattan  
 sss. Rock Wool Manufacturing Co.  
 ttt. Rutland Fire & Clay  
 uuu. Shook & Fletcher  
 vvv. Skinner Engine Company  
 www. Special Electric  
 xxx. Standard Insulations Inc.  
 yyy. Stone & Webster  
 zzz. Swan Transportation  
 aaaa. Todd Shipyards  
 bbbb. United States Gypsum (USG)  
 cccc. United States Mineral Products (Isolatek International)  
 dddd. United States Lines  
 eeee. Utex Industries  
 ffff. UNR Industries (UNARCO)  
 gggg. WR Grace  
 hhhh. Wallace & Gale  
 iiii. Waterman Steamship Corporation

**RESPONSE TO REQUEST FOR ADMISSION NO. 21:**

Plaintiff objects to the disclosure of settlement agreements as irrelevant and privileged.

Subject to the foregoing objection, denied.

**REQUEST FOR ADMISSION NO. 22**

Please admit that Plaintiff, or someone acting on Julian Rivera's behalf, agreed to settle with the following entities, their trusts or claims administrator:

a. A-Best Products Co.  
 b. Armstrong Contracting & Supply (AC&S)  
 c. Amatex Corporation  
 d. American Shipbuilding  
 e. API, Inc.  
 f. AP Green Industries, Inc.  
 g. AP Green Refractories Company  
 h. Armstrong World Industries, Inc.  
 i. Artra Group Inc. (Synkoloid)  
 j. Asbestec Industries  
 k. Asarco  
 l. Atlas Corporation

m. Babcock & Wilcox Company  
 n. Bethlehem Steel  
 o. Brauer Supply  
 p. Brunswick Fabrications  
 q. Burns & Roe Enterprises  
 r. CE Thurston & Sons, Inc.  
 s. Celotex Corporation  
 t. Chemetron Corporation  
 u. Ciemtex  
 v. Combustion Engineering  
 w. Congoleum Corporation  
 x. Crane Packing Company  
 y. Dana Corp.  
 z. DDI Industries  
 aa. Delaware Insulations  
 bb. Kellogg Brown & Root  
 cc. Dresser Industries  
 dd. Halliburton  
 ee. Eagle Pitcher  
 ff. E. J. Bartells  
 gg. Federal Mogul Corporation  
 hh. Fibreboard Corporation  
 ii. Flexitallic  
 jj. Flintkote  
 kk. Forty-Eight Insulations  
 ll. Fuller Austin Insulation  
 mm. GAF Corporation  
 nn. Ruberoid  
 oo. Gatke Corporation  
 pp. GI Holdings  
 qq. H&A Construction  
 rr. Harbison Walker Refractories Company  
 ss. Harnischfeger Industries  
 tt. Hillsborough Holdings  
 uu. Connecticut Valley Claims Services (HK Porter Trust)  
 vv. Claims Resolution Management Corp. (Johns-Manville Trust)  
 ww. JT Thorpe  
 xx. Kaiser Asbestos Trust (Kaiser Aluminum and Chemical)  
 yy. Keene Corporation  
 zz. Kentile Floors  
 aaa. Lone Star Steel  
 bbb. Lykes Brothers Steamship  
 ccc. MH Detrick  
 ddd. MacArthur Companies  
 eee. Muralo Company  
 fff. National Gypsum  
 ggg. Nicolet  
 hhh. North American Asbestos Corporation  
 iii. North American Refractories Company (NARCO)  
 jjj. Owens Corning Fiberglass  
 kkk. Pacor (Philadelphia Asbestos Corporation)  
 ll. Pittsburg Corning Corporation  
 mmm. Plibrico  
 nnn. Porter Hayden  
 ooo. Prudential Lines  
 ppp. Quigley  
 qq. Raytech Corporation  
 rrr. Raybestos Manhattan  
 sss. Rock Wool Manufacturing Co.  
 tt. Rutland Fire & Clay  
 uuu. Shook & Fletcher  
 vvv. Skinner Engine Company

- www. Special Electric
- xxx. Standard Insulations Inc.
- yyy. Stone & Webster
- zzz. Swan Transportation
- aaaa. Todd Shipyards
- bbbb. United States Gypsum (USG)
- cccc. United States Mineral Products (Isolatek International)
- dddd. United States Lines
- eeee. Utex Industries
- ffff. UNR Industries (UNARCO)
- gggg. WR Grace
- hhhh. Wallace & Gale
- iiii. Waterman Steamship Corporation

**RESPONSE TO REQUEST FOR ADMISSION NO. 22:**

Plaintiff objects to the disclosure of settlement agreements as irrelevant and privileged.

Subject to the foregoing objection, denied.

**REQUEST FOR ADMISSION NO. 23**

Please admit that Plaintiff, or someone acting on Julian Rivera's behalf, filed claims with the following entities, their trusts or claims administrator:

- a. A-Best Products Co.
- b. Armstrong Contracting & Supply (AC&S)
- c. Amatex Corporation
- d. American Shipbuilding
- e. API, Inc.
- f. AP Green Industries, Inc.
- g. AP Green Refractories Company
- h. Armstrong World Industries, Inc.
- i. Artra Group Inc. (Synkoloid)
- j. Asbestec Industries
- k. Asarco
- l. Atlas Corporation
- m. Babcock & Wilcox Company
- n. Bethlehem Steel
- o. Brauer Supply
- p. Brunswick Fabrications
- q. Burns & Roe Enterprises
- r. CE Thurston & Sons, Inc.
- s. Celotex Corporation
- t. Chemetron Corporation
- u. Clemtex
- v. Combustion Engineering
- w. Congoleum Corporation
- x. Crane Packing Company
- y. Dana Corp.
- z. DDI Industries
- aa. Delaware Insulations
- bb. Kellogg Brown & Root
- cc. Dresser Industries
- dd. Halliburton
- ee. Eagle Pitcher
- ff. F. J. Bartells
- gg. Federal Mogul Corporation
- hh. Fibreboard Corporation
- ii. Flexitallic
- jj. Flintkote

kk. Forty-Eight Insulations  
 ll. Fuller Austin Insulation  
 mm. GAF Corporation  
 nn. Ruberoid  
 oo. Gatke Corporation  
 pp. GI Holdings  
 qq. H&A Construction  
 rr. Harbison Walker Refractories Company  
 ss. Harnischfeger Industries  
 tt. Hillsborough Holdings  
 uu. Connecticut Valley Claims Services (HK Porter Trust)  
 vv. Claims Resolution Management Corp. (Johns-Manville Trust)  
 ww. JT Thorpe  
 xx. Kaiser Asbestos Trust (Kaiser Aluminum and Chemical)  
 yy. Keene Corporation  
 zz. Kentile Floors  
 aaa. Lone Star Steel  
 bbb. Lykes Brothers Steamship  
 ccc. MH Detrick  
 ddd. MacArthur Companies  
 eee. Muralo Company  
 fff. National Gypsum  
 ggg. Nicolet  
 hhh. North American Asbestos Corporation  
 iii. North American Refractories Company (NARCO)  
 jjj. Owens Corning Fiberglass  
 kkk. Pacor (Philadelphia Asbestos Corporation)  
 ll. Pittsburg Corning Corporation  
 mmm. Plibrico  
 nnn. Porter Hayden  
 ooo. Prudential Lines  
 ppp. Quigley  
 qq. Raytech Corporation  
 rrr. Raybestos Manhattan  
 sss. Rock Wool Manufacturing Co.  
 tt. Rutland Fire & Clay  
 uuu. Shook & Fletcher  
 vvv. Skinner Engine Company  
 www. Special Electric  
 xxx. Standard Insulations Inc.  
 yyy. Stone & Webster  
 zzz. Swan Transportation  
 aaaa. Todd Shipyards  
 bbbb. United States Gypsum (USG)  
 cccc. United States Mineral Products (Isolatek International)  
 dddd. United States Lines  
 eeee. Utex Industries  
 ffff. UNR Industries (UNARCO)  
 gggg. WR Grace  
 hhhh. Wallace & Gale  
 iiiii. Waterman Steamship Corporation

**RESPONSE TO REQUEST FOR ADMISSION NO. 23:**

Plaintiff objects to the disclosure of settlement agreements as irrelevant and privileged.

Subject to the foregoing objection, denied.

## INTERROGATORIES

### INTERROGATORY NO. 1:

Please state the name, present address, and present telephone number of each and every person, known to you or to your agents and attorneys, having knowledge or information concerning:

- A. The identification of products manufactured, sold or distributed by Warren Pumps which you claim contained asbestos and to which Julian Rivera was allegedly exposed; and
- B. The allegations against Warren Pumps enumerated in your complaint, and all amendments thereto.

### ANSWER TO INTERROGATORY NO. 1:

Objection. This interrogatory is premature. At this point, Plaintiff has not determined which experts or other witnesses will be called to testify. Plaintiff will exchange witness and exhibit lists pursuant to the Court's Scheduling Order.

### INTERROGATORY NO. 2

Please list every product which Warren Pumps manufactured, marked, distributed, or sold, if any, that you claim resulted in an asbestos exposure to Julian Rivera. Include in your answer the following:

- A. The product type and use;
- B. The brand name of the product;
- C. The manner in which the exposure(s) occurred;
- D. Whether Julian Rivera handled the product(s);
- E. The location(s) of the facility(ies) where the exposure(s) occurred, including but not limited to street address, plant name, unit name, and ship name and hull number;
- F. The frequency of exposure(s) (number of work days per week, month, or year);
- G. The duration and hours of the exposure(s) on each day that the exposure(s) occurred; and
- H. The specific time period and dates of the exposure(s).

### ANSWER TO INTERROGATORY NO. 2:

Objection. This interrogatory is overly broad and unduly burdensome. Subject to that objection, Plaintiff will exchange exhibit lists pursuant to the Court's Scheduling Order. At this time, plaintiff is alleging that he was exposed to injurious levels of asbestos during his employment at Avondale Shipyards in or about 1966 through 1974. Plaintiff suffered exposure

to asbestos and asbestos-containing products designed, manufactured, sold and/or supplied and/or maintained by the defendants. Plaintiff reserves the right to amend this response.

**INTERROGATORY NO. 3:**

Does Plaintiff have any documents, including but not limited to written memoranda, specifications, recommendations, blueprints, invoices, shipping documents, purchase orders, bills of lading, ship records, archive records, or other written materials of any kind or character, relating to the use, sale or installation of any Warren Pumps product at any location(s) listed in answer to Interrogatory No. 2E:

- A. Describe each such document;
- B. List the name, address and job title of each person who currently has possession of each document, and where the documents are currently located; and
- C. State which Warren Pumps product is listed in the document.

**ANSWER TO INTERROGATORY NO. 3:**

Please see answer to Interrogatory No. 2.

**INTERROGATORY NO. 4:**

Please identify by name, current address, employer and occupation, each and every expert, or lay, who you intend to call at the trial of this matter specifically regarding Warren Pumps.

**ANSWER TO INTERROGATORY NO. 4:**

Objection. This interrogatory is premature. At this point, Plaintiff has not determined which witnesses will be called to testify. Plaintiff will exchange witness lists pursuant to the Court's Scheduling Order.

**INTERROGATORY NO. 5:**

If you contend Julian Rivera was harmed by a product manufactured, distributed, or sold by Warren Pumps which was defective, unreasonably dangerous, or unfit for the purpose for which it was intended, state all facts supporting each such contention.

**ANSWER TO INTERROGATORY NO. 5:**

Objection. This interrogatory is premature. At this point, Plaintiff has not determined each and every document or other thing, without limit, that may be introduced as an exhibit or used as demonstrative evidence at the trial of this matter. Plaintiff will exchange witness and exhibit lists pursuant to the Court's Scheduling Order.

**INTERROGATORY NO. 6:**

For each ship, worksite and/or job location at which you allege Julian Rivera was exposed to a Warren Pumps pump, identify the following:

- A. Your knowledge of training provided to Mr. Rivera by his employer (including the U.S. Navy, where applicable) relating to pumps, including:
- i. specific instructions given regarding pumps;
  - ii. the person(s) providing the training; and
  - iii. whether any written materials were included in the training (attach if applicable).

**ANSWER TO INTERROGATORY NO. 6:**

Objection. This interrogatory is premature. Plaintiff will exchange witness and exhibit lists pursuant to the Court's Scheduling Order. At this time, plaintiff is alleging that he was exposed to injurious levels of asbestos from exposure to asbestos containing materials from 1966 through 1974 as a result of his work at Avondale Shipyards. While Petitioner used, handled and/or was in the vicinity of others using or handling asbestos or asbestos-containing products at these facilities, he was exposed dangerously high levels of asbestos. Plaintiff reserves the right to amend this response.

**INTERROGATORY NO. 7:**

Did Julian Rivera ever use cigarettes, cigars, pipes, snuff, chewing tobacco or other tobacco products of any kind? If you answered yes to this Interrogatory, please identify the type and brand of product smoked/used, the approximate date or age begun, the approximate amount smoked/used per day, and the date of stopping, if applicable.

**ANSWER TO INTERROGATORY NO. 7:**

Plaintiff objects to this interrogatory on the ground that it is overly broad, unduly burdensome and not reasonably tailored to the subject matter of this litigation; namely Mr. Rivera's diagnosis with malignant mesothelioma. Subject to, and without waiving same, to the best of Plaintiff's recollection, Mr. Rivera never used tobacco products. Plaintiff reserves the right to supplement and/or amend this response.

**INTERROGATORY NO. 8:**

Please indicate if Julian Rivera ever suffered from a pulmonary disease other than the asbestos-related injury or disease you allege in your complaint. If so, please indicate the dates he suffered from the pulmonary injury or disease, the treatment received for the injury or disease,

and the name, address, and telephone number of the medical care provider(s) who rendered treatment.

**ANSWER TO INTERROGATORY NO. 8:**

Plaintiff objects to this Interrogatory as overly broad. Subject to and without waiving the foregoing objection, see Plaintiff's medical records which will be deposited with Digital Legal Services upon receipt of same.

**INTERROGATORY NO. 9:**

Please identify by name, address, telephone number, occupation and relationship to the Plaintiff (if any) each and every witness you intend to call at the trial of this matter to testify specifically, though not necessarily solely or exclusively regarding Warren Pumps and state the expected oral testimony of these witnesses.

**ANSWER TO INTERROGATORY NO. 9:**

Objection. Overbroad, vague and premature. Subject to said objection and without waiving same, Plaintiff will provide a Witness List pursuant to the Court's Scheduling Order.

**INTERROGATORY NO. 10:**

If you have settled or otherwise compromised any claims against any person or company for any damages arising out of and/or related to Plaintiff's asbestos-related claims, please fully identify each and every person or company with whom you have settled or compromised and the date of each such settlement or compromise.

**ANSWER TO INTERROGATORY NO. 10:**

Plaintiff objects to the wholesale disclosure of settlement agreements as irrelevant and privileged.

**INTERROGATORY NO. 11:**

Please identify any and all pending lawsuits filed by the Plaintiff, and advise on the status of said claim(s), including when filed, the injuries which prompted the claim, and the result of said claim(s).

**ANSWER TO INTERROGATORY NO. 11:**

To the best of Plaintiff's knowledge, the instant case is the only pending lawsuit presently filed.

**INTERROGATORY NO. 12:**

If your response to Request for Admission No. 2 was anything but an unqualified admission, please describe:

- A. How the product was being used; the activity you were doing;
- B. How far you were from the product;
- C. Provide any information you have on the dimensions of the area, ventilation, wind patterns, and industrial hygiene measures in place;
- D. Describe the physical action, activity, work or manipulation of the product you allege caused the release of asbestos fibers;
- E. Describe how these fibers were released; and
- F. Identify by physical description, model number, serial number, trade name or common name each and every product manufactured, sold or distributed by Defendant that you claim released asbestos fibers.

**ANSWER TO INTERROGATORY NO. 12:**

Please see Plaintiff's Answer to Interrogatory No. 6.

**INTERROGATORY NO. 13:**

If your response to Request for Admission No. 3 was anything but an unqualified admission, please specifically identify the date, location, activity, employment, and duration of each occasion you allege you breathed asbestos fibers released from any product manufactured, distributed or sold by Warren Pumps, including the specific profession, trade or craft in which you were employed, and the specific jobs, tasks or activities you were engaged in.

**ANSWER TO INTERROGATORY NO. 13:**

Please see Plaintiff's Answer to Interrogatory No. 6.

**INTERROGATORY NO. 14:**

If your response to Request for Admission No. 4 was anything but an unqualified admission, please specifically identify the date, location, activity, employment, and duration of each occasion you allege Julian Rivera handled and/or worked around asbestos-containing products manufactured, distributed or sold by Warren Pumps, including the specific profession, trade or craft in which you were employed, and the specific jobs, tasks or activities he was engaged in at the time.

**ANSWER TO INTERROGATORY NO. 14:**

Please see Plaintiff's Answer to Interrogatory No. 6.

**INTERROGATORY NO. 15:**

If your response to Request for Admission No. 5 was anything but an unqualified admission, please identify any expert who will give such a causation opinion; and describe the basis of their causation opinion, including any epidemiological studies they will rely upon.

**ANSWER TO INTERROGATORY NO. 15:**

Please see Plaintiff's Answer to Interrogatory No. 6.

**INTERROGATORY NO. 16:**

For each ship, worksite and/or job location at which you allege Julian Rivera worked around a Warren Pumps pump, identify the following:

- A. The procedure(s) by which the employer (including the U.S. Navy) communicated hazards;
- B. Types of hazards communicated by the employer (including the U.S. Navy);
  - i. content and method of communication;
- C. Whether the employer (including the U.S. Navy) ever provided warnings regarding potential hazards associated with asbestos. If yes, provide the following:
  - i. what was said;
  - ii. the method by which it was communicated; and when the communications were made;
- D. Whether the employer (including the U.S. Navy) ever implemented any type of policy concerning the handling and/or use of asbestos. If yes:
  - i. what procedures were implemented; and
  - ii. when were the procedures implemented;
- E. Did the employer (including the U.S. Navy) ever provide any personal protective equipment for use with asbestos-containing materials? If yes:
  - i. what kind of equipment;
- F. Did the employer (including the U.S. Navy) ever implement engineering controls (separate venting, wet down, containment, etc.)? If yes:
  - i. what kind of controls.

**ANSWER TO INTERROGATORY NO. 16:**

Please see Plaintiff's Answer to Interrogatory No. 6.

**INTERROGATORY NO. 17:**

Please identify with specificity any claims made by Plaintiff, or anyone acting on Julian Rivera's behalf, against a bankrupt entity and/or its trust or claims administrator, including:

- a) Identify the entity against which a claim has been made;

- b) Identify the court, agency, trust or tribunal with which the claim has been filed including matter number, name of proceeding, and any other identifying information; and
- c) Describe in detail the relief sought and/or obtained.

**ANSWER TO INTERROGATORY NO. 17:**

Plaintiff objects to the disclosure of settlement agreements as irrelevant and privileged.

**REQUESTS FOR PRODUCTION OF DOCUMENTS**

**REQUEST FOR PRODUCTION NO. 1:**

Please produce all documents relating to your contention that Julian Rivera worked with or around any Warren Pumps product containing asbestos.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

Objection. This interrogatory is overly broad and unduly burdensome. Subject to that objection, Plaintiff will exchange exhibit lists pursuant to the Court's Scheduling Order.

**REQUEST FOR PRODUCTION NO. 2:**

Please produce all documents that relate in any manner to the information requested in Interrogatory No. 3.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

Objection. This interrogatory is overly broad and unduly burdensome. Subject to that objection, Plaintiff will exchange exhibit lists pursuant to the Court's Scheduling Order.

**REQUEST FOR PRODUCTION NO. 3:**

Please produce all documents that relate in any manner to the information requested in Interrogatory No. 5.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

Objection. This interrogatory is overly broad and unduly burdensome. Subject to that objection, Plaintiff will exchange exhibit lists pursuant to the Court's Scheduling Order.

**REQUEST FOR PRODUCTION NO. 4:**

Please produce all documents that relate in any manner to the information requested in Interrogatory No. 6.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

Objection. This interrogatory is overly broad and unduly burdensome. Subject to that objection, Plaintiff will exchange exhibit lists pursuant to the Court's Scheduling Order.

**REQUEST FOR PRODUCTION NO. 5:**

Please produce all documents that relate in any manner to the information requested in Interrogatory No. 7.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

Objection. This interrogatory is overly broad and unduly burdensome. Subject to that objection, Plaintiff will exchange exhibit lists pursuant to the Court's Scheduling Order.

**REQUEST FOR PRODUCTION NO. 6:**

Please produce all documents that relate in any manner to the information requested in Interrogatory No. 8.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

Plaintiff objects to this Interrogatory as overly broad and unduly burdensome. Subject to and without waiving the foregoing objection, Plaintiff's medical records will be deposited with Digital Legal Services upon receipt of same.

**REQUEST FOR PRODUCTION NO. 7:**

Please produce all documents that relate in any manner to the information requested in Interrogatory No. 12.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

Objection. This interrogatory is overly broad and unduly burdensome. Subject to that objection, Plaintiff will exchange exhibit lists pursuant to the Court's Scheduling Order.

**REQUEST FOR PRODUCTION NO. 8:**

Please produce all documents that relate in any manner to the information requested in Interrogatory No. 14.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

Objection. This interrogatory is overly broad and unduly burdensome. Subject to that objection, Plaintiff will exchange exhibit lists pursuant to the Court's Scheduling Order.

**REQUEST FOR PRODUCTION NO. 9:**

Please produce all documents that relate in any manner to the information requested in Interrogatory No. 15.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

Objection. This interrogatory is overly broad and unduly burdensome. Subject to that objection, Plaintiff will exchange exhibit lists pursuant to the Court's Scheduling Order.

**REQUEST FOR PRODUCTION NO. 10:**

Please produce all documents that relate in any manner to the information requested in Interrogatory No. 16.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 10:**

Objection. This interrogatory is overly broad and unduly burdensome. Subject to that objection, Plaintiff will exchange exhibit lists pursuant to the Court's Scheduling Order.

**REQUEST FOR PRODUCTION NO. 11**

Please execute the attached authorizations.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

Plaintiff will supplement.

**REQUEST FOR PRODUCTION NO. 12:**

Please produce a copy of any claim along with supporting documents filed with the Johns-Manville Trust or any other bankruptcy, trust or claims administrator seeking recovery for any asbestos-related disease.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

Plaintiff objects to the disclosure of settlement agreements as irrelevant and privileged.

**REQUEST FOR PRODUCTION NO. 13:**

Please produce a verified copy of all settlement documents regarding settlements or payments described in response to the above Interrogatories (amounts can be redacted).

**RESPONSE TO REQUEST FOR PRODUCTION NO. 13:**

Plaintiff objects to the disclosure of settlement agreements as irrelevant and privileged.

**Respectfully submitted,**

LANDRY, SWARR & CANNELLA, L.L.C.

  
FRANK J. SWARR, Bar No. 23322  
MICKEY P. LANDRY, Bar No. 22817  
DAVID R. CANNELLA, Bar No. 26231  
PHILIP HOFFMAN, Bar No. 32277  
1010 Common Street, Suite 2050  
New Orleans, Louisiana 70112  
Telephone: (504) 299-1214  
Facsimile: (504) 299-1215  
[fswarr@landryswarr.com](mailto:fswarr@landryswarr.com)

**COUNSEL FOR PETITIONER**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing has been served on all known counsel of record via electronic mail this the 9<sup>th</sup> day of March, 2012.

  
FRANK J. SWARR

# Exhibit

# B

**COPY**

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE No. 2011-05883

2017 JAN 13 P 14 DIV. 14-1

WILLIAM ODDO, JR.,

DISTRICT

VERSUS

ASBESTOS CORPORATION LTD, ET AL

FILED: \_\_\_\_\_

DEPUTY CLERK

**MOTION TO QUASH FORD'S SUBPOENA TO THE JOHNS-MANVILLE  
BANKRUPTCY TRUST AND OPPOSITION TO LETTERS ROGATORY WITH  
INCORPORATED MEMORANDUM IN SUPPORT**

NOW INTO COURT, through undersigned counsel, comes Plaintiff, who moves this Honorable Court for an Order quashing the subpoena served on the Claims Resolution Management Corporation (CRMC) at the behest of defendant Ford Motor Company seeking production of documents related to William Oddo (subpoena attached hereto as Exhibit "A"). As set forth below, the information and documents sought by the subpoena is confidential and is not subject to discovery, and an order quashing the subpoena should be issued.

On January 11, 2012, undersigned counsel was notified by Ford Motor Company that it had filed a petition for letters rogatory in order to serve a subpoena on CRMC demanding production of records related to William Oddo. It is a matter of hornbook law that settlement documents are not discoverable material. To force the production of settlement documents is not only contrary to Article 408 of the Louisiana Code of Evidence, but would also greatly deter, if not stop, settlements in litigation in general, and asbestos litigation in particular. A plaintiff would certainly be less amenable to taking settlement money if the remaining defendants were allowed to subpoena the settlement documents in order to prove the settling defendant's liability.

Deterring settlement is directly contrary to Louisiana law. According to the Louisiana Supreme Court:

[O]ur courts have repeatedly refused to implement jurisprudential rules which would reduce the plaintiffs' incentives to reach settlements with defendants without need for trial.

*Raley v. Carter*, 412 So.2d 1045, 1048 (La. 1982).

Article 408 of the Federal Rules of Evidence, provides in part that evidence of a compromise of a claim which is disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. **The purpose of this rule is to prevent prejudice to the settling parties who may have settled in order to avoid litigation rather than from a concession of liability or non-liability and to promote the public policy of encouraging compromise.** Fed. R. of Evidence 408, Notes of Advisory Committee on Proposed Rules, *Belton v. Fibreboard Corp.*, 724 F.2d 500 (5<sup>th</sup> Cir. 1984); *McHann v. Firestone Tire & Rubber Co.*, 713 F.2d 161 (5<sup>th</sup> Cir. 1983).

Essentially, article 408 of the Federal Rules of Evidence is identical to the Louisiana Code of Evidence Art. 408. See, *Louisiana Code of Evidence Practice Guide*, Richard Leaf (1994). Louisiana modeled its Code of Evidence rules after the Federal Rules of Evidence. In *Buckbee v. United Gas Pipe Line Co.*, 561 So.2d 76 (La. 1990), the Louisiana Supreme Court recognized federal decisions to be persuasive authority relative to the application of the rules of evidence set forth in the Louisiana Code of Evidence.

Louisiana Code of Evidence article 408 provides in pertinent part:

**A. Civil cases.** In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept anything of value in compromising or attempting to compromise a claim which is disputed as to validity or amount is not admissible to prove liability for or invalidity of the claim or its amount.

La. Code of Evidence Art. 408.

The Fourth Circuit has found that this article means that compromise, or offers to compromise are generally not admissible. See, *Fidelity Bank and Trust Co. v. Deutsch, Kerrigan and Stiles*, 557 So.2d 991 (La. App. 4 Cir. 1990). Our jurisprudence reflects the federal jurisprudential interpretation of the applicable article.

A case with similar facts and circumstances to the instant case is the asbestos case of *Davis v. Johns-Manville Products*, 766 F. Supp. 505 (E.D. La. 1991). In that case, the plaintiffs successfully argued that the disclosure of settlement amounts would not lead to the discovery of admissible evidence because such information would not prove liability, would not influence the amount of contribution to which a defendant may be entitled, and

would not result in a reduction of a final judgment against the Defendant.

In *Davis*, the defendants contended that the terms of the settlement agreement were relevant since the names of the released parties may be pertinent to its claims for contribution, indemnity, or to determine the proper reduction of any judgment rendered against the non-settling defendants. On the other hand, the plaintiffs argued that the disclosure of the settlement amount would not lead to discovery of admissible evidence, since such information would not prove the liability, would not establish the value of the claim, and would not influence the amount of contribution to which Defendant may be entitled or any reduction of a final judgment against the Defendant. The trial court, having reviewed the memorandum of counsel and the applicable law, **found that the defendant was not entitled to discovery of the amounts of the settlement agreements reached between the Plaintiffs and the joint tortfeasor because such information is irrelevant to the liability of the Defendant or the amount of damages which may be awarded against it.** The Court reasoned that the amount paid by a settling joint tortfeasor, in order to compromise the claim, has no relevance with respect to the reduction of the amount of a judgment against the remaining tortfeasor. *Davis*, 766 F. Supp 505 (E.D. La. 1991) (citing *Martin v. American Petrofina, Inc.*, 779 F.2d 250 (5<sup>th</sup> Cir. 1985); *Joseph v. Ford Motor Company*, 509 So.2d 1 (La. 1987); *Carroll v. Kilbourne*, 525 So.2d 284 (La. App. 1 Cir. 1988).

In *Branch v. Fidelity & Casualty Co. of New York*, 783 F.2d 1289 (5<sup>th</sup> Cir. 1986), the Court opined that:

“In multiparty . . . litigation, settlements should be ever more encouraged . . . the admission of the settlement agreement into evidence . . . violated both the letter and the spirit of Rule 408.”

In determining whether a document is discoverable, Article 1422 of the Louisiana Code of Civil Procedure states in pertinent part:

Parties may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any party, including the existence, description, nature, custody, condition and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. [Emphasis added]

La. C.C.P. art. 1422.

Therefore, a document, such as the settlement agreement at issue here, is not discoverable if it is privileged. The facts and substantive matters of a settlement agreement are privileged. This is a generally recognized principle in our legal system, created in order to facilitate the judicial policy of encouraging settlements between parties in dispute. *Dutton v. Gusset*, 387 So.2d 630, 632 (La. App. 1 Cir. 1980). Due to the privileged status of settlement agreements, the settling parties are afforded protection allowing for the details contained within a settlement to remain confidential. *Id.* The court in *Dutton* held, "It is apparent that the compromisers in the present transaction have a recognized right to be protected." *Id.*

As stated in article 1422 of the Code of Civil Procedure, privileged documents are not discoverable. The *Dutton* court, following the text of article 1422, held as follows:

... and as the **compromise agreement in question is privileged and not subject to discovery**, it is, not subject to production and inspection under the Public Records Statute. [Emphasis added.]

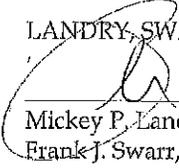
*Id.* at 633.

Defendant is entitled to know of previous settlements which relate to potential sources of William Oddo's asbestos exposure. Plaintiffs' counsel has already answered discovery regarding the number and identity of the defendants with whom the plaintiffs have previously settled.

In sum, Plaintiff objects vehemently to disclosure of any of the facts or substantive matters related to the amicable resolution of any claims. The documents sought are not discoverable and can not lead to the discovery of admissible evidence. Documents related to settlement agreements are privileged and confidential. Plaintiff objects to the disclosure of the facts or substantive matter contained within the receipt and release agreements, and respectfully requests that the Court issue an Order quashing this subpoena.

Respectfully submitted,

LANDRY, SWARR & CANNELLA, LLC

  
Mickey P. Landry, La. Bar No. 22817

Frank J. Swarr, La. Bar No. 23322

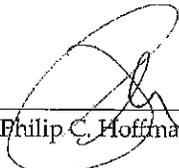
David R. Cannella, La. Bar No. 26231

Philip C. Hoffman, La. Bar No. 32277  
1010 Common Street, Suite 2050  
New Orleans, Louisiana 70112  
Tel: (504)299-1214  
Fax: (504)299-1215

PLAINTIFFS' COUNSEL

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing pleading has been served upon all known counsel of record by facsimile on the 13 day of January, 2012.

  
\_\_\_\_\_  
Philip C. Hoffman

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CASE No. 2011-05883

DIV. 14-I

WILLIAM ODDO, JR.,

VERSUS

ASBESTOS CORPORATION LTD, ET AL

FILED: \_\_\_\_\_

\_\_\_\_\_  
DEPUTY CLERK

RULE TO SHOW CAUSE

Considering the foregoing;

IT IS HEREBY ORDERED that Ford Motor Company appear and show cause why Plaintiff's Motion With Incorporated Memorandum to Quash Subpoena should not be granted on the \_\_\_\_\_ day of \_\_\_\_\_, 2012, at \_\_\_\_\_:\_\_\_\_\_ a.m.

New Orleans, Louisiana, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
JUDGE, CIVIL DISTRICT COURT

This pleading shall be served pursuant to La. Code Civ. Proc. Art. 1313.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 11-5883

SECTION: 14

DIVISION "P"

WILLIAM ODDO, JR.

VERSUS

ASBESTOS CORPORATION LTD, ET AL

FILED: \_\_\_\_\_

DEPUTY CLERK

PETITION FOR LETTERS ROGATORY

NOW INTO COURT, through undersigned counsel, comes Defendant, Ford Motor Company ("Ford"), and respectfully avers that:

1.

Upon information and belief, Johns-Manville Trust/Claims Resolution Management Corporation is a non-party in possession of potentially relevant information to the just resolution of the above-captioned matter.

2.

Johns-Manville Trust/Claims Resolution Management Corporation maintains an office in Falls Church, Virginia. Johns-Manville Trust/Claims Resolution Management Corporation has in its possession certain documents, items, information and/or tangible things concerning William Oddo, Jr., deceased, DOB: April 19, 1930, SSN: 439-24-9128.

3.

The records being requested are necessary for the defense of the pending lawsuit in the Parish of Orleans in the State of Louisiana.

4.

Ford has noticed the deposition upon written questions of the custodian of records for Johns-Manville Trust/Claims Resolution Management Corporation to be taken in Falls Church, Virginia before a Notary by February 15, 2012 and has contacted Johns-Manville Trust/Claims Resolution Management Corporation making them aware of the forthcoming subpoena.



5.

Louisiana Revised Statute 13:3823 authorizes this Court to issue a commission in the form of a Letter Rogatory addressed to the appropriate authority in another state.

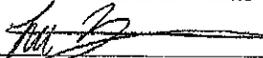
6.

Defendant, Ford Motor Company, tenders its proposed Letters Rogatory with this Petition for same.

**WHEREFORE**, the Petition prays that a Letter Rogatory be issued to the Fairfax County Clerk in Fairfax County, Virginia, commission him/her to take the deposition upon written questions as afore described.

Respectfully submitted,

Kuchler Polk Schell Weiner & Richeson, LLC



Deborah Kuchler (#17013)

Monique Wetner (#23233)

Janika Polk (#27608)

Jonique Martin Hall (#28137)

**Lee B. Ziffer (#32783)**

1615 Poydras Street, Suite 1300

New Orleans, Louisiana 70112

Telephone: (504) 592-0691

Facsimile: (504) 592-0696

**Attorneys for Defendant,**

**Ford Motor Company**

**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this 11<sup>th</sup> day of January, 2012, served a copy of the foregoing pleading on Plaintiffs' counsel by one of the following methods, in accordance with the Louisiana Code of Civil Procedure:

- by placing a copy in the U.S. Mail, properly addressed and first class postage prepaid
- by Certified Mail, properly addressed and first class postage prepaid
- by facsimile
- by hand delivery
- by overnight delivery
- by electronic delivery

In addition, all remaining counsel of record have been served via electronic delivery.

  
LEE BLANTON ZIFFER

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 11-5883

SECTION: 14

DIVISION "I"

WILLIAM ODDO, JR.

VERSUS

ASBESTOS CORPORATION LTD, ET AL

FILED: \_\_\_\_\_

DEPUTY CLERK

LETTER ROGATORY

TO: Clerk of Court  
Judicial Court of Fairfax County  
4110 Chain Bridge Road  
Fairfax, Virginia 22030

In the Civil District Court for the Parish of Orleans in the State of Louisiana, there is a pending case entitled, "*William Oddo, Jr. v. Asbestos Corporation Ltd., et al.*," No. 11-5883, Div. "I," Section "14," and it appears to this Court that the just determination of issue presented therein presented requires that the copies of the records of William Oddo, Jr., deceased, be taken from the Johns-Manville Trust/Claims Resolution Management Corporation, by deposition upon written questions.

It is therefore requested that you assist this Court in serving the interests of justice by causing the custodian of records of Johns-Manville Trust/Claims Resolution Management Corporation to appear before a competent officer authorized by your Court and require a custodian of records of the Johns-Manville Trust/Claims Resolution Management Corporation to answer, under oath, the written questions attached hereto, to produce the records of William Oddo, Jr., and that you require the officer to have the deposition reduced to writing, and cause a transcript to be returned to Lee Blanton Ziffer, Esq. at the law office of Kuchler Polk Schell Weincr & Richeson, 1615 Poydras Street, Suite 1300, New Orleans, LA 70112.

This Court will extend the same courtesy to you and your government in similar cases when requested and required.

**IT IS HEREBY ORDERED**, that the Petition for Letters Rogatory filed on behalf of Ford Motor Company be and is hereby **GRANTED**, and that the Letters Rogatory, Notice of Intention to Take Deposition Upon Written Questions and Deposition Subpoena be submitted to the appropriate authority of the Judicial Court of Fairfax County in Fairfax State of Virginia, for processing.

New Orleans, Louisiana, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
**DISTRICT JUDGE**

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 11-5883

SECTION: 14

DIVISION "T"

WILLIAM ODDO, JR.

VERSUS

ASBESTOS CORPORATION LTD, ET AL

FILED: \_\_\_\_\_

DEPUTY CLERK

**NOTICE OF RECORDS DEPOSITION  
AND NOTICE OF INTENTION TO TAKE  
DEPOSITION UPON WRITTEN QUESTIONS**

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that Defendant, Ford Motor Company ("Ford"), will take the records deposition and deposition upon written questions of the custodian of records for:

<u>DEPONENT</u>	<u>DATE &amp; TIME</u>	<u>LOCATION</u>
Johns-Manville Trust/Claims Resolution Management Corporation	February 15, 2012 at 10:00 a.m.	Johns-Manville Trust/Claims Resolution Management Corp. 3110 Farview Park Drive Suite 200 Falls Church, Virginia 22042

This deposition will be taken before an in-house Notary, for the production of the following described documents:

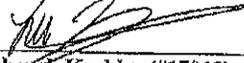
A certified copy of all documents relating to or reflecting any claims for compensation, including all documents reflecting the status of payment if any such claims, based on asbestos-related injuries submitted to Johns-Manville Trust/Claims Management Corporation by or on behalf of William Oddo, Jr., whose date of birth is April 19, 1930 and whose Social Security number is 439-24-9128.

Service is hereby made of the attached written questions that are to be propounded to the witness at his/her deposition.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

Kuchler Polk Schell Weiner & Richeson, LLC

  
Deborah Kuchler (#17013)  
Monique Weiner (#23233)  
Janika Polk (#27608)  
Jonique Martin Hall (#28137)  
Lee B. Ziffer (#32783)  
1615 Poydras Street, Suite 1300  
New Orleans, Louisiana 70112  
Telephone: (504) 592-0691  
Facsimile: (504) 592-0696  
Attorneys for Defendant,  
Ford Motor Company

**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this 11<sup>th</sup> day of January, 2012, served a copy of the foregoing pleading on Plaintiffs' counsel by one of the following methods, in accordance with the Louisiana Code of Civil Procedure:

- by placing a copy in the U.S. Mail, properly addressed and first class postage prepaid
- by Certified Mail, properly addressed and first class postage prepaid
- by facsimile
- by hand delivery
- by overnight delivery
- by electronic delivery

In addition, all remaining counsel of record have been served via electronic delivery.

  
**LEE BLANTON ZIFFER**

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 11-5883

SECTION: 14

DIVISION "T"

WILLIAM ODDO, JR.

VERSUS

ASBESTOS CORPORATION LTD, ET AL

FILED: \_\_\_\_\_

DEPUTY CLERK

**DIRECT QUESTIONS TO BE PROPOUNDED TO  
THE CUSTODIAN OF RECORDS FOR JOHNS-MANVILLE  
TRUST/CLAIMS RESOLUTION MANAGEMENT CORPORATION**

**QUESTION NO. 1:**

State your full name, address and occupation.

**ANSWER:**

**QUESTION NO. 2:**

For William Oddo, Jr., deceased, whose date of birth is April 19, 1930 and whose Social Security No. is 439-24-9128, do you have any documents signed by William Oddo, Jr., or submitted on behalf of William Oddo, Jr., which describe, outline, set forth, reflect and/or explain the nature and/or extent of William Oddo, Jr.'s exposure to asbestos for which he asserted a claim against the Johns-Manville Trust/Claims Resolution Management Corporation and/or for which he received settlement funds/monies from the Johns-Manville Trust/Claims Resolution Management Corporation?

**ANSWER:**

**QUESTION NO. 3:**

Are there any statements, affidavits and/or other documents which describe, outline, set forth, reflect and/or explain the product(s) mined, manufactured, sold, produced, marketed, labeled and/or distributed by Johns-Manville to which William Oddo, Jr. or anyone acting on his

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behalf claims to have been exposed and/or which William Oddo, Jr. or anyone acting on his behalf claims caused him to be exposed to asbestos?

ANSWER:

QUESTION NO. 4:

Are there any statements, affidavits and/or other documents related to the settlement and/or release by William Oddo, Jr. of his claims against the Johns-Manville Trust/Claims Resolution Management Corporation? If so, have those records been produced in conjunction with the subpoena *duces tecum*?

ANSWER:

QUESTION NO. 5:

Were the records referenced in the preceding questions made or caused to be made by Johns-Manville Trust, Claims Resolution Management Corporation and/or Johns-Manville in the regular course of business?

ANSWER:

QUESTION NO. 6:

Are the records referenced in the preceding questions under your care, supervision, direction, custody or control?

ANSWER:

QUESTION NO. 7:

If the records referenced in the preceding questions are in your possession or the possession of Johns-Manville Trust/Claims Resolution Management Corporation and/or Johns-

Manville, would you provide such records to the Court Reporter/Notary public for photocopying to be attached to this deposition?

ANSWER:

QUESTION NO. 8:

Have you done as requested in the preceding interrogatory? If not, why not?

ANSWER:

\_\_\_\_\_  
CUSTODIAN OF RECORDS

SWORN AND SUBSCRIBED before me, Court Reporter/Notary Public, in and for the County of Fairfax, State of Virginia, on this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
COURT REPORTER/NOTARY PUBLIC

My Commission Expires: \_\_\_\_\_

# Exhibit

C



Dec 28 2011  
8:59AM

STATE OF RHODE ISLAND  
PROVIDENCE

SUPERIOR COURT

IN RE ASBESTOS LITIGATION

December 28, 2011

**PLAINTIFFS' JOINT MOTION FOR A PROTECTIVE ORDER REGARDING  
SETTLEMENTS AND BANKRUPTCY CLAIMS**

The three plaintiffs' firms representing all plaintiffs within the Rhode Island Asbestos Docket, by and through their respective undersigned counsel, respectfully move this Honorable Court to issue a protective order preventing the disclosure of the terms and supporting documentation of any settlement entered into between any plaintiff and any named or unnamed defendant or bankruptcy trust.

Settlement agreements are not relevant absent a showing otherwise or until such time as necessary to allow a reduction pursuant to R.I.G.L. §10-6-7. Until an asbestos case reaches a verdict, the amount of a settlement paid by any entity is utterly irrelevant. Further, the defendant cannot show that the release of the settlement agreement or bankruptcy claims will likely lead to the discovery of admissible evidence. If this discovery is permitted, then the precedent will only create a disincentive for any defendant to settle early because the discoverability of any early settlement will only benefit the remaining defendants and eventually increase and prolong litigation, which would contradict the long-standing tradition of settlement history in Rhode Island Asbestos Litigation.

**I. DOCUMENTS SUBMITTED TO ASBESTOS TRUSTS FOR PURPOSES  
OF SETTLEMENT NEGOTIATIONS ARE NOT ADMISSIBLE AT  
TRIAL.**

Plaintiffs submit exclusive and limited information to various bankruptcy trusts for the sole purpose of resolving their claims against the trusts. This information is then

used by the trust to negotiate a settlement with counsel for Plaintiff. Importantly, each trust has its own set of rules and criteria for formulating an initial offer to the Plaintiff. In fact, many of the asbestos bankruptcy trusts do not require proof of exposure to a company's products. Rather, some trusts base their offer on medical diagnosis alone, while others care about an individual's occupation or job location. **None of the trusts require the standard of proof that is used by a court in a civil trial.** Finally, not only are the documents that are submitted to the trusts prepared by counsel solely for purposes of negotiating with the trust, the claim forms themselves do not contain the signature of the Plaintiff nor have they ever been viewed by the Plaintiff.

The Rhode Island Rules of Evidence explicitly prohibit evidence of a settlement to prove liability for, or invalidity of, a claim or its amount. In other words, Defendant cannot use or discover the communications that were generated for the purposes of settlement negotiations to prove that an entity other than Defendant are liable for Plaintiff's claims in this case. Finally, the documents and information routinely sought by the Defendants are protected from disclosure under Rhode Island Superior Court Rules of Civil Procedure Rule 26.

The Defendants' request for discovery of various bankruptcy trusts seeks highly confidential information that was collected and presented solely for the purpose of compromise negotiations. The Defendants often seek this information claiming any information concerning potential exposure to other asbestos-containing products **may** allow defendants to put on a prima facie case such that these entities may appear on the jury form.<sup>1</sup> The defendants often claim that such information **may** affect the opinions of

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<sup>1</sup> The operative word here is may because the defense carries the burden of persuading the jury that a rational basis exists for apportionment in the first place. Absent a rational basis finding, there will be no apportionment

the expert witnesses in these cases, and **may** be evidence which impugns the Plaintiff's credibility (emphasis added). Thus, the Defendants seek to use these documents for purposes of proving/disproving liability, one of the expressly impermissible purposes under Rhode Island Rule. Evid. 408.

Moreover, the admission of these documents would severely prejudice the Plaintiff by denying him the opportunity to respond to these documents before the jury and confusing the issues of the trial. Finally, the request is overly broad, unduly burdensome, and seeks information which is not reasonably calculated to lead to the discovery of admissible evidence.

**A. The Defendants' Proposal Seeks Information Which is Protected From Disclosure Under Rhode Island Rule. Evid. Rule 408.**

The documents and information sought by Defendants are materials submitted by Plaintiffs for the sole purpose of settlement with various bankruptcy trusts or other entities. Rhode Island Rules of Evidence Rule 408 provides as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was distributed as a to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rhode Island Rule. Evid. R. 408. Rule 408's prohibition of the admission of settlement information exists because exclusion of such evidence facilitates an atmosphere of

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which furthers the point that any settlement amount is not relevant until there is a verdict.

compromise among the parties and promotes alternatives to litigation. Further, settlements conserve judicial resources.

Recently, the Court of Appeals for the 8<sup>th</sup> Appellate District in Ohio held that:

{¶ 39} John Crane also argues that the document was clearly not read to the jury to show that appellant had settled or offered to settle with any party, and it was otherwise admissible under Ohio Evid.R. 401 because it assisted the trier of fact to decide the ultimate issue in the case: whether John Crane's products could have been a substantial factor in causing Ronald's illness.

{¶ 40} However, this is the very reason contemplated in Ohio Evid.R. 408 for excluding this evidence. The rule states that such evidence is clearly "\*\*\*not admissible to prove liability for or invalidity of the claim or its amount." The admission of the proof of claim form on this basis was therefore error. Under Ohio Evid.R. 408, admission of evidence of settlements or settlement negotiations is prohibited when offered to prove liability, the invalidity of a claim, or the amount of a claim. *Owens-Corning Fiberglass Corp. v. American Centennial Ins. Co.* (1995), 74 Ohio Misc.2d 272, 274. While it is true the members of the jury could have used the documents to decide whether exposure to John Crane gaskets and packing was a substantial factor in causing Ronald's mesothelioma, the jury did not need a claim form to show them that, especially when the parties stipulated to Ronald's exposure to dozens of asbestos-containing products. The jury also had much more substantial and specific evidence on which to rely: expert testimony. It is therefore inadmissible under Evid.R. 408.

Werts v. Goodyear Tire & Rubber Co., 2009-Ohio-2581, 17 at Exhibit "A."

In asbestos cases, Defendants seek information submitted by Plaintiffs to various trusts. Plaintiffs submit limited and exclusive "out of court" information to the bankruptcy trusts and other entities for the sole purpose of receiving a settlement. This information "...is not admissible to prove liability for or invalidity of the claim or its amount." Rhode Island R. 408. Further, none of the exclusions to Rule 408's general principle that settlement information is inadmissible is applicable to the Plaintiffs. A Defendant cannot use the limited and exclusive information submitted by Plaintiffs for

sole purpose of settlement to prove that another entity other than the Defendant was the major contributor to the Plaintiff's disease. All evidence intended to prove or disprove liability on the part of Defendants must comply with the rule of evidence.

Pursuant to rulings by the Supreme Court of Rhode Island, evidence of the fact and amount of pretrial settlements is inadmissible on the issue of damages. See Votolato v. Merandi, 747 A.2d 455, 461 (R.I. 2000); see also McInnis v. A.M.F., Inc., 765 F.2d 240, 247 (1st Cir. 1985) (interpreting Fed.R.Evid. 408). In Votolato, the Supreme Court of Rhode Island held:

Rhode Island law recognizes that offers to compromise and evidence of settlement negotiations generally are not admissible into evidence. Exclusion of such evidence facilitates an atmosphere of compromise among the parties and promotes alternatives to litigation. Further, it is well settled that such evidentiary protection extends to settlements reached between plaintiffs and third party tortfeasors.

Votolato, 747 A.2d at 461. The Votolato Court further held that "unless evidence of a settlement is relevant to some issue, other than the quantum of damages, a trial justice is instructed to bar the admission of such evidence and subsequently to make the appropriate reduction in any jury award rendered in favor of the plaintiff." Votolato, 747 A.2d at 462.

Under Rule 408, the limited and exclusive documents and information submitted by Plaintiffs to bankruptcy trusts and/or other entities are protected from disclosure and thus, are inadmissible. Moreover, the Defendants have available to them other means by which they can obtain evidence of exposure to other asbestos-containing products.

**B. Admission of Bankruptcy Trust Documents Is Not Permitted Under Rhode Island Rule. Evid. Rule 403.**

Under Rhode Island law, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rhode Island Rule. Evid. Rule 403. The Rhode Island Supreme Court has further recognized that evidence of the disposition of a separate but related claim is inadmissible when different burdens of proof are applied between the two claims. Cannone v. New England Telephone And Telegraph Co., 471 A.2d 211 (R.I. 1984).

In Cannone, the Defendant claimed that it was an error for the trial Court to exclude evidence that he was found "not guilty" of any traffic violations related to the collision which was subject of the lawsuit. The Rhode Island Supreme Court held that, "[s]ince the burden is greater before the Division than in a Superior Court civil action, dismissal of the failure-to-yield-the-right-of-way charge may merely have meant that the state or the concerned municipality had failed to satisfy the more rigorous burden rather than the specific act charged did not occur. Consequently, we feel that evidence concerning the ultimate disposition of the failure-to-yield charge was properly excluded." Id. at 214.

In asbestos cases, Defendants seek to introduce evidence of negotiations with an asbestos bankruptcy trust. The introduction of any bankruptcy documents would unfairly prejudice the Plaintiff in this case. First and foremost, many times the Plaintiffs have already testified and passed away, and introduction of this evidence at trial would leave them unable to respond to these documents. Plaintiff's counsel would then be forced to put an expert witness on to rebut any assertions made by Defendants regarding these documents at trial. This would necessarily include discussions of the separate burdens of

proof in the bankruptcy process, the nature of these trusts, and purposes of the disease classifications. Importantly, the issue of a particular defendant's contribution to the Plaintiff's disease might be lost in the "mini-trial" over what the documents truly mean. The Court can short-circuit this by recognizing that the documents at issue have low, if any, probative value, and excluding them because of the prejudicial impact that they will have on Plaintiff.

**C. The Defendants' Seek Irrelevant Settlement Information That Is Not Reasonably Calculated To Lead To The Discovery of Admissible Evidence.**

Defendants attempt to seek discovery seeks strictly irrelevant and highly confidential information that was exchanged between two parties to a settlement negotiation. Under the Rhode Island Rules of Evidence, information that is exchanged during an offer of compromise is not admissible for purposes of proving liability. Rhode Island Rule. Evid. R. 408. Documents are only discoverable if their production could reasonably be calculated to lead to the discovery of admissible evidence. Any information that is not reasonable calculated to lead to the discovery of admissible evidence does not fall within the scope of Rhode Island's rule of discovery. See e.g. Rhode Island Superior Court Rules of Civil Procedure Rule 26. Furthermore, Rhode Island Rules of Evidence Rule 401 defines relevant evidence as "... having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be with out the evidence." *Id.* "Evidence which is not relevant is not admissible." RI Rules. Evid. R. 402.

As this Court has previously recognized in other cases, the mere existence of settlement communications does not make them discoverable. Alessio v. Capaldi, P.E.,

2007 R.I. Super. Lexis 152. In Alessio, this Court had to determine whether a settlement agreement with a co-defendant was discoverable under Rhode Island law. In concluding that the “immediate disclosure of the settlement agreement is not required,” the Court recognized that the disclosure of a settlement agreement need not necessarily lead to the discovery of admissible evidence. Id. Under the facts of Alessio, the Court reasoned that “Defendant Beta advances three unsupported assertions in support of its argument that the settlement agreement must be disclosed.” Id.

In asbestos cases, the Defendants often do not offer any support for the proposition that the discovery of these settlement negotiations is reasonably calculated to lead to the discovery of admissible evidence. Instead Defendants routinely offer two separate and prohibited justifications. First, they assert that this information is likely to provide evidence of exposure to amphibole asbestos. The Defendants claim they seek this information because any information concerning potential exposure to other asbestos-containing product may allow defendants to put on a prima facie case. Secondly, Defendants often intend to utilize such information in an attempt to gather evidence about which they failed to question plaintiffs or co-workers at the appropriate time.

Both of the often stated uses of the documents and information at issue clearly violate the spirit and letter of Rule 408. First and foremost, the Supreme Court of Rhode Island has held that evidence of the fact and amount of pretrial settlements is inadmissible in Rhode Island on the issue of damages. See Votolato v. Merandi, 747 A.2d 455, 461 (R.I. 2000); see also McInnis v. A.M.F., Inc., 765 F.2d 240, 247 (1st Cir. 1985) (interpreting Fed.R.Evid. 408). In Votolato, the Supreme Court of Rhode Island held:

Rhode Island law recognizes that offers to compromise and evidence of settlement negotiations generally are not admissible into evidence. Exclusion of such evidence facilitates an atmosphere of compromise among the parties and promotes alternatives to litigation. Further, it is well settled that such evidentiary protection extends to settlements reached between plaintiffs and third party tortfeasors.

Votolato, 747 A.2d at 461. The Votolato Court further held that “unless evidence of a settlement is relevant to some issue, other than the quantum of damages, a trial justice is instructed to bar the admission of such evidence and subsequently to make the appropriate reduction in any jury award rendered in favor of the plaintiff.” Votolato, 747 A.2d at 462.

Defendants’ second proposed use of the information at issue, impeachment of plaintiffs’ testimony, is equally improper when the Court considers the fact that the plaintiffs have already testified and that the record will often show that the Defendants never asked him specifically about his exposure to the asbestos of bankrupt entities. Of course, the majority of plaintiffs are dead at the time of trial. Thus, there is nothing to impugn in the Plaintiff’s testimony.<sup>2</sup>

**D. The United States District Court for the Eastern District of Pennsylvania has Held in Opposition to Defendants’ Position Regarding the Information and Documents at Issue.**

The United States District Court for the Eastern District of Pennsylvania, home to the consolidated asbestos MDL, has ruled on arguments factually indistinguishable from the basis often used by the defendants in the Rhode Island Asbestos litigation.

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<sup>2</sup> In Goodyear Tire & Rubber Company, v. Chiles Power Supply Inc., 332 F.3d 976 (6<sup>th</sup> Cir. 2003) the Court, in holding that a settlement privilege exists, precluding discovery of settlement negotiations, recognized that the defendant “has not presented evidence of any case where the Rule 408 exceptions have been used to allow settlement communications into evidence for any purpose.” Id. at 981.

In Dent v. Westinghouse, et al., United States Magistrate Judge Elizabeth T. Hey was presented with arguments in support of the production of settlement information mirroring those of Georgia-Pacific. Each argument presented was unambiguously held to be in contravention of the purposes of the Federal Rules of Evidence Rule 408. See Memorandum and Order of Judge Hey, attached hereto as **Exhibit A**.

In regard to the argument that the information at issue would be used to challenge the credibility of plaintiff's testimony, Judge hey ruled: "[Defendant] contends that it seeks the settlement information to test the credibility of Plaintiff's claims. However, this seems to merely repackage the motives forbidden by Rule 408 by placing them under the guise of credibility." **Exhibit A** at 3. In regard to the argument that the settlement information at issue would be used to "determine the amounts of those settlements", an argument that asbestos defendants often frame as their desire to include the bankrupt entities "on the jury verdict form", Judge Hey ruled that the defendant "seeks the settlement information to establish the amount of Plaintiff's claim against [the defendant]. Again, this is forbidden by Rule 408." Id. at 4. In regard to the defendant's assertion that the information at issue would implicate the causation analysis, Judge Hey ruled: "This is the essence of the evil that Rule 408 seeks to prevent." Id.

Judge Hey's ruling is in perfect symmetry with the holding of the Chief United States Magistrate Judge of the United States District Court for the Eastern District of Pennsylvania, Judge Thomas J. Rueter, in Dutton v. Todd Shipyards Corp., et al.. See Memorandum and Order of Judge Rueter, attached hereto as **Exhibit B**. Judge Reuter, presented with the largely identical issues, held:

[T]he court finds that defendant has not made a sufficient showing of how production of the settlement agreements will lead to

admissible evidence. The court rejects the claim that defendant needs the agreements to 'impeach' plaintiff. Defendant already knows that plaintiff filed claims against other asbestos manufacturers in state courts. Defendant has access to all state court pleadings. Defendant may impeach plaintiff with his state court filings to suggest that his exposure to asbestos occurred at times and places having nothing to do with defendant's conduct. While disclosure of the settlement agreements will reveal the amount of money plaintiff received from other asbestos manufacturers, the settlement amounts cannot be used to prove the extent of plaintiff's exposure to asbestos from another manufacturer's product.

Exhibit B at 3.

II. **ALL SETTLEMENTS, INCLUDING BOTH CO-DEFENDANT SETTLEMENTS AND BANKRUPTCY TRUST SETTLEMENTS, ARE IRRELEVANT AND NOT DISCOVERABLE UNTIL THE TIME OF VERDICT.**

Settlement agreements should not be discoverable until the time of verdict. Although a defendant may be entitled to a setoff, such a determination cannot be made until a final judgment has been rendered. Even when a final judgment has been rendered, the settlement would not be evidence relevant to any issue in the case other than the apportionment of damages.

Second, Rule 408 of the Rules of Evidence state that the furnishing and accepting of valuable consideration in compromising a claim is not admissible evidence for proving or disproving liability of a claim or its amount. As such, the amount of settlement is, by definition of this rule, not admissible and the request for it to be released is not reasonably calculated to lead to the discovery of admissible evidence. However, this is precisely what many asbestos defendants intend to do with settlement figures and, if allowed, the letter and spirit of Rule 408 would be undermined.

Lastly, allowing discovery of the amount paid in a settlement will not encourage early settlements. Rather, if such discovery is permitted, it will create a disincentive for

defendants to settle early, increasing the costs of litigation and prolonging the processes of litigation.

**A. Settlement Agreements Are Not Relevant Absent A Showing Otherwise Or Until Such Time As Necessary To Allow A Reduction Pursuant To R.I.G.L. §10-6-7.**

The question is whether a non-settling defendant may compel the disclosure of a settlement reached between a plaintiff and a co-defendant. This question has not been decided in an asbestos case. However, this Honorable Court has answered this very question in a non-asbestos case. See Alessio v. Capaldi, P.E., 2007 R.I. Super. Lexis 152, attached hereto as **Exhibit C**. Like the issue in Alessio, the issue here is basic relevancy and its limits, as defined within the Rules of Civil Procedure and the Rules of Evidence.

In the Alessio case, the party seeking discovery of the settlement figures, Beta Group, argued that the information should be disclosed because 1) it was entitled to a set off; 2) the plaintiff opposing discovery may have received the full value of its claims and may be pursuing a windfall from the remaining defendants; and 3) because the RIDOT had threatened to file a separate suit that may include the amount paid to the plaintiff. This Honorable Court rejected each of the defendant's arguments and denied the disclosure of the settlement.

This Honorable Court ruled that the settlement agreement between the plaintiff and a co-defendant was not discoverable because, although a settling defendant's liability for contribution depended on whether it paid its share of any damage award, this determination could not be made until a final judgment had been rendered. Id. The Court noted, "even then, the settlement would not be evidence relevant to any issue in this case other than the ministerial apportionment of damages, a mathematical computation which

the Court rather than the jury will perform. Hence, the amount of the settlement is not relevant to any issue in this case at this time.” *Id. citing Bottaro v. Hatton Associates*, 96 F.R.D. 158 (D.C.N.Y. 1982).

The issue presently before the Court is identical to the issue in *Alessio*. The determination of whether a co-defendant has paid its share of any damage award cannot be made until a final judgment has been rendered. This Honorable Court should follow its decision in *Alessio*.

**B. The Amount Of Settlement Is Not Admissible Evidence For Proving Or Disproving Liability.**

Although the discovery of settlement-related information is governed by Super.R.Civ.P. Rule 26, Rule 408 of the Rules of Evidence creates a legislated narrowing of relevancy. See *Proposed Rules of Evidence*, 51 F.R.D. 315, 356-83 (1971)(Rule 408 proposal by the U.S. Supreme Court came under Article IV, ‘Relevancy and Its Limits’). The Rules of Evidence narrow the relevancy of settlement agreements by stating that the furnishing and accepting valuable consideration in compromising a claim is not admissible evidence for proving or disproving liability of a claim or its amount. The Uniform Contribution Among Tortfeasors Act, R.I.G.L. §10-6-7, should not, by itself, make the settling amount a subject matter of any claim or defense involved in the pending action. Super.R.Civ.P. Rule 26 (b)(1) is unambiguous in its requirement for information to be relevant to the subject matter involved in the pending action. The amount of a settlement is, by definition of Rule 408, not admissible and thus the request for it to be released is not reasonably calculated to lead to the discovery of admissible evidence. See *Griffin v. Mashariki*, 1997 WL 756914 at 1-2 (S.D.N.Y. 1997).

Consideration paid by one tortfeasor only satisfies that tortfeasor's percentage of

fault and is a credit against a future determination of the total amount of liability. It is the duty of a fact finder to assess the injured person's total damages and apportion fault among all tortfeasors, present or absent. 76 C.J.S. Release § 56 (2007). Although a jury must be instructed on the application of R.I.G.L. §10-6-7, this is a separate requirement that does not create an early and absolute discovery of settlement agreements. See ABF Capital Management v. Askin Capital, 2000 WL 191698 (S.D.N.Y.) (Information that creates a more enlightened perspective and realistic case assessment is not discoverable absent relevance to the issues of the case); See also Shepardson, 714 A.2d at 1184 (failure to instruct a jury on joint tortfeasor contribution is reversible error). Thus, settlement agreements should not be discoverable until it is required to be disclosed during trial or upon a further showing that it is likely to lead to the discovery of admissible.

**C. The Defendant Has Failed To Show That The Disclosure Of A Settlement Will Likely Lead To The Discovery Of Admissible Evidence.**

The predominant view of federal courts is that the proponent of discovery may obtain discovery “(1) by showing that the evidence is admissible for another purpose other than that barred by the Federal Rules of Evidence or (2) by articulating a plausible chain of inferences showing how discovery of the item sought would lead to other admissible evidence.” Yardon Golf Company v. BBMG Gold LTD, 156 F.R.D. 641, 650 (1994); In re RDM Sports Group, Inc., 277 B.R. 415, 433-434 (Bankr. N.D.Ga. 2002)(quoted). The Court conducting this review should also follow a similar test and include a balancing test. Such a test would take into account the strong public policy in favor of settlement negotiations and thus would require a particularized showing of likelihood that admissible evidence will be generated by the dissemination of the terms of

a settlement agreement. Groton v. Connecticut Light & Power, 84 F.R.D. 420, 423 (D. Conn. 1979); Bottaro v. Hatton Associates, 96 F.R.D. at 160 (D.C.N.Y. 1982); Morse/Diesel, Inc. v. Trinity Industries, Inc., 142 F.R.D. 80, 85 (D.N.Y. 1992).

It is likely that the asbestos defendants will veil their interests in obtaining settlement amounts as gaining an enlightened perspective regarding concerns of double dipping and indemnification. As previously stated above, the claim of a setoff is a managerial calculation that is not relevant until the proper time in a trial. The possibility of a plaintiff's windfall is not relevant to the subject matter involved in any of the pending asbestos actions because there are no allegations of bad faith dealings in these cases to support the possibility of a plaintiff windfall. The defendants are only trying to raise self-serving stereotypes. In fact, the possibility of a windfall is precisely defeated by the Uniform Contribution Among Tortfeasors Act, R.I.G.L. §10-6-7. Further, R.I.G.L. § 10-6-5 provides that: "A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement." Thus, any fear of payment in any asbestos case and payment of indemnification for settlement is also protected by the Uniform Contribution Among Tortfeasors Act.

**D. Allowing The Discovery Of The Amount Paid In A Settlement For The Sole Purpose Of Granting Advantageous Perspective Will Not Encourage Early Settlements.**

The Rhode Island Courts and the procedure they utilize "should always encourage settlement. Voluntary settlement of disputes has long been favored by the courts." Homar, Inc. v. North Farm Associates, 445 A.2d 288, 290 (R.I. 1982). Likewise, it is the intent and effect of Rule 408 as encompassed in the Rules of Evidence to promote

settlements. Please see Brazil, Protecting The Confidentiality of Settlement Negotiations (1988) 39 Hastings L.J. 955, 998-999 (1988)(critiquing the Court in Bennett v. LaPere, 112 F.R.D. 136 (D.R.I. 1986)). Parties settle a suit not only to limit their potential liability but also to buy their peace and avoid the continuing pressures, vexations, associated legal expenses and unpleasantness involved in litigation. Homar, Inc. v. North Farm Associates, 445 A.2d at 290. By permitting the disclosure of settlement agreements for almost a limitless number of reasons a court will disturb the peace bought by settling defendant, corrupt the purpose and protection of Rule 408, and create a disincentive for joint tortfeasors to settle early.

It is a mistake to assume that the purpose of Rule 408 ceases to be if a settlement agreement has been reached by one or more tortfeasors in a case. What is settled in one lawsuit may reverberate in other ongoing or future litigation in which the settling defendants are involved. It is for this reason that most defendants include clauses of confidentiality in settlement agreements. If parties are aware that they can gain advantageous posturing by being the last to settle and realize that the circumstances in which settlements can be discovered is near limitless, then the result will be an obvious and unavoidable chill to negotiations.

### **III. CONCLUSION**

This Honorable Court should grant the Plaintiffs' Joint Motion for a Protective Order, as the asbestos defendants cannot show that the settlement agreements are admissible for another purpose other than that barred by the R.I. Rules of Evidence nor can they articulate a plausible chain of inferences to show how discovery of the settlement agreement will lead to other admissible evidence. Settlement agreements are

not relevant absent a showing otherwise or until such time as necessary to allow a reduction pursuant to R.I.G.L. §10-6-7. The release of settlement information in any case prior to it becoming relevant would be detrimental to negotiations and settlements in all cases involving more than one party. This Court should apply the same sound decision it did in Alessio to the asbestos cases.

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Dated: December 12, 2011

# Exhibit

D

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

SUIT NO. 2004-15722 SECTION "7" DIVISION: E

MARY A. ROBESON, ET AL,

VERSUS

AMETEK, INC, ET AL,

\*\*\*\*\*

ORAL DEPOSITION OF

DAVID THOMAS ROBESON, SR.

JANUARY 24, 2011

\*\*\*\*\*

ORAL DEPOSITION OF DAVID THOMAS ROBESON, SR.,  
produced as a witness at the instance of the Defendant,  
Union Carbide Corporation, was duly sworn, was taken in  
the above-styled and numbered cause on the JANUARY 24,  
2011, from 10:28 a.m. to 1:04 p.m., before Chris  
Carpenter, CSR, in and for the State of Texas, reported  
by machine shorthand, at the offices of Esquire  
Deposition Services, 3010 Bee Caves Road, Suite 220,  
Austin, Texas 78746, pursuant to the Louisiana Rules of  
Civil Procedure and the provisions stated on the record  
or attached hereto.

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EXHIBITS

10 NO. DESCRIPTION PAGE MARKED

11 DR-1 LUMMUS 524(G) Asbestos PI Trust Claim Form 7

12 DR-2 ACandS Asbestos Settlement Trust Claim 10

13 Form

14 DR-3 AWI Claim Form, 2/26/2008 10

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16 DR-5 Celotex Asbestos Settlement Trust Claim 24

17 Form

18 DR-6 Combustion Engineering Trust Claim Form 29

19 DR-7 Claim Form to Eagle Picher 37

20 DR-8 Claim Form to Owens Corning/Fibreboard 42

21 DR-8A Owens Corning/Fibreboard Asbestos Personal 81

22 Injury Trust Proof Of Claim Form, Claim

23 Number: 11176578

24 DR-9 Fuller-Austin Asbestos Settlement Trust 47

25 Claim Form

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1                   DAVID THOMAS ROBESON, SR.,  
2           having been first duly sworn to testify the truth, the  
3           whole truth, and nothing but the truth, testified as  
4           follows:

5                                   EXAMINATION

6           BY MR. ABRAHAM:

7           Q.     Mr. Robeson, my name is Michael Abraham and I  
8           know you've been deposed in this case but I wasn't  
9           present at that deposition. We're here today for a  
10          limited purpose, just to ask you some questions about  
11          some of these bankruptcy trust applications that we  
12          received from your attorney. And I had down that you  
13          were first deposed on March 6th of 2009, in this case;  
14          is that correct, or if you recall?

15          A.     I don't recall the exact date.

16          Q.     Okay. It was in 2009? Do you remember that?

17                   MR. LANGE: If -- if you remember.

18          Q.     (By Mr. Abraham) If you remember.

19          A.     Again, I don't remember the exact -- the exact  
20          date. I honestly don't.

21          Q.     Okay. Well, in any event, the transcript will  
22          speak. I'm just looking at it, and Counsel is welcome  
23          to see it, but I have it as March 6th of '09, is when  
24          you were deposed.

25                   So you're familiar with the process.

1 We're just going to be asking you questions. If you  
2 don't understand something, let me know and I'll be  
3 happy to rephrase it. If I ask you a question and you  
4 answer it, I'm going to assume you understood my  
5 question. Is that fair?

6 A. Yes.

7 Q. And we're going to need verbal responses.  
8 Avoid the shaking of the head type of things so the  
9 court reporter can take everything down, and try to  
10 verbalize even yes's and no's, because the uh-huh's or  
11 nuh-uh's are sometimes unclear for the court reporter.  
12 So if we can do that, I think we'll -- we'll be fine.

13 And if at any time you need a break, just  
14 let us know. We'll be happy to stop and take a short  
15 break, either drink, restroom, or whatever you need,  
16 okay?

17 A. Yes.

18 Q. Okay. Now, can you state your name for the  
19 record, please?

20 A. David Thomas Robeson, Senior.

21 Q. Okay. And just what is your current address?

22 A. 12113 Metric Boulevard, Apartment 431, Austin,  
23 Texas 78758.

24 Q. And is that a different address from when you  
25 were deposed last time, if you remember?

1 A. Yeah, yes.

2 Q. How long have you been residing at this  
3 address?

4 A. One year.

5 Q. Now, when you were deposed originally in March  
6 of 2009, you were asked some questions about what is  
7 known as asbestos bankruptcy trusts and whether you had  
8 any information about it, and your response was you  
9 didn't know. Do you remember any of those questions?

10 A. No, I don't.

11 Q. Well, let me ask you this: Prior to coming  
12 here today, did you read your deposition that you gave  
13 in this case?

14 A. No, I have not.

15 Q. Did you do anything in preparation besides  
16 talking with your attorney?

17 A. No, other than talking with my attorney.

18 Q. I want to show you -- and I'll mark this; I'm  
19 just going to do DR-1.

20 (Exhibit DR-1 marked for identification).

21 Q. (By Mr. Abraham) Have you ever seen that  
22 document before?

23 A. No, sir.

24 Q. Now, you see on the first page towards the  
25 bottom, it has mailing address, "C/O David T. Robeson"?

1 A. Yes, sir.

2 Q. 3570 Oak Harbor Boulevard, Apartment 738?

3 A. Yes, sir.

4 Q. First, where is -- where is the Oak Harbor  
5 Boulevard; is that in Austin?

6 A. No, sir. Slidell, Louisiana.

7 Q. Okay. When were you living in Slidell at that  
8 address?

9 A. Before I moved to Austin.

10 Q. Okay. When was that?

11 A. 2009, 2008, at that timeframe.

12 Q. Did you have any participation in the  
13 information that went into this document?

14 A. No, sir.

15 Do I look at it?

16 Q. You can --

17 MR. LANGE: If he's got questions --

18 THE WITNESS: I'm sorry, I'm sorry.

19 MR. LANGE: -- he'll ask you what he wants  
20 to ask you.

21 THE WITNESS: Okay. I'll keep my mouth  
22 shut.

23 MR. LANGE: No, that's fine. That's fine.  
24 But he'll -- he'll ask you questions about what he wants  
25 to ask about, so...

1 A.

2 THE WITNESS: Okay.

3 Q. (By Mr. Abraham) Oh, and if you could turn to  
4 the third page.

5 MR. LANGE: I think one more.

6 Q. (By Mr. Abraham) And you see --

7 A. This page?

8 Q. Yes, that's it.

9 And do you see a box that's checked off on  
10 that page?

11 A. Yes.

12 Q. Okay. And that says -- it's next to  
13 "Mesothelioma level 8"; is that correct?

14 A. It's what it's checked off, yes.

15 Q. Okay. And you had nothing to do with the  
16 information as far as why that box was checked off?

17 A. No.

18 Q. Do you know when this form was filled out?

19 A. No, sir.

20 Q. If you turn to the next page, it says "Smoking  
21 History" at the top?

22 A. Yes, sir.

23 Q. And there's no information in any of the  
24 blanks; is that correct?

25 A. Yes, it's correct. There's no information in

1 any of the blanks.

2 Q. Okay. But your father was a smoker, correct?

3 A. Yes, sir.

4 Q. Okay. You can put that one to the side.

5 (Exhibit DR-2 marked for identification.)

6 Q. (By Mr. Abraham) This is what I marked as  
7 DR-2. It's entitled "ACandS Asbestos Settlement Trust  
8 Claim Form." Now, have you ever seen this document  
9 before?

10 A. No, sir.

11 Q. And again, on the front page of that form, it  
12 has a mailing address "C/O David T. Robeson, 3570 Oak  
13 Harbor Boulevard, Apartment 738," correct?

14 A. Yes, sir.

15 Q. And that's you, right?

16 A. Yes, sir.

17 Q. And did you provide any information to your  
18 attorneys with regards to what went into this  
19 application?

20 A. No, sir.

21 (Exhibit DR-3 marked for identification.)

22 Q. (By Mr. Abraham) Okay. I'm going to hand you  
23 what's marked as DR-3, which is the Armstrong World  
24 Industries at the top. And have you ever seen this  
25 document before?

1 A. No, sir.

2 Q. And if you could turn to the second page, and  
3 under number 8, 8-A, is that your -- that refers to you,  
4 correct?

5 A. Yes, sir.

6 Q. And it has a mailing address of 4114 Medical  
7 Drive, Apartment 16307 in San Antonio?

8 A. Yes, sir.

9 Q. Okay. When did you live at that address?

10 A. I lived there from about, somewhere around, I  
11 don't know, 2000, 2001, to around 2005.

12 Q. And if you turn the page, the -- it has the box  
13 "Level 8 mesothelioma" is -- has an "X" in it, correct?

14 A. Yes, sir, it does.

15 Q. Okay. If you can turn -- if you look at the  
16 top, it has page numbers. Look at Page 5. And that has  
17 occupation at time of exposure for your father as a  
18 mechanic, correct?

19 A. According to this page up at the top, it says  
20 mechanic, yes, correct.

21 Q. And have you known your father to work as a  
22 mechanic?

23 A. I don't know.

24 Q. Do you know why they put he worked as a  
25 mechanic?

1 A. I don't know.

2 Q. Do you know where they got the information  
3 where your father worked as a mechanic?

4 A. No, sir, I don't.

5 Q. And correct me if I'm wrong, but did your  
6 attorneys know your father?

7 A. I'm not sure I understand your question.

8 Q. Did your attorneys know -- ever personally meet  
9 your father?

10 A. No, sir.

11 Q. They never had any kind of discussions with  
12 your father at all?

13 A. No, sir.

14 Q. No, sir, they didn't? I just want to be clear,  
15 because it was kind of a -- my question maybe wasn't  
16 clear. Let me re-ask it.

17 Did your attorneys ever have any  
18 discussions with your father?

19 A. No, sir.

20 Q. And if you look at number 6, I'm sorry, same  
21 page but number 6.

22 MR. LANGE: Page 5, number 6?

23 Q. (By Mr. Abraham) Page 5, number 6, you will see  
24 five boxes. If you look at the third box, it has a "Y"  
25 in it and it says, "Injured party altered, repaired, or

1 otherwise worked with an asbestos-containing product  
2 such that the injured party was" -- looks like it's cut  
3 off, but I think it's "exposed on a regular basis to  
4 asbestos fibers." And that has a "Y" in it, correct,  
5 for "yes"?

6 A. Yes, sir, it does have a "Y" in it.

7 Q. And the next one also has a "Y" in the box. It  
8 says, "Injured party was employed in an industry or  
9 occupation such that injured party worked on a regular  
10 basis in close proximity to workers who did one or more  
11 of the three above activities."

12 Do you know where the information came for  
13 them to check, put a "Y" in those boxes?

14 A. No, sir.

15 Q. If you turn to the page on number 6, and you  
16 see Number 1, it says, "Site plant where exposed: Name  
17 of site plant of asbestos exposure: EJ Garland,"  
18 G-A-R-L-A-N-D. Do you see that?

19 A. Yes, sir.

20 Q. Do you have any information about your father  
21 being exposed at EJ Garland?

22 A. No, sir.

23 Q. Okay. Do you know where your attorneys got any  
24 information to say he was exposed to asbestos there?

25 A. No, sir.

1 Q. And at the bottom, it says the dates of those  
2 exposures began 1 -- 01/1956 and ended 11/1956, correct?

3 A. Yes, sir, it says that at the bottom of the  
4 page.

5 Q. Okay. Do you know why they put January '56,  
6 through November '56, that your father was exposed to  
7 asbestos from EJ Garland?

8 A. No, sir.

9 Q. And you don't have any information about that?

10 A. I don't know.

11 Q. And again, your attorneys never met your dad or  
12 talked with him about any of his work; is that correct?

13 MR. LANGE: Objection, asked and answered,  
14 but you can answer.

15 THE WITNESS: Do I have to or can I just  
16 rely on your statement?

17 MR. LANGE: Well, no, you still have to  
18 answer. I may have an objection every once in a while  
19 or they may have some. It's just for the record and you  
20 still --

21 A. Okay.

22 MR. LANGE: -- have to answer.

23 A. Okay. No. My attorneys have never talked to  
24 my dad.

25 Q. (By Mr. Abraham) Okay. And if you turn the

1 page on number 7, it says number -- at number 3,  
2 "Occupation at time of exposure: Carpenter." And  
3 again, under number 6, the same two boxes as we just  
4 went over are checked with a "Y"; is that correct?

5 A. Yes, sir. The same two boxes are checked with  
6 Y's.

7 Q. And do you know where any of that information  
8 came from to say your father was exposed to asbestos as  
9 a carpenter?

10 A. No, sir.

11 Q. Okay. Next page on Page 8, it has the site of  
12 the plant where exposure occurred on the USS Braxton  
13 (APA-138). Now do you have any -- any information about  
14 any asbestos exposure your father may have had when he  
15 was on the USS Braxton?

16 A. No, sir.

17 Q. Do you know where your attorneys got that  
18 information from?

19 A. My older brother, Bill, had done some research  
20 for my dad related to when he was in the Marines, and he  
21 had found out that he had been on two transport ships.  
22 Whether this is one of them or not, I don't know. I  
23 don't know what the names were. That's all I know.

24 Q. Okay. And did you talk to Bill about what your  
25 father did on the USS Braxton?

1 A. No.

2 Q. So is it, and correct me if I'm wrong, is it  
3 your brother's understanding that your father was  
4 exposed to asbestos when he was on the USS Braxton?

5 MR. LANGE: Objection, form, calls for  
6 speculation, mischaracterizes testimony.

7 Q. (By Mr. Abraham) If you know.

8 A. No.

9 Q. Okay. So, no, your brother did not -- your  
10 brother doesn't think your dad was exposed to asbestos  
11 on the USS Braxton?

12 MR. LANGE: Objection, same  
13 objection. You can answer if you can.

14 A. Again, I have -- I have no clue what -- what --  
15 I have no clue. I don't know.

16 Q. (By Mr. Abraham) Okay. Did you have any  
17 conversations with your brother after he found out this  
18 information that your dad was on some transport vessels  
19 when he was in the military?

20 A. Just the fact that he found out that my dad was  
21 on a couple of transports.

22 Q. Do you know why that information, I guess, was  
23 turned over to your attorneys for his asbestos lawsuit?

24 A. Do I -- no, I don't.

25 Q. Do you have any information, other than what

1 you told me about why the USS Braxton is identified in  
2 this Asbestos Personal Injury Settlement Trust Proof of  
3 Claim form stating that your father would have been  
4 exposed to asbestos on that vessel?

5 A. No, I don't.

6 MR. LANGE: Objection, form.

7 A. Excuse me, I'm sorry.

8 Q. (By Mr. Abraham) That's okay.

9 A. Was that too quick?

10 Q. That's okay.

11 A. Do I need to rephrase that?

12 No, I don't.

13 Q. And again, on Page 9, relating to the Braxton,  
14 it has those same two boxes that we've already discussed  
15 as checked with a "Y" or marked with a "Y" stating that  
16 "The injured party altered, repaired, or otherwise  
17 worked with an asbestos-containing product such that the  
18 injured party was exposed on a regular basis to asbestos  
19 fibers," and checked with a "Y" that "The injured party  
20 was employed in an industry or occupation such that the  
21 injured party worked on a regular basis in close  
22 proximity to workers who did one or more of the above  
23 three activities."

24 You have no information you can tell me as  
25 to why your attorneys submitted about your father's work

1 on the Braxton to this asbestos trust, do you?

2 A. That is correct. I don't have any information  
3 that I can tell you about why those two boxes are  
4 checked.

5 Q. Okay. And on Page 10, it mentions the USS --  
6 it says "Shangi-La," but I imagine it's "Shangri-La."  
7 Does that sound -- do you know?

8 A. I have no idea.

9 Q. Do you know the names of the vessels your  
10 father served on?

11 A. No, sir, I don't.

12 Q. Your brother, Bill, would know that, though,  
13 right?

14 MR. LANGE: Objection, form, calls for  
15 speculation.

16 A. I --

17 Q. (By Mr. Abraham) Didn't you tell me that your  
18 brother, Bill, researched your father's military  
19 service?

20 A. Yes.

21 MR. LANGE: Same objection.

22 A. Yes, I did.

23 Q. (By Mr. Abraham) And you said he found out he  
24 was on a couple of transport vessels?

25 MR. LANGE: Same objection.

1           A.    Yes, I did.

2           Q.    (By Mr. Abraham) So would he be the best  
3 person, if I wanted to know what vessels those were,  
4 would Bill be the one to -- to ask about?

5                   MR. LANGE:  Objection, form, calls for  
6 speculation.

7           A.    Again, I don't -- I don't know.

8           Q.    (By Mr. Abraham) You don't know if your brother  
9 would be the best person to tell me about your father's  
10 military service if he researched it?

11                   MR. LANGE:  Same objection.

12           A.    I -- I, you know, I just know he researched it.

13           Q.    Okay.

14           A.    I can't tell you what he knows and what he  
15 doesn't know.

16                   May I get some more coffee?  Would that be  
17 a problem?

18                   MR. ABRAHAM:  Sure.  No, we can take a  
19 short break.

20                   THE WITNESS:  Real short.  I'm just going  
21 to fill up with some coffee and come right back.

22                   MR. ABRAHAM:  I'm not going anywhere.

23                   THE WITNESS:  Okay.

24           Q.    (By Mr. Abraham) Okay.  And on Page 11, with  
25 regards to the USS Shangri-La, it has, again, the same

1 two boxes that it had for the Braxton marked with a "Y,"  
2 correct?

3 A. Yes, sir, the same two boxes on Page 11 of 20  
4 are marked with Y's.

5 Q. And you don't have any information regarding  
6 any -- any asbestos exposure your father may have had  
7 when he was on the USS Shangri-La; is that correct?

8 A. That is correct, I don't have any information.

9 Q. Okay. If you go to Page 17 of 20, that has  
10 your name, correct, David T. Robeson listed in this  
11 form, doesn't it?

12 A. Yes, sir. It has my name listed on Page 17 of  
13 20.

14 Q. Okay. And on Page 18, under the first box  
15 under "Smoking history," it says, "Has the injured party  
16 ever smoked cigarettes?" It's marked with an "X" in the  
17 "no" box, correct?

18 A. Yes, sir, it's marked with an "X" in the "no"  
19 box.

20 MR. LANGE: And that appears to be a  
21 typographical error. We're not alleging that he wasn't  
22 a smoker.

23 This one is kind of falling apart.

24 MR. ABRAHAM: You need another staple?

25 MR. LANGE: Yeah, I may just put it

1 sideways.

2 MR. ABRAHAM: That was 3, right?

3 MR. LANGE: Correct, yes. I just don't  
4 want that to come separated.

5 (Exhibit D-4 marked for identification.)

6 Q. (By Mr. Abraham) Okay. And I handed you and  
7 your attorney what's marked as DR-4 which is the Babcock  
8 & Wilcox Asbestos Personal Injury Settlement Trust Proof  
9 of Claim Form. And have you ever seen that document?

10 A. No, sir, I have not.

11 Q. And if you turn to Page 2, under number 8,  
12 again it has -- has your name listed, David T. Robeson,  
13 on the 4114 Medical Drive, Apartment 16307 in San  
14 Antonio, Texas; is that correct?

15 A. Yes, sir, that is correct. It's got my name on  
16 Page 2 of 19.

17 Q. Okay. And -- but you have not seen anything --  
18 any -- you have not seen this form in any manner prior  
19 to today; is that correct?

20 A. That is correct, I have not seen this form  
21 prior to today in any manner.

22 Q. And then on Page 5 of 19 under occupation, it  
23 has -- it says, "Occupation at time of exposure:  
24 Mechanic." Do you know where your attorneys got that  
25 information to put that your father was a mechanic?

1 A. No, sir, I do not.

2 Q. And again, the same two blocks marked with a  
3 "Y" as in the previous form, they're also marked with a  
4 "Y" on this one, correct? Under number 5?

5 A. Yes, sir, under number 5 on Page 5 of 19, there  
6 are two boxes that are marked with Y's.

7 Q. Okay. And on Page 6 of 19, it has the exposure  
8 site of EJ Garland. And again, you don't have any  
9 information about your father working around any Babcock  
10 & Wilcox equipment or products at EJ Garland, do you?

11 A. No, sir, I do not.

12 Q. And do you know where your attorneys got that  
13 information?

14 A. No, sir, I do not.

15 Q. And on Page 7 of 19, again it has, "Occupation:  
16 Carpenter." And you don't know where that information  
17 came from, do you?

18 A. No, sir. On Page 7 of 19, I don't know where  
19 that occupation of carpenter came from.

20 Q. And you don't have any information regarding  
21 the two boxes under number 5 that are again checked with  
22 a "Y"?

23 A. No, sir. On Page 7 of 19 under number 5 the  
24 two boxes marked with "Y," no, sir, I don't -- I don't  
25 know why they're marked that way.

1 Q. Okay. And on Page 8 of 19, again it brings up  
2 the USS Braxton and on Page 10 of 19, the USS -- again,  
3 it says "Shangi-La," but I believe it's "Shangri-La,"  
4 which I think is just a typo on the form.

5 But again, you don't have any information  
6 or know how your -- why your attorneys -- strike that.

7 Do you know why your attorneys listed USS  
8 Braxton and USS Shangri-La alleging your father was  
9 exposed to asbestos, why they submitted that to the  
10 Babcock & Wilcox --

11 MR. LANGE: Objection, form.

12 Q. (By Mr. Abraham) -- Asbestos Personal Injury  
13 Settlement Trust?

14 MR. LANGE: Objection, form.

15 A. No, sir, I do not.

16 Q. (By Mr. Abraham) And again, on Page 16 of 19,  
17 it has you listed -- your name listed, David T. Robeson,  
18 into -- that it is listed in the Babcock & Wilcox  
19 Personal Injury Settlement Trust Proof of Claim Form,  
20 correct?

21 A. Yes, sir, on Page 16 of 19 in this particular  
22 document, it lists my name.

23 Q. And on Page 17, under the smoking history,  
24 again, it's checked "No" where it says, "Has the injured  
25 party ever smoked cigarettes?" Is that correct?

1 A. Yes, sir. On Page 17 of 19 of this particular  
2 document, it's checked "no."

3 (Exhibit D-5 marked for identification.)

4 Q. Okay. That's number -- DR-5 is the --

5 MR. LANGE: Which one is this?

6 MR. ABRAHAM: Celotex. It says -- you see  
7 under 2, Celotex.

8 MR. LANGE: On the second page. I see  
9 that, yeah.

10 Q. (By Mr. Abraham) I hand you which is the  
11 Celotex Asbestos --

12 MR. LANGE: Oh, I see.

13 Q. (By Mr. Abraham) -- Settlement Trust Claim  
14 form. Do you have any information about this Celotex --  
15 do you have any information about what is contained  
16 within the asbestos settlement trust form that was  
17 submitted to Celotex?

18 A. No, sir.

19 Q. And if you turn to page -- it has a Page 4 at  
20 the top, it's about, kind of little past midway down,  
21 "Industry in which exposure occurred." Do you see -- is  
22 there a number 17 there?

23 A. Yes, sir, there is a number 17 on Page 4 under  
24 where it says, "Industry in which exposure occurred."

25 Q. And according to the code, 17 matches up with

1 construction trades; is that correct?

2 A. According to the table above it, where it says  
3 Industry Codes, there's a 17 and to the side of that, it  
4 says, "Construction trades."

5 Q. Okay. And if you turn to -- it's the page  
6 right before the death certificate. Okay, in this  
7 settlement trust, it says: "Celotex Corporation  
8 Products Lists Exhibit B. The injured person was  
9 exposed to one or more of the following products  
10 manufactured and/or distributed by the Celotex  
11 Corporation," and the first one is "Celotex Roofing  
12 Products."

13 Do you have any information about your  
14 father being exposed to asbestos from Celotex roofing  
15 products?

16 A. No, sir, I do not.

17 Q. The next one is Carey Insulating Cement. Do  
18 you have any information about your father being exposed  
19 to asbestos from Carey insulating cement?

20 A. No, sir, I do not.

21 Q. And the third one is Carey Millboard. Do you  
22 have any -- any information regarding your father being  
23 exposed to asbestos from Carey millboard?

24 A. No, sir, I do not.

25 Q. Careytemp Pipe Covering is the next one

1 listed. Do you have any information regarding your  
2 father being exposed to asbestos from Careytemp pipe  
3 covering?

4 A. No, sir, I do not.

5 Q. Careytemp Block Insulation, do you have any  
6 information about your father being exposed to asbestos  
7 from Careytemp block insulation?

8 A. No, sir.

9 Q. Careytemp Insulating Cement, do you have any  
10 information regarding your father being exposed to  
11 asbestos from Careytemp insulating cement?

12 A. No, sir.

13 Q. Careytemp MW-50 Cement, do you have any  
14 information regarding your father being exposed to  
15 asbestos from Carey MW-50 cement?

16 A. No, sir.

17 Q. Carey MW-40 Cement, do you have any information  
18 regarding your father being exposed to asbestos from  
19 Carey MW-40 cement?

20 A. No, sir.

21 Q. Carey Fiberrock Felt, do you have any  
22 information regarding your father being exposed to  
23 asbestos from Carey fiberrock felt?

24 A. No, sir.

25 Q. Carey 7M Asbestos Shorts, do you have any

1 information regarding your father being exposed to  
2 asbestos from Carey 7M asbestos shorts?

3 A. No, sir.

4 Q. Do you know what asbestos shorts is?

5 A. That's why I was smiling. No, sir.

6 Q. It's raw asbestos.

7 A. No, sir.

8 MR. LANGE: Objection, form.

9 Q. (By Mr. Abraham) Spraycraft Fireproofing, do  
10 you have any information regarding your father being  
11 exposed to asbestos from Spraycraft fireproofing?

12 A. No, sir.

13 Q. Carey Asbestos Rope, do you have any  
14 information regarding your father being exposed to  
15 asbestos from Carey asbestos rope?

16 A. No, sir.

17 Q. And Carey Asbestos Felts, do you have any  
18 information regarding your father being exposed to  
19 asbestos from Carey asbestos felts?

20 A. No, sir.

21 Q. Can you tell me where your attorneys got these  
22 specific lists of products that say your father was  
23 exposed to asbestos from them?

24 MR. LANGE: Objection, form.

25 A. I have -- I don't know.

1 Q. (By Mr. Abraham) Is this the first time you've  
2 seen that list?

3 A. Yes, sir.

4 Q. Do you know why your attorneys listed those  
5 specific -- those are pretty --well, strike that.

6 Would you agree those are pretty specific  
7 products by -- some of them by a number, MW-50 cement;  
8 that's pretty specific, wouldn't you agree?

9 MR. LANGE: Objection, form.

10 A. I don't know.

11 Q. (By Mr. Abraham) Have you ever heard of any of  
12 those products?

13 A. No, sir.

14 Q. Do you -- and you have no information regarding  
15 how your attorneys would know how your father was  
16 exposed to asbestos from those products?

17 MR. LANGE: Objection, form, and asked and  
18 answered.

19 A. No, sir.

20 Q. (By Mr. Abraham) Would your brothers know?

21 MR. LANGE: Objection, form, calls for  
22 speculation.

23 A. I don't know.

24 Q. (By Mr. Abraham) Have you talked to any of your  
25 brothers about all these different trusts that we've

1       been talking about so far?

2             A.    No, sir.

3                        (Exhibit 6 marked for identification.)

4             Q.    (By Mr. Abraham) I'm going to hand you what is  
5       -- I've marked as DR-6 which is the Combustion  
6       Engineering Trust Claim Form. Do you have any  
7       information regarding the Combustion Engineering Trust  
8       Claim Form and the contents within?

9             A.    No, sir.

10            Q.    On the first page where it says mailing  
11       address, Medical -- 4114 Medical Drive, Apartment 16307,  
12       San Antonio, Texas, that is your address, correct? Or  
13       was your address?

14            A.    That is correct, was my address.

15            Q.    And if you turn to the page that has Section 5  
16       at the top, again that has your name, David T. Robeson;  
17       is that correct?

18            A.    Yes, sir, Section 5 has my name.

19            Q.    Is that your tax identification number that is  
20       listed there?

21            A.    Yes, sir.

22            Q.    If you turn to Section 7, it says exposure  
23       site, site of exposure, "Railway Express."

24                        Do you have any information regarding your  
25       father being exposed to any either product or equipment

1 from combustion engineering at Railway Express?

2 A. No, sir, I do not.

3 Q. Do you know where that information came from --

4 A. No, sir.

5 Q. -- for your attorneys to put that?

6 A. I'm sorry.

7 Q. That's okay.

8 A. Excuse me.

9 Q. Right. And just, it might be a good point, if  
10 you know where I'm going to be going, you've heard my  
11 questions, if you could, just let me finish.

12 A. I apologize.

13 MR. LANGE: And he's not fussing at you.  
14 We all forget.

15 A. No, I -- I apologize. I'm sorry. I caught  
16 myself.

17 Q. (By Mr. Abraham) It happens. You know where  
18 I'm going. You're ready to answer. I understand.

19 MR. LANGE: Just makes a cleaner record if  
20 you pause.

21 A. I understand. I -- I'm sorry, go ahead. Start  
22 over. This is like a movie. Can we start this scene  
23 over again?

24 MR. LANGE: This is take 2.

25 Q. (By Mr. Abraham) Again, you do not have any

1 information regarding your father being exposed to  
2 asbestos from combustion engineering equipment or  
3 products at Railway Express; is that correct?

4 A. That's correct. I do not have any information  
5 related to this exposure. None.

6 Q. And in this form, there's under "Exposure  
7 Type," there again are some boxes marked. These are a  
8 little different than the other ones we've talked  
9 about. The first box that has an "X" says, "Claimant  
10 altered, repaired, or otherwise worked with an asbestos-  
11 containing product such that the claimant was exposed on  
12 a regular basis to asbestos fibers."

13 And again, you don't -- you don't know  
14 where that information came from for your attorneys to  
15 check that box, do you?

16 A. No, sir, I don't.

17 Q. And where it says, "Claimant was employed in an  
18 industry or occupation such that the claimant worked on  
19 a regular basis in close proximity to workers who did  
20 one or more of the above three activities," you don't --  
21 you don't have any information on where your attorneys  
22 got the information for them to check that box, do you?

23 A. No, sir, I don't.

24 Q. And the third box is checked "Other," but I  
25 don't know what that means or why that box is checked,

1 so there's not a question there. It's just unclear as  
2 to why "Other" is checked.

3 On the next page, it says, "Exposure site  
4 2, Great Atlantic and Pacific Tea Company," and again  
5 those same three boxes that we just talked about from  
6 Railway Express are checked on this page. Would you  
7 agree with that?

8 A. Yes, sir. On this page, it says at the top,  
9 "Exposure Site: 2."

10 Q. Uh-huh.

11 A. The same three boxes are checked that were  
12 checked on the previous page.

13 Q. And do you have any information as to any  
14 exposure to asbestos your father may have had at the  
15 Great Atlantic and Pacific Tea Company?

16 A. No, I don't.

17 Q. Do you have any information as to where your  
18 attorneys got any information to list the Great Atlantic  
19 and Pacific Tea Company as an exposure site to where  
20 your father would have been exposed to asbestos?

21 MR. LANGE: Objection, form.

22 A. No, I don't.

23 Q. (By Mr. Abraham) Okay. Now, go to Exposure  
24 Site 4. It says, "Site of Exposure, Service Station."  
25 Do you see that? Want to make sure we're on the same.

1 Page?

2 A. Yes, sir. It says, "Exposure Site 4. Site of  
3 Exposure, Service Station."

4 Q. Okay. And again, it says, "Exposure Type: CE  
5 Exposure," with "CE" being Combustion Engineering. Do  
6 you have any information as to your father being exposed  
7 to asbestos from combustion engineering products or  
8 equipment at a service station?

9 A. No, sir.

10 Q. Okay. And again, those same three boxes we've  
11 talked about for the previous two exposure sites are  
12 marked with an "X"; is that correct?

13 A. Yes, sir. On this sheet marked, "Exposure Site  
14 4," the same three boxes are checked.

15 Q. And do you have any information as to where  
16 your attorneys had any information as to why -- strike  
17 that.

18 Do you have any information where your  
19 attorneys gathered any information that allowed them to  
20 check those three boxes stating that your father was  
21 exposed to asbestos from Combustion Engineering at a  
22 service station?

23 MR. LANGE: Objection, form.

24 A. I'm waiting for him.

25 Q. (By Mr. Abraham) Uh-huh.

1 A. No, sir, I don't.

2 Q. Okay, Exposure Site 5. And it states,  
3 "Occupation, Carpenter." And it says, "Site of  
4 Exposure, U.S. National Guard." And again, the same  
5 three boxes under exposure type are marked with an "X."  
6 Do you see that?

7 A. Yes, sir. Exposure Site 5, same three boxes  
8 are checked.

9 Q. Okay. Do you have any information as to your  
10 father being exposed to asbestos from combustion  
11 engineering products or equipment as a carpenter in the  
12 U.S. National Guard?

13 A. No, sir, I do not.

14 Q. Do you know where your attorneys got that  
15 information?

16 A. No, sir.

17 Q. Okay, Exposure Site 6, and that one has a date  
18 of January 1st, 1946; end date December 1st, 1947;  
19 Occupation, Carpenter; Site Exposure, Unknown.

20 Do you have any information as to your  
21 father being exposed to asbestos from combustion  
22 engineering products or equipment between January 1st of  
23 1946 and December 1st, 1947, as a carpenter?

24 A. No, sir.

25 Q. And do you know where your attorneys would have

1 gotten that information?

2 A. No, sir.

3 Q. Same question regarding Exposure Site 7 which  
4 says start date January 1st, 1956, through end date  
5 December 1st, 1957; Occupation, Carpenter; Site  
6 Exposure, Unknown, again with the same three boxes  
7 marked with an "X" under Exposure Type, CE Exposure.

8 Do you have any information as to your  
9 father being exposed to asbestos from combustion  
10 engineering products or equipment as a carpenter between  
11 January 1st, 1956 and December 1st, 1957?

12 A. No, sir.

13 Q. And do you know where your attorneys would have  
14 gotten the information that your -- that your father  
15 would have been exposed to asbestos from combustion  
16 engineering products or equipment between January 1st,  
17 1956 and 1957, as a carpenter?

18 MR. LANGE: Objection, form.

19 A. No, sir.

20 Q. (By Mr. Abraham) Exposure Site 8, in this  
21 document has the years January 1st, 1950 through  
22 December 1st, 1980; Occupation, Carpenter; Site of  
23 Exposure, Auto Repair.

24 Do you have any information regarding your  
25 father being exposed to asbestos from combustion

1 engineering products or equipment between January 1st,  
2 1950 and December 1st, 1980, as a carpenter doing auto  
3 repair?

4 A. No, sir.

5 Q. And do you know where your attorneys would have  
6 gotten that information to put in this form?

7 A. No, sir.

8 Q. Okay, Exposure Site 9 has the January 1st, 1943  
9 through December 1st, 1946, as a carpenter in the U.S.  
10 Marine Corps. With regards to combustion engineering  
11 exposure, do you have any information regarding your  
12 father being exposed to asbestos from combustion  
13 engineering products or equipment between January 1st,  
14 1943 through December 1st, 1946, as a carpenter in the  
15 U.S. Marine Corps?

16 A. No, sir.

17 Q. And do you know where your attorneys would have  
18 gotten that information to put in this form?

19 A. No, sir.

20 Q. Exposure Site 10, has the years January 1st,  
21 1947 through December 1st, 1981; Occupation, Carpenter;  
22 Site of Exposure, U.S. Post Office.

23 Do you have any information regarding your  
24 father being exposed to asbestos from Combustion  
25 Engineering products or equipment between January 1st,

1 1947 and December 1st, 1981, at the U.S. Post Office?

2 A. No, sir.

3 Q. And do you have any information where your  
4 attorneys got that information to put into this form?

5 A. No, sir.

6 (Exhibit 7 marked for identification.)

7 Q. I'm handing you what's been marked as DR-7 and  
8 on the transmittal form it says, "To Eagle Picher,"  
9 P-I-C-H-E-R. Have you ever seen that document before  
10 today?

11 A. No, sir.

12 Q. Have you ever heard of Eagle Picher?

13 A. No, sir.

14 Q. Okay. And if you turn to the page that has --  
15 it's marked at the top as Exhibit A, if you could look  
16 at that page for me. If you see the box that says,  
17 "Occupation Description 1," it's the second -- it says,  
18 "Occupation Description 1." Do you see that box?

19 A. Yes, sir, I do.

20 Q. It states, "Carpenter-Claimant was a  
21 carpenter. Claimant built scaffolding in various sites  
22 inside the plants under and around pipes and boilers.  
23 Claimant worked in the immediate vicinity of others  
24 performing similar duties and various other craftsmen."

25 MR. LANGE: That seems to be typographical

1 error. I'm not sure if that carried over from another  
2 client's information.

3 MR. ABRAHAM: Well, at the top of the  
4 page, doesn't -- does it have the name, last name,  
5 "Robeson, Jr., first name, William S."?

6 MR. LANGE: Right, and the first and  
7 second box, the last name box and the job site box,  
8 appear to apply to Mr. Robeson. I'm not sure what the  
9 Occupation Description 1 applies to. That does seem to  
10 be a mistake on our part.

11 Q. (By Mr. Abraham) Well, for purposes of today,  
12 that is -- what I read is what it says on this form,  
13 isn't that correct?

14 A. Yes, sir. What you read under "Occupation  
15 Description 1" under Exhibit A, yes, it says,  
16 "Carpenter-Claimant was a carpenter. Claimant built  
17 scaffolding," et cetera, et cetera, et cetera. Yes,  
18 sir.

19 Q. And do you have any information regarding your  
20 father building scaffolding at various sites inside the  
21 plants -- strike that.

22 Let me ask you: Do you know what means,  
23 "Claimant built scaffolding at various sites inside the  
24 plants"?

25 A. No, sir.

1 Q. When they say, "at various sites inside the  
2 plants," do you know what means?

3 A. No, sir.

4 Q. Do you know what locations that infers?

5 A. No, sir.

6 Q. Right above the "Occupation Description 1," it  
7 has job sites, and some of the sites listed say: "Great  
8 Atlantic and Pacific Tea Company, Railway Express  
9 Agency, U.S. Marine Corps, War Assets Administration,  
10 National Guard, Jansen Service Station, EJ Garland, U.S.  
11 Post Office, home remodeling, automatic mechanic work on  
12 personal cars." Do you see that box?

13 A. Yes, I see the box.

14 Q. Okay. And then under the "Occupation  
15 Description 1," it states, "Claimant," who would be your  
16 father, "built scaffolding at various sites inside the  
17 plants under and around pipes and boilers," and that he  
18 also worked in the "immediate vicinity of others  
19 performing similar duties and various other craftsmen."

20 Do you have any information of your father  
21 ever doing that type of work?

22 A. No, sir, I don't.

23 Q. Do you know where your attorneys got that  
24 information to put it into this form?

25 A. No, sir, I don't.

1 MR. LANGE: Yeah, there are no plants  
2 listed in the job site box, which is why -- those two  
3 boxes.

4 MR. ABRAHAM: Well, we've been discussing  
5 in the prior trusts exposure sites of Great Atlantic and  
6 Pacific Tea Company, Railway Express, National Guard,  
7 the service station, EJ Garland, so...

8 MR. LANGE: Oh, right. No, I'm just  
9 saying that Occupational Description 1 talks about  
10 plants, and I don't see any plants listed in the job  
11 site box. That's all I'm saying.

12 Q. (By Mr. Abraham) Okay. And if you turn the  
13 page, the page, it says at the top, "Eagle Picher  
14 Corporation Products List, Exhibit B. The injured  
15 person was exposed to one" of the -- "one or more of the  
16 following products manufactured and/or distributed by  
17 the Eagle Picher Corporation."

18 The first one says Eagle Picher 106  
19 Finishing Cement. Do you have any information regarding  
20 your father being exposed to asbestos from Eagle Picher  
21 106 finishing cement?

22 A. No.

23 Q. The next one is Eagle Picher 33 Insulating  
24 Cement. Do you have any information regarding your  
25 father being exposed to asbestos from Eagle Picher 33

1 insulating cement?

2 A. No, sir.

3 Q. The next one is Eagle Picher 43 Cement. Do you  
4 have any information regarding your father being exposed  
5 to asbestos from Eagle Picher 43 cement?

6 A. No.

7 Q. The next one is HiLo low cement. Do you have  
8 any information regarding your father being exposed to  
9 asbestos from HiLo cement?

10 A. No.

11 Q. And the next one listed as HyLo Block Pipe  
12 Covering. Do you have any information regarding your  
13 father being exposed to asbestos from HyLo block pipe  
14 covering?

15 A. No.

16 Q. The next product is: Eagle Picher One-CO-- and  
17 it's the little "@" Cement. Do you have any information  
18 regarding your father being exposed to asbestos from the  
19 Eagle Picher One-CO Cement?

20 A. No.

21 Q. And Super 66, do you have any information  
22 regarding your father being exposed to asbestos from  
23 Super 66?

24 A. No.

25 Q. Have you ever heard of any of those products

1 prior to today?

2 A. No.

3 Q. Do you know where your attorneys got the  
4 information to specifically list those products?

5 A. No.

6 Q. Do you have any information of your father ever  
7 worked around anyone who used those products?

8 A. I don't know.

9 Q. Would any of your brothers know?

10 MR. LANGE: Objection, form, calls for  
11 speculation.

12 A. I don't know.

13 (Exhibit 8 marked for identification.)

14 Q. (By Mr. Abraham) Okay. I hand you what's  
15 marked as DR-8. This is the Owens Corning/Fibreboard --  
16 it's F-I-B-R-E -- board Asbestos Personal Injury Trust  
17 Proof of Claim Form. Okay. Have you ever seen that  
18 document prior to today?

19 A. No.

20 Q. And if you look at Page 3 of 30, again this is  
21 similar to some of the other forms. Under number 8, it  
22 does have your name listed under 8-A, correct?

23 A. Yes, on Page 3 of 30, under 8, it has my name  
24 listed.

25 Q. Okay. And then it had your mailing address..

1 That was the 4114 Medical Drive, Apartment 16307 in San  
2 Antonio, Texas, correct?

3 A. Yes, it has my San Antonio, Texas address when  
4 I was living there, yes, sir.

5 Q. And if you look at Page 6 of 30, some of it  
6 might be two-sided.

7 MR. LANGE: I think this one is 6.

8 MR. ABRAHAM: Yeah.

9 MR. LANGE: Where it starts with 3,  
10 Occupation?

11 MR. ABRAHAM: Correct.

12 Q. (By Mr. Abraham) Under "Occupation at the Time  
13 of Exposure," it says, "Mechanic." Do you know where  
14 your attorneys got the information to put your father  
15 was a mechanic to submit to the Owens Corning trust  
16 and/or Fibreboard trust?

17 A. No, sir.

18 Q. And again on Page 7 of 30, the same two boxes  
19 we have discussed in previous applications have a "Y"  
20 where it states, "Injured party altered, repaired, or  
21 otherwise worked with asbestos-containing products such  
22 that the injured party was exposed on a regular basis to  
23 asbestos fibers." And, "Injured party was employed in  
24 an industry or occupation such that the injured party  
25 worked on a regular basis in close proximity to workers

1 who did one or more of the above three activities."

2 Those two boxes are marked with a "Y" on  
3 this page, correct?

4 A. Yes, sir. On Page 7 of 30, item 5, there are  
5 two boxes that are marked with Y's.

6 Q. And do you know where your attorneys got the  
7 information for them to mark those two boxes at "Y" as  
8 it relates to the Owens Corning and/or Fibreboard  
9 Asbestos Personal Injury Trust Proof of Claim?

10 A. No, sir, I do not.

11 Q. And if you look on Page 9 of 30, again it has  
12 the name of the Site/Plant as EJ Garland. Do you see  
13 that?

14 A. On Page 9 of 30 under item 1 where it says  
15 Site/Plant where exposure occurred, yes, sir, name of  
16 site/plant of asbestos exposure, it does say EJ Garland.

17 Q. And right at the bottom under number 2, it  
18 says, "Date exposure began, January 1956. Date exposure  
19 ended, November 1956." Is that correct?

20 A. Yes, sir. On Page 9 of 30, item number 2, it  
21 does provide a date of exposure and it does provide a  
22 beginning and a date of exposure ending, yes, sir.

23 Q. And when you turn to page -- to Page 10 of 30,  
24 it has that your father's occupations was a carpenter  
25 for the EJ Garland site, correct?

1           A.    On Page 10 of 30, number 3, it does list  
2           occupation at the time of exposure as carpenter.

3           Q.    Okay.  And that was for the EJ Garland site,  
4           correct?  As we established under Number 1, it says,  
5           "Name of site of plant is EJ Garland"?

6           A.    On Page 9 of 30, it lists the site as EJ  
7           Garland.  On Page 10 of 30, it lists the occupation as  
8           carpenter.

9           Q.    Okay.  Do you have any information regarding  
10          your father being exposed to asbestos from any either  
11          products or equipment from Owens Corning or Fibreboard  
12          while working as a carpenter at the EJ Garland plant?

13          A.    No, sir.

14          Q.    Do you know where your attorneys got the  
15          information to state that your father was exposed to  
16          asbestos --

17          A.    No, sir.

18          Q.    -- from -- from products manufactured by --  
19          products or equipment manufactured by Owens Corning or  
20          Fibreboard?

21                       MR. LANGE:  Objection, form.

22          A.    No, sir.

23          Q.    (By Mr. Abraham) And then looking at page --  
24          when you look at Page 13 and when you look at 17, and  
25          I'll see, if I don't -- I don't think it will confuse

1 you. If you see on Page 13, it has the USS Braxton and  
2 on Page 17, again, the USS -- again it says Shangri-La,  
3 which I think is Shangri-La is the actual ship, which  
4 we've -- we've discussed in the previous applications,  
5 correct, the two vessels, the Braxton and the Shangri-  
6 La?

7 A. Yes. And in previous, whatever you want to  
8 call these things, yes --

9 Q. Okay.

10 A. -- these have been listed.

11 Q. And with regards to, on Page 14 of 30 and on  
12 Page 18 of 30, as it relates to the two vessels, the USS  
13 Braxton and the USS Shangri-La, it has your father's  
14 occupation as a carpenter; is that correct?

15 A. Yes, on both of those pages, it does list  
16 occupation at time of exposure as carpenter.

17 Q. Okay. Now, do you have any information  
18 regarding your father being exposed to asbestos from any  
19 products or equipment manufactured by Owens Corning or  
20 Fibreboard when he worked as a carpenter on either the  
21 USS Braxton or the USS Shangri-La?

22 A. No.

23 Q. Do you know where your attorneys would have  
24 gotten that information to put into these forms that  
25 were submitted to the Owens Corning and Fibreboard

1 Asbestos Personal Injury Trust?

2 A. No.

3 Q. And when you look at Page 27 of 30, again that  
4 has your name David T. Robinson listed in this form,  
5 doesn't it?

6 A. Yes, sir. On Page 27 of 30, my name is listed.

7 Q. And on the next page, 28 of 30, again where it  
8 has, "Has the injured party smoked cigarettes," it's  
9 marked "No"; is that correct?

10 A. On Page 28 of 30, it has a check box and no.

11 Q. Okay.

12 MR. LANGE: We've been going about an  
13 hour. Would this be a good time for a quick break?

14 MR. ABRAHAM: Yes.

15 (Exhibit 9 marked for identification.)

16 (Recess from 11:28 to 11:40 A.M.)

17 Q. (By Mr. Abraham) Okay. I'm going to hand you  
18 what I've marked as DR-9 which is the Fuller-Austin  
19 Asbestos Settlement Trust. Now, have you seen that  
20 document prior to today?

21 A. No.

22 Q. If look at the second page -- it might be  
23 double-sided -- under 1.1, it has mailing address, "C/O  
24 David T. Robeson, P.O. Box 335, Chalmette, Louisiana  
25 70044. And that would be you, correct?

1 A. Yes, sir.

2 Q. And the P.O. box, was that -- was that tied to  
3 a residential address or was it a P.O. box at a post  
4 office?

5 A. A post office box at a post office.

6 Q. Do you remember the years you had the P.O. Box  
7 335?

8 A. No, sir, I don't, not offhand.

9 Q. And under 1.6, again it has your name listed;  
10 is that correct?

11 A. Yes, sir, on 1.6, it does.

12 Q. In the next page, it says part 2 at the top.  
13 Part 2, "Diagnosed Asbestos-Related Injuries." Under  
14 Section 2.3, "Smoking/Tobacco History," nothing is  
15 marked; is that correct? It's blank?

16 A. Under Part 2, "Diagnosed Asbestos-Related  
17 injuries"; 2.3, "Smoking/Tobacco History," I don't see  
18 anything checked.

19 Q. And under Part 3 on the next page, under  
20 Section 3.2, "Was the injured party exposed to asbestos-  
21 containing products sold, installed, or removed by  
22 Fuller-Austin Insulation Company?" There is a mark in  
23 the "yes" box; is that correct? Or circled, "yes"  
24 circled?

25 A. I'm sorry, would you repeat that again?

1 Q. Under Section 3.2, under Part 3, it says, "Was  
2 the injured party exposed to asbestos-containing  
3 products sold, installed, or removed by Fuller-Austin  
4 Insulation Company? The -- there's a circle next to  
5 "yes" and it has a mark in it; is that correct?

6 A. Yes, on Part 3, 3.2, there's a circle with a  
7 dot in it next to "yes."

8 Q. And under Section 3.32 it says, "Plant or  
9 Site," and it has listed Great Atlantic and Pacific Tea  
10 Company, Railway Express Agency, U.S. Marine Corps, or  
11 Assets Administration, National Guard, Jansen Service  
12 Station, EJ Garland, U.S. Post Office, home remodeling,  
13 auto mechanic work on personal cars."

14 You would agree what I just read to you is  
15 listed as the plants or sites as it relates to the  
16 claims for exposure --

17 MR. LANGE: Objection, form.

18 Q. (By Mr. Abraham) To -- let me finish.

19 MR. LANGE: I'm sorry, I thought you were  
20 done.

21 MR. ABRAHAM: No. I'm trying to word it.

22 A. You're worse than me.

23 Q. (By Mr. Abraham) -- for claims of exposure to  
24 asbestos from the Fuller-Austin Insulation Company on  
25 behalf of your father?

1 MR. LANGE: Objection, form. He said he's  
2 never seen this form before.

3 A. Part 3, 3.32 states, "Plant or Site." Yes,  
4 there are a number of whatever you want to call them  
5 listed. Yes, sir.

6 Q. And under Section 3.35, "Occupation," it has  
7 listed that your father was a carpenter; is that  
8 correct?

9 A. Part 3, 3.35 says, "Occupation," and it has the  
10 word "Carpenter" written.

11 Q. Or typed in, correct?

12 A. Excuse me, typed in, yes, sir.

13 Q. And under Section 3.37 with a question, "How  
14 closely did you work with asbestos-containing products  
15 and materials sold, distributed, or installed by Fuller-  
16 Austin at this exposure site only?" There's a box that  
17 has a check in it that says, "Worked in a specific area  
18 where Fuller-Austin ACM" -- for asbestos-containing  
19 materials -- "were being installed or removed," correct?

20 MR. LANGE: Objection, form.

21 A. Part 3, 3.37, there's a box that's checked, and  
22 that box says, "Worked in a specific area where FA ACM  
23 were being installed or removed." Yes, that's correct.

24 Q. (By Mr. Abraham) Now, with regards to the  
25 plants or sites that are listed in Section 3.32 on this

1 form, do you have any information regarding your father  
2 being exposed to asbestos-containing products sold or  
3 distributed or installed by Fuller-Austin at any of  
4 those sites that are listed in Section 3.32 of this  
5 form?

6 A. No.

7 Q. Okay. Do you know where your attorneys got  
8 information that your father was exposed to asbestos-  
9 containing products or materials sold or distributed by  
10 and/or installed by Fuller-Austin at the locations  
11 listed in Section 3.32?

12 A. No.

13 Q. Let me ask you, in the document is a -- looks  
14 like a report from a Richard B. Levine, M.D. Had you  
15 ever seen that document before?

16 A. No, not that I'm aware of.

17 Q. Do you know who Richard B. Levine is, who looks  
18 like he's located out of Elkins Park, Pennsylvania?

19 A. No, sir.

20 Q. Do you know if your father ever was treated by  
21 Richard Levine, Dr. Richard Levine?

22 A. No, sir, I don't know.

23 Q. Do you know -- is it you don't think he was or  
24 you don't know one way or the other?

25 A. I don't know.

1 MR. ABRAHAM: Is this 10? I think, right,  
2 10 is the next one?

3 MR. LANGE: 10, yes.

4 (Exhibit DR-10 marked for  
5 identification.)

6 Q. (By Mr. Abraham) Okay. I'm going to hand you  
7 what I marked as DR-10, which has DII Industries, LLC  
8 Asbestos PI Trust Proof of Claim Form at the top. And  
9 have you -- have you seen that document prior to today?

10 A. No.

11 Q. And at the bottom of that first page, do you  
12 see there's a box marked "Halliburton" that is checked  
13 off?

14 A. On the bottom of Page 1 of 22, there's a check  
15 box with "Halliburton-HAL" checked.

16 Q. And on Page 3 of 22, again that has -- you are  
17 listed under Section 1.8 with the mailing address of  
18 3570 Oak Harbor Boulevard, Apartment 738 in Slidell,  
19 Louisiana. Is that correct?

20 A. Yes. On Page 3 of 22, 1.8 has my name listed  
21 and my previous Slidell residence.

22 Q. And if you look at Page 6 of 22, under Section  
23 3.2, it has a "Name of Site," and next to that it says,  
24 "EJ Garland." You would agree with me?

25 A. Yes, sir. Page 6 of 22, 3.2, name of site

1 shows EJ Garland.

2 Q. And under that same section, it says, "Name of  
3 product or operations: Plaintiff may have been exposed  
4 to lightweight Cast 10 Micacrete 7 Refractory Cement  
5 Asbestos Millboard." And then it says, "If so, please  
6 see affidavit of exposure."

7 That's what it says there, doesn't it?

8 A. Yes, sir. On, what is it?

9 Q. 6 of 22.

10 A. 6 of 22 under "Name of Product or Operations,"  
11 it does say, "Plaintiff may have been exposed to  
12 lightweight Cast 10 Micacrete 7 Refractory Cement  
13 Asbestos Millboard. If so, please see affidavit of  
14 exposure."

15 Q. In the years, they have listed a date of  
16 exposure began January 1956. Date exposure ended,  
17 November 1956, correct?

18 A. Yes, sir. On 3.3, it shows the date of  
19 exposure it begin and date of exposure that ended.

20 Q. Do you know what lightweight cast 10 micacrete  
21 7 refractory cement asbestos millboard, do you know what  
22 any of that is?

23 A. No, sir.

24 Q. Do you have any information with regards to  
25 your father being exposed to asbestos from lightweight

1 cast 10 micacrete 7 refractory cement asbestos millboard  
2 at EJ Garland between January 1956 and November of 1956?

3 A. No, sir.

4 Q. Do you know where your attorneys would have  
5 gotten the information that your father would have been  
6 exposed to asbestos from that product or products at EJ  
7 Garland between January 1956 and November of 1956?

8 MR. LANGE: Objection, form.

9 A. No, sir.

10 Q. (By Mr. Abraham) And under 3.6, it states the  
11 "Injured party fabricated asbestos-containing products  
12 such that the injured party in the fabrication process  
13 was exposed on a regular basis to raw asbestos fibers."

14 Do you see that under Section 3.6?

15 A. Yes, sir. 3.6, it says, "Injured party  
16 fabricated asbestos-containing products such that the  
17 injured party in the fabrication process was exposed on  
18 a regular basis to raw asbestosis fibers," and it has a  
19 "Y" in the box next to that.

20 Q. Okay. Do you have any information that your  
21 father fabricated asbestos-containing products at EJ  
22 Garland between January 1956 and November of 1956?

23 A. No, sir.

24 Q. Do you have any information that your father  
25 between January 1956 and November of 1956, when he

1 worked at EJ Garland was exposed on a regular basis to  
2 raw asbestos fiber during the fabrication of asbestos-  
3 containing products?

4 A. No, sir.

5 Q. Do you know where your attorneys got the  
6 information to mark the box with a "Y" for "yes" to  
7 state that your father did in fact fabricate asbestos-  
8 containing products?

9 MR. LANGE: Objection, form.

10 Q. (By Mr. Abraham) Such that he was exposed in  
11 the fabrication process on a regular basis to raw  
12 asbestos fibers?

13 MR. LANGE: Objection, form.

14 A. No, sir.

15 Q. (By Mr. Abraham) And it also states a box  
16 marked with a "Y" -- and you're happy -- you're happy --  
17 just so we're clear, it's fine if you want to repeat  
18 when I ask you if that's what it says, but I'm -- the  
19 reason I'm doing that is to make sure you're where I am  
20 when I'm going to follow it up with a question. You're  
21 more than free if you want to repeat it; that's fine.  
22 But the reason I'm doing that is because I'm going to  
23 follow it up with a question.

24 A. Okay.

25 Q. So...

1 MR. LANGE: And you're free to answer  
2 however you're most comfortable.

3 Q. (By Mr. Abraham) Exactly. But I'm just trying  
4 to explain I'm making sure we're looking at the same  
5 thing and then I'm going to follow it up with a  
6 question.

7 Now, there's a box that's also marked with  
8 a "Y" that states, "Injured party altered, repaired, or  
9 otherwise worked with asbestos-containing products such  
10 that the injured party was exposed on a regular basis to  
11 raw asbestos fibers." Now, you see where I am on that  
12 page?

13 A. Yes, sir.

14 Q. Okay. Now, do you have any information that  
15 your father, between January 1956 and November of 1956,  
16 when he worked as a carpenter for EJ Garland, either  
17 altered, repaired, or worked with asbestos-containing  
18 products such that he was exposed on a regular basis to  
19 raw asbestos fibers?

20 A. No, sir.

21 MR. LANGE: Objection, form.

22 Q. (By Mr. Abraham) Okay. And do you know where  
23 your attorneys would have gotten the information to  
24 state that your father did in fact do that, that they  
25 marked that box with a "Y"?

1 MR. LANGE: Objection, form.

2 A. No, sir.

3 Q. (By Mr. Abraham) Now, it also, there's a box  
4 marked with a "Y" that states, "The injured party was  
5 employed in an industry or occupation such that the  
6 injured party worked on a regular basis in close  
7 proximity to workers who did one or more of the above  
8 three activities." Okay. Now, you see where I am  
9 on the -- on the page?

10 A. Yes, sir.

11 Q. Now, do you have any information to state that  
12 when your father worked at EJ Garland between January  
13 1956 and November of 1956, that he worked on a regular  
14 basis in close proximity to workers who may have worked  
15 with asbestos products or raw asbestos fibers?

16 A. No, sir.

17 Q. And do you know where your attorneys would have  
18 gotten the information to state your father did work  
19 around -- work in close proximity to workers who did in  
20 fact work with asbestos-containing products, including  
21 raw asbestos fibers, when he worked for EJ Garland  
22 between January 1956 and November of 1956?

23 MR. LANGE: Objection, form.

24 A. No, sir.

25 Q. (By Mr. Abraham) Now I'm looking on Page 9 of

1 22. Make sure we're on the page that says, "Name of  
2 Site: Various brake jobs." We're on the same page?

3 A. Yes, sir.

4 Q. And again, it states on the under "Name of  
5 Product or Operations," do you see where it states,  
6 "Plaintiff may have been exposed to lightweight Cast 10  
7 Micacrete 7 Refractory Cement Asbestos Millboard, if so,  
8 please see affidavit of exposure." Do you see where it  
9 says that?

10 A. Yes, sir.

11 Q. And it has the dates of exposure, December 1956  
12 and exposure ended December 1979; and occupation at time  
13 of exposure, mechanic.

14 And under 3.6, it has, again, the two --  
15 two boxes with the "Y" checked off. Do you see that on  
16 the page?

17 A. Yes, sir, I do.

18 Q. Now, do you have any information regarding your  
19 father being exposed to asbestos, including raw asbestos  
20 fibers doing various brake jobs and being exposed to, it  
21 looks like, the lightweight cast 10 micacrete 7  
22 refractory cement asbestos millboard between December of  
23 1956 and December of 1979, as a mechanic?

24 MR. LANGE: Objection, form.

25 A. No, sir.

1 Q. (By Mr. Abraham) Okay. Do you know where your  
2 attorneys would have gotten the information to make that  
3 statement that's in this form?

4 A. No, sir.

5 Q. Do you have any information regarding the same  
6 brake, various brake jobs that -- of your father, either  
7 working around workers who may have worked with the  
8 lightweight cast 10 micacrete 7 refractory cement  
9 asbestos millboard between December of '56 and December  
10 of '79?

11 A. No, sir.

12 Q. Okay. And you don't have any information as to  
13 where your attorneys would have gotten the information  
14 to make that statement, do you?

15 A. No, sir.

16 Q. Now, again starting on Page 12 of 22, and on  
17 Page 15 of 22, where you again have the USS Braxton and  
18 the USS Shangri-La with your -- your father's occupation  
19 code at the time as a carpenter. And just to be clear,  
20 for the Braxton, they have the date of exposure between  
21 July of 1944 and ended December 1945. And on the  
22 Shangri-La, January 1943 and ending July of 1944.

23 And again, the -- as it relates to your  
24 father's work on the Braxton and Shangri-La, they have  
25 three boxes checked under Section 3.6, with the first

1 one being -- they have it marked with a "Y": "Injured  
2 party fabricated asbestos-containing products such that  
3 the injured party in the fabrication process was exposed  
4 on a regular basis to raw asbestos fibers."

5 The second one states, "Injured party  
6 altered, repaired, or otherwise worked with an asbestos-  
7 containing product such that the injured party was  
8 exposed on a regular basis to raw asbestos fibers."

9 And the third box marked with a "Y" says,  
10 "Injured party was employed in an industry or occupation  
11 such that the injured party worked on a regular basis in  
12 close proximity to workers who did one or more of the  
13 above three activities."

14 Now, with regards to the USS Braxton and  
15 Shangri-La, you would agree that that's, what I've just  
16 read to you, is contained in this form?

17 A. Yes, I'd agree that what you just read to me is  
18 contained in this form.

19 Q. And again, it has that same product under "Name  
20 of Product or Operation: Lightweight Cast 10 Micacrete  
21 7 Refractory Cement Asbestos Millboard."

22 Now, do you have any information with  
23 regards to your father either when he was on the USS  
24 Braxton or the USS Shangri-La of being exposed to  
25 asbestos in the manners indicated under Section 3.6 to

1 -- to that product, the lightweight cast 10 micacrete 7  
2 refractory cement asbestos millboard?

3 MR. LANGE: Objection, form.

4 A. No, I do not.

5 Q. (By Mr. Abraham) Okay. Do you have any  
6 information as to where your attorneys would have gotten  
7 the information to make that statement in this form?

8 A. No, I do not.

9 Q. And on Page 19 of 22, again under smoking  
10 history, "Has the injured party ever smoked  
11 cigarettes?" The "no" box is marked; is that correct?

12 A. Page 19 of 22, part 7, smoking history, that is  
13 correct, "no" box is checked.

14 Q. Okay.

15 MR. ABRAHAM: I think we're up to Number  
16 11.

17 (Exhibit DR-11 marked for identification.)

18 EXAMINATION

19 BY MR. WILLIAMS:

20 Q. We're going to hand you now a document marked  
21 DR-11. If you look at the bottom, you will see a box  
22 checked "Harbison-Walker"?

23 A. Yes, sir, on Page 1 of 18 at the bottom,  
24 Harbison-Walker (HW) and there's an "X" in the box.

25 Q. Okay. And if we turn to Page 3 of 18 of that

1 document, under Section 1.8 and following, that's you  
2 that's listed there, correct, David T. Robeson, along  
3 with your San Antonio address at the top?

4 A. Yes, on Page 3 of 18, Section 1.8, that's my  
5 name and my previous address in San Antonio.

6 Q. All right. Now, if we continue on to Page 6 of  
7 18, under Section 3.2, we have a Name of Site listed as  
8 EJ Garland, and under "Name of Product or Operations,"  
9 it notes that "Plaintiff may have been exposed to  
10 Lightweight Cast 10 Micacrete 7 Refractory Cement and/or  
11 Asbestos Millboard. If so, please see affidavit of  
12 exposure." That information is -- is listed under  
13 Section 3.2, correct?

14 A. Page 6 of 18, Section 3.2, yes.

15 Q. Okay. And under Section 3.3, the date of  
16 exposure for the aforementioned was January 1956, ending  
17 November 1956, correct?

18 A. On 6 of 18, Section 3.3, yes.

19 Q. Okay. And then Section 3.4, it lists the  
20 occupation at the time of exposure as carpenter,  
21 correct?

22 A. On 6 of 18, 3.4 lists occupation as carpenter,  
23 yes.

24 Q. Okay. Now, moving a little further down onto  
25 Section 3.6, we have two boxes that are marked with the

1 letter "Y," correct?

2 A. Page 6 of 18, section 3.6, yes, there are two  
3 boxes that have "Y" in them.

4 Q. Okay. And the first box with the "Y" would --  
5 reads, "Injured party altered, repaired, or otherwise  
6 worked with an asbestos-containing product such that the  
7 injured party was exposed on a regular basis to raw  
8 asbestos fibers."

9 And then the second box marked "Y" reads,  
10 "Injured party was employed in an industry or occupation  
11 such that the injured party worked on a regular basis in  
12 close proximity to workers who did one or more of the  
13 above three activities." Those two boxes are the ones  
14 that I just read that are in fact marked with "Y,"  
15 correct?

16 MR. LANGE: Objection, form.

17 A. Yes.

18 Q. (By Mr. Williams) Okay. Sir, concerning your  
19 father's -- do you have any personal knowledge  
20 concerning your father's work at EJ Garland between  
21 January 1956 and November 1956, where he was exposed to  
22 lightweight cast 10 micacrete 7 refractory cement and/or  
23 asbestos millboard?

24 A. No.

25 Q. Okay. Do you know whether or not your

1 attorneys have any of that information?

2 A. No.

3 Q. Okay. Do you know why your attorneys have  
4 cited that information on this particular form?

5 A. No.

6 Q. Okay. Have you ever seen this form before,  
7 sir?

8 A. No, sir.

9 Q. Okay. And concerning those two boxes that we  
10 just discussed marked "Y," do you have any personal  
11 knowledge regarding the information in those --  
12 contained in the sentences that the are marked "Y"?

13 A. No, sir.

14 Q. Okay. Do you know whether your attorneys have  
15 any of that information?

16 A. No, sir.

17 Q. Okay. And do you know why your attorneys  
18 completed or marked those two boxes with a "Y"?

19 A. No, sir.

20 Q. Now, I'm going to turn your attention to Page 9  
21 of 18, and again, we're going to be looking at the same  
22 sections, 3.2, "Name of Site, EJ Garland." Under that  
23 same section, "Name of Product or Operations,  
24 Lightweight Cast 10 Micacrete 7 Refractory Cement and/or  
25 Asbestos Millboard," and under Section 3.3, "Date of

1 exposure beginning September 1956, and ending October of  
2 1957." That information is correct as I have read it to  
3 you?

4 MR. LANGE: Objection, form.

5 A. On Page 9 of 18, the information you've read to  
6 me is the information that is typed on this particular  
7 form.

8 Q. (By Mr. Williams) Okay. And under Section 3.4,  
9 the occupation is listed as carpenter, correct?

10 A. 9 of 18, Section 3.4, "Carpenter" is the name  
11 or the word that is typed on under 3.4.

12 Q. Okay. And in Section 3.6, we have two  
13 sentences that are marked with a letter "Y" and those  
14 are the same two sentences that we have just discussed  
15 concerning EJ Garland just a moment ago, correct?

16 A. Yes, that's correct.

17 Q. Okay. In fact, the only difference that we  
18 have on this page, Page 9 of 18 as opposed to the Page 6  
19 of 18 we previously discussed is the exposure periods,  
20 correct?

21 A. From what I can see, on 6 of 18, it shows the  
22 date of exposure began 1 of '56; it ended 11 of '56.  
23 And on 9 of 18, it shows date of exposure began 12 of  
24 '56, and it ended 10 of '57.

25 Q. Okay. Do you have any personal knowledge

1 concerning your father's employment at EJ Garland  
2 between December 1956 and October 1957, involving his  
3 work with lightweight cast 10 micacrete 7 refractory  
4 cement and/or asbestos millboard?

5 A. No.

6 Q. Okay. Do you know whether the attorneys have  
7 any information concerning that -- your father's work  
8 with those products?

9 A. I don't know.

10 Q. Okay. And do you know why your attorneys  
11 indicated those products for that employer during that  
12 particular time period?

13 A. I don't know.

14 Q. Okay. Concerning the information that's noted  
15 in the two boxes marked "Y," while employed with EJ  
16 Garland between December 1956 and October 1957, do you  
17 have any personal knowledge regarding that information?

18 A. No, I don't.

19 Q. Okay. Do you know whether your attorneys have  
20 any personal knowledge -- or do you know whether your  
21 attorneys have any information regarding those two boxes  
22 that are checked?

23 A. I don't know.

24 Q. Okay. And do you know why your attorneys would  
25 have indicated "yes" in those two boxes?

1           A.    I don't know.

2           Q.    Okay.  On Page 14 of 18, it's your name that is  
3 listed there under part 6, correct, sir?

4           A.    On Page 14 of 18, part 6, yes, that's my name.

5           Q.    Okay.  And then on Page 15 of 18 under part 7,  
6 "Smoking History," the box marked "no," "Has the injured  
7 party ever smoked cigarettes," correct?

8           A.    15 of 18, part 7, "Smoking history," correct,  
9 the box "no" is the one with the "X" next to it.

10          Q.    Okay.  Also, the box 7.2, "Has the injured  
11 party ever smoked cigars," that box is also checked  
12 "no," correct?

13          A.    That is correct.  7.2, "Smoked cigars," has an  
14 "X" by the word "no."

15          Q.    Okay.  But you do know your father to be a  
16 smoker, sir, to have been a smoker?

17                   MR. LANGE:  We're certainly not claiming  
18 he wasn't a smoker.

19          A.    Yes.

20          Q.    (By Mr. Williams) Do you know your father to  
21 have been a smoker, sir?

22          A.    Yes.

23                   (Exhibit DR-12 marked for identification.)

24                   MR. ABRAHAM:  Just so we're clear, for  
25 DR-12, we have two documents; I think they are the

1 same. The claimant ID -- the claimant ID number is the  
2 same. There's two documents that say 1 of 2 and 1 of  
3 2. Do you want to look at it?

4 MR. LANGE: No. Y'all can ask him  
5 whatever questions.

6 MR. ABRAHAM: I think that's the same. I  
7 think that's related to same trust, though.

8 Q. (By Mr. Williams) All right, sir, we've just  
9 handed you now another document marked DR-12, and under  
10 claim there, if you see the words "Claim Information" at  
11 the top right under "Trust," it notes Manville, correct?  
12 Is that correct sir?

13 A. Page 1 of 2, employment information, trust, it  
14 says Manville.

15 Q. Okay. And if we go a couple of boxes down,  
16 there's the word -- or excuse me -- the box  
17 "Representative" and your name is listed in there,  
18 correct, sir?

19 A. Yes, 1 -- 1 of 2, "Representative," it has my  
20 name.

21 Q. Okay. And would it bother you to go back up to  
22 claim information. Under "Claim Status," it notes,  
23 "Settled Paid," correct?

24 A. Yes. On Page 1 of 2 under "Claim Information,  
25 Claim Status," the word "settled paid" are next to it.

1 Q. Sir, do you recall receiving any settlement  
2 proceeds from any trust named Manville?

3 MR. LANGE: Objection, form.

4 A. No.

5 Q. (By Mr. Williams) Okay. Have you ever been  
6 advised -- well, strike that.

7 Have you ever seen this document before  
8 today?

9 A. No.

10 Q. Have you ever been advised that a trust named  
11 Manville has been settled?

12 MR. LANGE: And are you asking about  
13 conversations he's had with his attorneys because we're  
14 going to object to the extent that you're asking about  
15 anything, any privileged communications. You can  
16 certainly ask him if he's aware of whether or not it's  
17 been settled with Manville.

18 MR. WILLIAMS: That's a fair question.

19 Q. (By Mr. Williams) Are you aware of whether or  
20 not -- I understand you haven't received any settlement  
21 proceeds from a trust named Manville. Are you aware  
22 whether or not a trust named Manville has been settled?

23 A. No.

24 Q. Turn to Page 2 of 2 of that document, just the  
25 immediate following page. Under "Smoking Information,"

1 it cites the word under Smoker, "yes," correct?

2 A. Page 2 of 2, "Smoking information," it says  
3 smoker, yes.

4 Q. All right. Along with the Quit Year of 1990,  
5 correct?

6 A. There is a year 1990, marked under Quit Year,  
7 yes.

8 Q. Turning to the next page, it's also marked 1 of  
9 2, but it's titled 2002 TDP CDT Summary. Do you see  
10 that page, sir?

11 A. Page 1 of 2, TDP CDT Summary?

12 Q. Yes.

13 A. Yeah, I'm looking -- I'm looking at a page  
14 that's got that on it, yes.

15 Q. Okay. If we look down, we see CDT Value,  
16 \$26,250. And then underneath that, "Claims status,  
17 Settled Paid," correct?

18 A. Yes, I see that.

19 Q. Okay. Sir, do you recall receiving any  
20 settlement funds or being made aware of any settlement  
21 of a value of \$26,250?

22 A. No.

23 Q. Okay. Looking further down under CDT  
24 questions, it states under number 2, "Claimant Name:  
25 William S. Robeson," and that's your father, correct?

1 A. Well, my father is William S. Robeson, Jr.

2 Q. Okay. Well, if you read further down, you see  
3 number 3, "Deceased 1." Does that shed any light to you  
4 as to which William S. Robeson is being referred to?

5 A. My -- my father's father was named William S.  
6 Robeson and he's deceased also.

7 Q. Okay. What about at the very top of that page  
8 where it says, "Claimant, William S. Robeson, Jr."?

9 A. Very top of the page says, "Claimant, William  
10 S. Robeson, Jr."

11 Q. Okay.

12 A. That would be my dad.

13 Q. All right. Regarding numbers 5 and 6 under the  
14 CDT questions: "Years of first exposure, 1943, Years of  
15 Exposure, 26," did you provide any of that information  
16 to your lawyers?

17 A. No.

18 Q. Do you know where your lawyers would have  
19 obtained this information?

20 A. No.

21 Q. And do you know why it's included on this  
22 particular form?

23 A. No.

24 Q. And turning to the last page of the document  
25 handed to you, under number 14, "Choose the physician

1 who wrote the report and enter the report date." And it  
2 cites Kradin, Richard, Boston, Massachusetts. And then  
3 there's a date, June 3rd, 2008.

4 Is that -- do you see where that's noted  
5 there, sir?

6 A. On Page 2 of 2 of this particular document,  
7 number 14, yes, it does have those names and that  
8 particular date.

9 Q. Okay. Are you aware of your father ever  
10 treating or being examined by a Dr. Richard Kradin?

11 A. No.

12 Q. Okay. Have you ever reviewed any report that  
13 Dr. Richard Kradin would have prepared regarding your  
14 father?

15 A. The name is not familiar, no.

16 Q. Okay. That was my next question. As you sit  
17 here today, have you ever heard that name, Dr. Richard  
18 Kradin?

19 A. It's not familiar, no.

20 (Exhibit DR-13 marked for identification.)

21 Q. (By Mr. Williams) I'm going to hand you another  
22 document marked DR-13 and it's labeled KACC Asbestos  
23 Personal Injury Trust. And, sir, on the very first page  
24 there, under section 1, down to mailing address, C/O  
25 David T. Robeson, and the 3570 Oak Harbor Boulevard

1 address, that's you, sir? That's your former address in  
2 Slidell?

3 A. Yes, sir.

4 Q. Have you ever seen this document before today?

5 A. No, sir.

6 Q. Again, if we -- you turn to the fifth page,  
7 Section 5, "Personal representative," again, that would  
8 be your name that's listed there, sir?

9 A. Section 5, "Personal representative," yes, sir,  
10 that's my name.

11 Q. If we turn to the last page there, Section 11,  
12 "Medical reports," there's a physician name R. E.  
13 Treuting. T-R-E-U-T-I-N-G. Do you see that, sir? Did  
14 I read that correct?

15 A. Section 11, "Medical Reports, Physician Name,  
16 R. E. Treuting," yes, sir.

17 Q. Okay. Have you ever reviewed any report  
18 written by a Dr. R. E. Treuting?

19 MR. LANGE: Objection, form.

20 A. Not that I can remember.

21 Q. (By Mr. Williams) Okay. Have you ever heard  
22 the name R. E. Treuting before today, sir?

23 MR. LANGE: Objection, form.

24 A. No.

25 Excuse me, excuse. I am familiar with a

1 biopsy report. I just don't remember the name. Okay.  
2 This biopsy report here which came from his -- his  
3 physician, Dr. Crosby, and it is -- does have  
4 Dr. Treuting down here and it does state that the  
5 diagnosis was mesothelioma.

6 Q. Have you seen that report before today?

7 A. Yes, sir.

8 MR. ABRAHAM: And to be clear, we're  
9 talking about the June -- what's the date on that?

10 A. May I read it?

11 MR. ABRAHAM: Is it June 20, 2001?

12 A. Oh, I'm sorry, there's a log-in date here that  
13 says 06-20-2001. Yes, sir, this one. This one right  
14 here, this pathology number. Do I need -- should I read  
15 that too?

16 MR. ABRAHAM: No, the date.

17 A. I'm sorry.

18 MR. ABRAHAM: The date was, I believe,  
19 June 20, 2001.

20 MR. LANGE: Yes.

21 A. That was in a -- that's in one of your other --  
22 that was --

23 MR. WILLIAMS: And just for the sake of  
24 clarity, we'll be clear, the -- the report that  
25 Mr. Robeson just referenced was attached to the exhibit

1 previously marked as DR-9.

2 MR. LANGE: Any more on this one or are we  
3 on to the next one?

4 MR. WILLIAMS: Off the record for a  
5 second.

6 (Brief discussion off the record.)

7 (Exhibit DR-14 marked for identification.)

8 Q. (By Mr. Williams) All right. Let's talk about  
9 another document we just handed you marked DR-14 labeled  
10 up top U.S.G. If we turn to the second page, 2 of 24,  
11 under Section 8, sir, is that your name and your San  
12 Antonio address noted under Section 8?

13 A. Yes, that is.

14 Q. If you would turn your attention to Page 7 of  
15 24, if we look down at the name of Site/Plant of  
16 exposure, it lists EJ Garland. Do you see that, sir?

17 A. Yes, sir, 7 of 24, 1, Site/Plant, it shows EJ  
18 Garland.

19 Q. Okay. And date of exposure under number 2,  
20 January 1956 through November of 1956, and then under  
21 Section 3, the occupation at time of exposure,  
22 carpenter. Is that correct, sir?

23 A. Yes, sir, Page 7 of 24, yes, sir.

24 Q. Okay. And on Page 8 of 24, the industry in  
25 which the exposure occurred in number 17 is noted, and

1 if we look at the -- the list of industry codes below 17  
2 tells us it's "construction trades," is that correct,  
3 sir?

4 A. According to this document, yes, sir.

5 Q. Okay. And then under Section 5, we've got two  
6 boxes marked with a "Y," the first being "Claimant  
7 altered, repaired, or otherwise worked with an asbestos-  
8 containing product such that the claimant was exposed"  
9 to regular -- "was exposed on a regular basis to  
10 asbestos fibers." And the second box being, "Claimant  
11 was employed in an industry or occupation such that the  
12 claimant worked on a regular basis in close proximity  
13 with workers who did one or more of the other three  
14 activities. Did I accurately read those two boxes  
15 marked with a "Y," sir?

16 A. Yeah, except my copy doesn't have a few of  
17 those words to the side.

18 Q. I think there's an issue. Yeah, it may have  
19 gotten cut off there on the side.

20 A. Yes, sir.

21 Q. Do you have any personal knowledge regarding  
22 your father working at EJ Garland between January 1956  
23 and November of 1956, as a carpenter where he would have  
24 altered, repaired, or worked with an asbestos-containing  
25 product or within the proximity of others that worked

1 with asbestos-containing products?

2 A. No.

3 Q. Okay. Do you know whether or not your  
4 attorneys had any information regarding that?

5 A. I don't know.

6 Q. Okay. And do you know why your attorneys would  
7 have indicated this information or cited this  
8 information listed in this form?

9 A. No, I don't know.

10 Q. Have you ever seen this form before today?

11 A. No, sir.

12 Q. We're going to treat the next couple of pages  
13 kind of at the same time. On Page 10 of 24 and 13 of  
14 24, both the USS Braxton and the USS Shangri-La, but we  
15 believe that to be Shangri-La, are noted as ships that  
16 your father would have worked on, correct?

17 MR. LANGE: Objection, form.

18 Q. (By Mr. Williams) That's what's cited in the --  
19 in these documents I've just referenced, correct?

20 A. I don't know what my dad did or didn't do on  
21 these ships. But, yes, if your -- if your question is  
22 asking me if this documents lists those ships, yes, this  
23 document does list those ships.

24 Q. Okay. And concerning the USS Braxton, if you  
25 look at Page 10 of 24, the date of exposure is cited as

1 July 1944 through December 1945, and the occupation at  
2 the time of the exposure was a carpenter, correct?

3 A. This document, Page 10 of 24, does show that  
4 information.

5 Q. Okay. And on Page 13 of 24, the document  
6 indicates that aboard the Shangri-La, the date of  
7 exposure beginning would have been January 1943 and  
8 exposure ending July 1944, and the occupation at the  
9 time of exposure as carpenter?

10 MR. LANGE: Objection, form.

11 A. Yes, on Page 13 of 24, it does have that  
12 information documented.

13 Q. (By Mr. Williams) Okay. And then on Page 11 of  
14 24 and 14 of 24, the industry in which those exposures  
15 occurred is cited as number 21, which would be military,  
16 correct? Page 11 of 24 and 14 of 24.

17 MR. LANGE: It's double-sided, so I think  
18 --

19 A. Oh, okay, I'm sorry. I went back and looked  
20 too far. I was like --

21 Q. No problem.

22 MR. LANGE: That's okay.

23 A. Yes. On Page 11 of 24 and on Page 14 of 24, it  
24 does show under number 4 and number 21 and under  
25 industry codes 21 has the word "Military" next to it.

1 Q. (By Mr. Williams) Okay. And on those same two  
2 pages, 11 and 14 of 24, we have the same two boxes  
3 marked with a "Y," correct?

4 A. Yes, sir.

5 Q. Okay. Now, sir, as you sit here today, do you  
6 have any personal knowledge that your father was aboard  
7 the USS Braxton and USS Shangri-La -- and I'll break  
8 down the years -- for the Braxton, July 1944 through  
9 December 1945, as a carpenter; and for the Shangri-La,  
10 from January 1943 through July 1944, as a carpenter, and  
11 he was exposed to asbestos. Do you have any personal  
12 knowledge of that, sir?

13 MR. LANGE: Objection, form.

14 A. No, I do not.

15 Q. (By Mr. Williams) Okay. Do you know whether or  
16 not your attorneys have any such knowledge?

17 A. I don't know.

18 Q. And do you know why your attorneys cited that  
19 information on this particular trust application form?

20 A. I don't know.

21 Q. If you look at Page 21 of 24 under part 6,  
22 would that be your name that's cited on the form, sir?

23 A. On Page 21 of 24, part 6, yes, that appears to  
24 be my name.

25 Q. Okay. And then on Page 22 of 24 under part 7,

1 smoking history, the two boxes, one regarding smoking of  
2 cigarettes, the second regarding smoking of cigars, the  
3 "no" box is indicated for both, correct?

4 A. That is correct.

5 Q. Okay. But you do know your father to be a  
6 smoker?

7 A. Yes.

8 Q. Okay.

9 MR. ABRAHAM: I think for the record, I  
10 had a --

11 MR. LANGE: Are we going back to the  
12 earlier one?

13 MR. ABRAHAM: I think I've already covered  
14 the questions regarding Owens Corning Fibreboard but I  
15 just want to attach for clarity, I think you had two  
16 separate, one's for Owens Corning, one's for Fibreboard,  
17 where the forms are identical; it's just one box is  
18 Owens Corning and one says Fibreboard. So I would like  
19 to just make this --

20 MR. LANGE: It's fine to attach it.

21 MR. ABRAHAM: Because I've already asked  
22 questions about both.

23 MR. LANGE: Sure.

24 MR. ABRAHAM: I just need to know what the  
25 number for Owens Corning and I'll just make this an A,

1 since my questions were related.

2 MR. LANGE: Do you remember kind of early,  
3 middle, or late?

4 MR. WILLIAMS: 8, I believe.

5 MR. LANGE: That helps.

6 MR. ABRAHAM: Do you have 8? Is that the  
7 Owens Corning?

8 MR. LANGE: Yes.

9 MR. ABRAHAM: Okay. Then I will make this  
10 one 8-A.

11 (Exhibit 8-A marked for identification.)

12 MR. WILLIAMS: While you're doing that,  
13 I'm going to continue.

14 MR. LANGE: Are we on the same one or the  
15 next one?

16 MR. ABRAHAM: Well, I think this is the  
17 only other one I had and it's 1 of 1, so I assume this  
18 must be a form in and of itself.

19 MR. LANGE: Could be.

20 MR. ABRAHAM: Because I discussed this  
21 one. It says 1 of 1 so this has to be -- I think this  
22 is the last one. Since we put that one with this one, I  
23 think this is the last one.

24 MR. WILLIAMS: What number are we on?

25 MR. LANGE: 15, I want to say.

1                   (Exhibit DR-15 marked for identification.)

2           Q.    (By Mr. Williams) All right. Mr. Robeson,  
3 we'll hand you another document that we've marked as  
4 DR-15, a one-page document. The very first title of it  
5 is claim -- Claim View Detail Report, and in the center  
6 of the document, it's noted, "Asbestos Litigation.  
7 Status against ACMC or National Gypsum Company as of  
8 June 16, 2000."

9                   First off, sir, did you -- do you see that  
10 information that I just read; did you follow me?

11           A.    Yes, sir. Kind of midway down, it says,  
12 "Asbestos Litigation," and it says, "Status against ACMC  
13 or National Gypsum Company as of June 16, 2000," yes, I  
14 see that.

15           Q.    Okay. Have you ever seen this document before,  
16 sir?

17           A.    No, sir.

18           Q.    Okay. Do you have any -- well, under Claimant  
19 Representative, is that your name listed there along  
20 with your San Antonio former address?

21           A.    Up at the top?

22           Q.    Yes, sir.

23           A.    Yes, sir. That is my -- appears to be my name  
24 and my previous San Antonio address.

25           Q.    Okay. Under "IR Factors" there, do you see the

1 words, "Smoking Status:" "How many years:" "Average  
2 packs a day:" "Date last smoked:" Do you see those  
3 words, sir?

4 A. Yes, sir, I see those words.

5 Q. Okay. And is there any information provided  
6 for any of those -- those words we just read through?  
7 Let me break it up.

8 "Smoking status," is any information  
9 provided?

10 A. I'm not sure I understand the question.

11 Q. Is anything written after --

12 A. Oh, you're asking me, yeah.

13 Q. If that form contains any information --

14 A. To the right side of the colon?

15 Q. Correct.

16 A. Okay. I'm sorry, I just --

17 Q. No problem.

18 A. I did not understand. I was trying to get  
19 clarification.

20 Q. Not a problem.

21 A. So when I look at this particular form and I  
22 look at "Smoking status:" I see nothing provided to the  
23 right side.

24 Q. Okay. And for, "How many years:" is there any  
25 information provided?

1 A. No, sir.

2 Q. "Average packs a day," is there any information  
3 provided?

4 A. No, sir.

5 Q. And for "Date last smoked," is there any  
6 information provided?

7 A. No, sir.

8 Q. Okay. Under "Exposure to Asbestos," it looks  
9 like there's an exposure began January 1st, 1950 and  
10 exposure ended January 1st, 1979. And then "State of  
11 Greatest Exposure: LA." Did I read that correct, sir?

12 A. Yes, sir.

13 Q. Under Exposure to Asbestos?

14 A. Yes, sir, that's what I see on this form.

15 Q. Okay. And a little further down, under  
16 "Occupation," there's a number 12, Carpenter. And then  
17 "Industry," the number 9, Military.

18 And the date the NGC -- excuse me -- NGC  
19 exposure began was January 1st, 1950, and the NGC  
20 exposure ended January 1st, 1979. Did I read that  
21 accurately, sir?

22 A. Yes, you've read the words that are on this  
23 form.

24 Q. Okay. Do you have any personal knowledge that  
25 your father as a carpenter in the military between

1 January 1st, 1950 and January 1st, 1979, would have been  
2 exposed to any National Gypsum Company product?

3 A. No.

4 Q. Do you know whether your attorneys have any  
5 such information?

6 A. No.

7 Q. Do you know why that information is listed on  
8 this form?

9 A. I have no idea.

10 Q. Have you ever heard of the National Gypsum  
11 Company Trust before today?

12 A. No.

13 Q. Earlier today, sir, we discussed the Eagle  
14 Picher Trust. Do you recall that? Do you remember us  
15 discussing Eagle-Picher?

16 A. In one of these -- in one of these documents?

17 Q. Yes, sir.

18 A. Yes, sir.

19 Q. Okay. Can you tell me what's the status of  
20 that -- that trust application?

21 A. No.

22 Q. And I ask that question because in discovery  
23 responses provided by your lawyer, some entities that  
24 with whom you've settled with were cited, and then there  
25 was some other entities in which bankruptcy claims were

1 submitted and are still pending were cited, but the  
2 Eagle Picher trust wasn't listed in either. So I was  
3 just trying to figure out where does that the Eagle  
4 Picher Trust stand? Do you have -- can you give me any  
5 information regarding that, sir?

6 A. No.

7 MR. LANGE: He may not know but, Anthony,  
8 I'm certainly happy to find that information and provide  
9 it to y'all. If it was not included, that was  
10 inadvertent.

11 MR. WILLIAMS: If we can reconcile that?

12 MR. LANGE: Sure.

13 Q. (By Mr. Williams) Do you recall, sir, applying  
14 to the Chrysler Bankruptcy Trust?

15 A. No.

16 Q. Do you recall applying to the GM, which I  
17 presume is the General Motors Bankruptcy Trust?

18 A. No.

19 Q. Are you aware that a bankruptcy trust was  
20 submitted to Chrysler?

21 MR. LANGE: Objection, form.

22 A. No.

23 Q. (By Mr. Williams) Are you aware that a  
24 bankruptcy trust application was submitted to General  
25 Motors?

1 MR. LANGE: Objection, form.

2 A. No.

3 Q. (By Mr. Williams) Have you received any  
4 settlement proceeds from any settlement trust fund,  
5 sir?

6 MR. LANGE: Objection, form.

7 A. Again, I don't -- I don't know.

8 MR. WILLIAMS: Let me look over my notes  
9 for a second.

10 FURTHER EXAMINATION

11 BY MR. ABRAHAM:

12 Q. Let me follow up on what Mr. Williams just  
13 asked you but in a little different way. Have you  
14 received any money from any settlement in this case?

15 A. Yes.

16 Q. Do you know where -- whether any of the monies  
17 you have received was as a result of these -- any of  
18 these applications to the bankruptcy trusts?

19 A. No, I don't.

20 Q. When you received the funds, were you provided  
21 any information or made aware of where -- who provided  
22 those funds?

23 MR. LANGE: And I'm going to object to the  
24 form. And to the extent you're asking attorney-client  
25 privileged information, instruct you not to answer.

1                   You're more than welcome to ask him if he  
2 knows where the funds came from, but in terms of the  
3 communication, that's privileged.

4           Q.     (By Mr. Abraham) Yeah, I don't want to -- and I  
5 don't know -- I don't want to know what you talked with  
6 your attorneys. But are you aware of which entities, I  
7 guess, have provided the settlement monies you have  
8 received?

9           A.     I've -- I don't remember.

10          Q.     Have you ever heard of a company called Asarco,  
11 A-S-A-R-C-O?

12          A.     No.

13          Q.     Do you -- do you have any recollection or are  
14 you aware of settling any claims in this case with a  
15 company named Asarco?

16          A.     No.

17          Q.     Have you ever heard of Quigley, Q-U-I-G-L-E-Y,  
18 slash Pfizer, P-F-I-Z-E-R?

19          A.     No.

20          Q.     Are you aware of receiving any settlement  
21 proceeds from Quigley/Pfizer?

22          A.     I guess I have to say I honestly don't  
23 remember.

24          Q.     At the time you were first deposed, which I  
25 have down was -- occurred in March of 2009, do you

1 recall having received settlement proceeds at that time?

2 A. Yes.

3 Q. Again, but based on what you're saying today,  
4 you can't tell me back when you were deposed in March of  
5 '09, which companies you would have received settlement  
6 proceeds from?

7 A. No, sir. Sir, I rely on my attorneys.

8 Q. Now, all these settlement trusts that we've  
9 asked you about, and the reason we wanted to ask -- talk  
10 to you was a lot of that information in there was pretty  
11 specific as far as naming of products, type of work,  
12 sites and locations. We're trying to figure out where  
13 that information came from and wanted to see if you  
14 could help us with that.

15 MR. LANGE: Is there a question?

16 Q. (By Mr. Abraham) Well, based on what I'm  
17 hearing today is you have no information regarding  
18 anything that is in those documents as far as the  
19 products that are identified or the sites of  
20 exposure. And the time period. Is that correct?

21 A. That's correct.

22 Q. Is the information with regards to some of  
23 those, say, for instance, let's take -- if you can find  
24 the Celotex one, which one is the Celotex?

25 MR. WILLIAMS: 5.

1 (Retrieving Exhibit DR-5 out of the  
2 stack).

3 Q. (By Mr. Abraham) Do you remember, and I opened  
4 it up; that was Exhibit 5.

5 MR. LANGE: These the ones you asked him  
6 about earlier?

7 Q. (By Mr. Abraham) Right. I read through that  
8 list of products with you; do you remember that earlier?

9 A. Yes.

10 Q. Is that information false?

11 MR. LANGE: Objection, form, calls for  
12 speculation. He said he didn't provide the  
13 information. He doesn't know anything about that  
14 information.

15 Q. (By Mr. Abraham) Right, okay. And -- but you  
16 told me earlier your attorneys never met your father,  
17 correct?

18 A. That's correct.

19 Q. So they never talked to your father if they  
20 never met him about his work, right?

21 A. Correct.

22 Q. These are some specific products that I asked  
23 you about that is listed -- that your attorneys listed  
24 and I'm trying to figure out then, how do they know your  
25 father worked around these eleven Celotex products that

1 were identified in the trust application?

2 MR. LANGE: I'm going to object to the  
3 extent that this is argumentative. I'm going to object  
4 to the extent that this is misleading, and I'm going to  
5 object because he's already said he doesn't have any  
6 information one way or the other about these products  
7 and he doesn't know what his attorneys do or don't know  
8 about these products.

9 MR. ABRAHAM: Okay. But I'm trying to  
10 make the connection between what your client knows to  
11 what his father did.

12 MR. LANGE: And he said he doesn't have  
13 any information about the Celotex products.

14 Q. (By Mr. Abraham) Is there any way you can  
15 provide any information about how your attorneys know  
16 that your father worked with these eleven products?

17 MR. LANGE: Objection, form. Same  
18 objections.

19 MR. WILLIAMS: But you can answer.

20 MR. LANGE: They're not asking you to  
21 guess. They're just asking what you know.

22 THE WITNESS: So you're telling me I can  
23 answer? I'm looking to you to ask you whether or not I  
24 should -- I can answer or not.

25 MR. LANGE: You can answer. You can

1 answer.

2 MR. ABRAHAM: He'll tell you not to answer  
3 if -- if that's --

4 A. That's all I'm looking for.

5 Excuse me, what was your question again,  
6 please?

7 Q. (By Mr. Abraham) I'm trying to figure out how  
8 your attorneys list these eleven products and said your  
9 father worked with or around these products, these  
10 asbestos-containing products. If they never spoke to  
11 him, they never met him, and they didn't talk to him  
12 about his work, I'm trying to figure out, and you don't  
13 know about it, I'm trying to figure out where's the  
14 connection of them knowing your father worked with these  
15 eleven specific products?

16 MR. LANGE: I'm going to object --

17 Q. (By Mr. Abraham) And see if you have any  
18 information about that.

19 MR. LANGE: I'm going to object and assert  
20 the same objections as before. And also asked and  
21 answered at this point. But you can answer if you can.

22 A. I can't. I don't know.

23 Q. (By Mr. Abraham) So all of these -- all these  
24 trust applications we went through with you today, I  
25 just want to be clear, and they list specific products

1 like Celotex lists specific products, Harbison-Walker  
2 lists specific products; the Fuller-Austin lists  
3 specific work jobs saying your father did and worked  
4 around. I mean, all these specific jobs they say your  
5 father did and was exposed to asbestos, you have no  
6 information about?

7 MR. LANGE: Objection, form, and same  
8 objections as before, and asked and answered.

9 Q. (By Mr. Abraham) Is that correct?

10 MR. LANGE: Same objections. You can  
11 answer if you can.

12 A. I don't know.

13 Q. (By Mr. Abraham) If your attorneys put this  
14 information in a trust and submitted it on your behalf,  
15 you would expect that information to be correct,  
16 wouldn't you?

17 MR. LANGE: Objection, form.

18 A. I -- I don't know. I don't know how to answer  
19 that question.

20 Q. (By Mr. Abraham) Okay. Well, would you expect  
21 them to submit false information to these trusts, saying  
22 your father was exposed to asbestos from products that  
23 he didn't actually work with?

24 MR. LANGE: Objection, form, argumentative  
25 and misstates the trust applications.

1 THE WITNESS: Do I answer?

2 MR. LANGE: You can answer if you know.

3 A. I don't know.

4 Q. (By Mr. Abraham) Okay. So you're telling me  
5 you don't know whether your attorneys would or would not  
6 submit false information --

7 MR. LANGE: Objection, form.

8 Q. (By Mr. Abraham) -- to these trust  
9 applications?

10 A. No, what I'm telling you is, is I've never seen  
11 these forms before today. I have no clue what this  
12 information is or why the information is here. That's  
13 what I'm telling you.

14 MR. LANGE: And he's -- he's told you guys  
15 everything he knows about this and this has been a long  
16 deposition and now you're just asking the same stuff  
17 over and over again.

18 MR. ABRAHAM: No. My questions are  
19 actually -- pretty -- a little different and pretty  
20 specific, because I'm just trying to find out if he  
21 doesn't know about this and these are specific. This  
22 isn't general information.

23 MR. LANGE: He can only give you the  
24 information he has.

25 MR. ABRAHAM: Exactly.

1                   MR. LANGE: And if you've got questions  
2 about his information, feel free to ask, but I think  
3 he's told you what he knows.

4           Q.     (By Mr. Abraham) You would agree that you --  
5 well, strike that.

6                   If the attorneys have indicated that some  
7 of the settlement proceeds you received came as a result  
8 of some of these trust applications, that is money that  
9 you have received, correct?

10                  MR. LANGE: Objection, form. He's said he  
11 doesn't know where the settlements he's received come  
12 from.

13                  MR. ABRAHAM: I can read them. It's in  
14 your responses so I can read them to you.

15                  MR. LANGE: That's fine but if you're  
16 asking his personal knowledge, he's given that to you.

17           Q.     (By Mr. Abraham) I said your attorney has  
18 provided me the information. All right. It says,  
19 "Plaintiffs have settled their claims arising out of  
20 William Robeson, Jr.'s death with the following  
21 defendants: Asarco, Babcock & Wilcox, Johns Manville,  
22 Quigley/Pfizer, U.S. Gypsum, and Honeywell  
23 International, formally known as Allied, for a total  
24 settlement \$189,612.48. Plaintiffs have filed the  
25 following bankrupt claims which are currently pending:

1 ABB Lummus." I don't know if that's one we've asked  
2 about, but do you have any information about ABB  
3 Lummus?

4 MR. LANGE: Lummus was the first one you  
5 asked about.

6 MR. ABRAHAM: Was it? Okay. Long day.

7 MR. LANGE: It has been a long day.

8 Q. "ACandS, Armstrong World, Celotex, Chrysler,  
9 Combustion Engineering, Fibreboard, GM, Halliburton,  
10 Harbison-Walker, Kaiser, National Gypsum, and Owens  
11 Corning."

12 Now, that's the information from your  
13 attorneys and you're relying on them, correct, to  
14 provide the information about your settlement, right?

15 A. Yes.

16 Q. Okay. That's the information they gave to  
17 us. So my question is, is according to this you have  
18 received funds from some of these trust  
19 applications. My question is: If you received -- you  
20 have received funds from these trust applications.  
21 Would you expect the information in the trust  
22 applications that they've submitted on your behalf,  
23 alleging your father was exposed to asbestos from those  
24 specific products, you would expect that information to  
25 be correct, wouldn't you?

1 MR. LANGE: I'm going to object to the  
2 form, because, again, he's given you the information  
3 that he has about these trust applications.

4 Q. (By Mr. Abraham) You can answer.

5 MR. LANGE: You can answer.

6 A. I -- no, I'm not -- I don't have the  
7 information that you're reading to me. Okay? So I  
8 don't know what my -- I don't know what my attorneys  
9 have provided to you. And again, I can only -- I can  
10 only tell you what -- what I remember and what I know.

11 MR. LANGE: And I'm going to state for the  
12 record that I resent this line of questioning. You're  
13 sitting here saying that me and my law firm are liars  
14 and I deeply resent that.

15 MR. ABRAHAM: I'm not. I'm asking if he  
16 expects the information that he doesn't know about, that  
17 you submitted, your firm has submitted to be correct.

18 MR. LANGE: The question that you've just  
19 asked admits that he's said he doesn't know about the  
20 information. How can he tell you anything more about  
21 the information he's already said repeatedly for two and  
22 a half hours he doesn't know about?

23 MR. ABRAHAM: I don't think he's answered.

24 Q. (By Mr. Abraham) My question is: Would you  
25 expect the information your lawyers submitted to these

1 trusts that they were paid on and that you were paid on,  
2 based on your father's exposure, would you expect the  
3 information they provided in those forms to be correct?

4 A. How about I answer it like this: I would -- I  
5 would expect that what anyone is providing to be  
6 correct, including this biopsy report that says that my  
7 father was diagnosed and died of mesothelioma.

8 Q. Okay, well --

9 MR. LANGE: I think that answers your  
10 question.

11 Q. (By Mr. Abraham) Well, that tells me, are you  
12 aware -- have you ever heard of Dr. Samuel Hammer?

13 A. No, sir.

14 Q. He's an expert your attorneys have  
15 retained. Are you aware his opinion is he doesn't have  
16 enough information to state that your father had  
17 mesothelioma?

18 MR. LANGE: Objection, form.

19 A. No.

20 Q. (By Mr. Abraham) Have you heard that before  
21 today?

22 A. No.

23 Q. Do you know that Dr. Samuel Hammer also stated  
24 that all these trust applications where the disease  
25 process is marked as mesothelioma, he states the

1 attorneys didn't have enough information to submit those  
2 applications stating that?

3 MR. LANGE: Objection, form.

4 A. No.

5 Q. (By Mr. Abraham) Do you have any understanding  
6 as to how the trust distributions work?

7 MR. LANGE: Objection, form.

8 A. No.

9 Q. (By Mr. Abraham) Do you know if you were paid  
10 more based on certain types of diseases?

11 MR. LANGE: Objection, form.

12 A. No.

13 Q. (By Mr. Abraham) Well, if it turns out as  
14 Dr. Hammer has stated, that he can't state that your  
15 father had mesothelioma, you've collected money based on  
16 that diagnosis, and if that's not correct as your own  
17 expert has said, are you going to return any of that  
18 money?

19 MR. LANGE: Objection, form. That's  
20 something he'll have to address with counsel. I'm going  
21 to instruct you not to answer that. You're asking him  
22 for a legal opinion. I instruct him not to answer that.

23 Q. (By Mr. Abraham) In discovery responses that  
24 were provided to myself and to Mr. Williams, did you  
25 have any participation in answering these discovery

1 responses? And I'll be happy to show them, but your  
2 counsel is well aware of them.

3 MR. LANGE: Objection, form. Answer if  
4 you know.

5 A. I'm not -- I'm really not sure what you're  
6 talking about.

7 Q. (By Mr. Abraham) I can show him the whole  
8 document but I'll show you the heading.

9 MR. LANGE: Show him the whole document.

10 (Handed to witness.)

11 Q. (By Mr. Abraham) Have you ever seen that  
12 document? You can take your time and look through it,  
13 but have you ever seen that prior to today?

14 A. No.

15 Q. Did you participate with your counsel anytime  
16 between October and December of 2010, and provide any  
17 information that may be contained in these documents?

18 MR. LANGE: Objection, form. You can  
19 answer if you know.

20 Q. (By Mr. Abraham) If you know?

21 A. I -- I don't recall.

22 MR. LANGE: Anything else?

23 MR. ABRAHAM: And just, before you ask, do  
24 you we need to attach this since we referenced it?

25 MR. LANGE: Not for me unless he wants to.

1 MR. ABRAHAM: Because I actually had a  
2 couple of little marks in it so I prefer not to.

3 MR. LANGE: Fine either way.

4 MR. WILLIAMS: I think that's all the  
5 questions for Mr. Robeson, but while we're still on the  
6 record, concerning Chrysler, GM, it appears that those  
7 are two trusts that were applied to that we don't have.  
8 And just so we can reconcile that along with the Eagle  
9 Picher, which is -- it appears to be in limbo.

10 MR. LANGE: Yeah. With respect to  
11 Chrysler and GM, I will have to check into that. If  
12 claims have been submitted and there are applications  
13 that have been sent to those trusts, I'm happy to give  
14 you all whatever has been cited and we'll produce that.

15 With respect to Eagle Picher, did you say  
16 we had given you the trust but it wasn't listed in the  
17 logs? If so, we'll update you with the status of that.

18 MR. WILLIAMS: Yeah, we got the trust, but  
19 we don't know if it's --

20 MR. LANGE: I don't know the statute but  
21 I'm happy to find that out and we'll update our logs  
22 accordingly. Sure, we're happy to do that. Any other  
23 questions?

24 MR. ABRAHAM: I don't think I have any.

25 MR. LANGE: Let's go off the record.

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MR. ABRAHAM: Thank you, Mr. Robeson.  
(Deposition concluded at 1:04 p.m.)



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THE STATE OF \_\_\_\_\_ )

COUNTY OF \_\_\_\_\_ )

Before me, \_\_\_\_\_, on this day personally appeared DAVID THOMAS ROBESON, SR., known to me (or proved to me under oath or through \_\_\_\_\_ (description of identity card or other document) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR  
THE STATE OF \_\_\_\_\_

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CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

SUIT NO. 2004-15722 SECTION "7" DIVISION: E

MARY A. ROBESON, ET AL,

VERSUS

AMETEK, INC, ET AL,

REPORTER'S CERTIFICATION  
DEPOSITION OF DAVID THOMAS ROBESON, SR.  
JANUARY 24, 2011

I, Chris Carpenter, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, DAVID THOMAS ROBESON, SR., was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on the \_\_\_\_\_ day of \_\_\_\_\_, 2011, to the witness or to the attorney for the witness for examination, signature and return to Esquire Deposition Solutions, 9901 W. I-10, Suite 800, San Antonio, TX 78230 by \_\_\_\_\_, 2011; and if returned, the original transcript will be forwarded to Michael Abraham, the custodial attorney;

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was

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taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 3rd day of February, 2011.

Chris Carpenter, Texas CSR 1151  
Expiration Date: 12/31/2012  
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Firm Registration No. 283

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# Exhibit

E

COURT OF APPEAL  
FOURTH CIRCUIT  
STATE OF LOUISIANA

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NO. 2012-C-0415

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WILLIAM ODDO, JR., ET AL.  
Plaintiffs

VERSUS

ASBESTOS CORPORATION, LTD, ET AL.  
Defendant/Applicant,  
Ford Motor Company

---

APPLICATION FOR SUPERVISORY WRITS FROM THE RULING OF  
THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS,  
STATE OF LOUISIANA, NO. 2011-5883, DIVISION "I,"  
THE HONORABLE JUDGE PIPER GRIFFIN

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SECOND MOTION TO SUPPLEMENT THE RECORD

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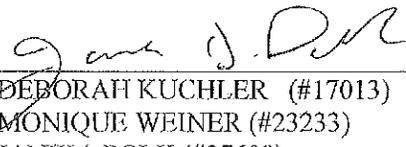
CIVIL PROCEEDING

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TRIAL IS SCHEDULED FOR JULY 2, 2012

FACT DISCOVERY CLOSED ON MARCH 30, 2012

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BY: 

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Appeal Counsel for Defendant/Applicant  
Ford Motor Company

**NOW INTO COURT**, through undersigned counsel, comes Defendant/Applicant, Ford Motor Company (“Ford”), with this Second Motion to Supplement the Record with correspondence from Claims Resolution Management Corporation confirming the existence of William A. Oddo, Jr.’s claim with the Johns Manville Trust.

As noted in Ford Motor Company’s Reply in Support of its Application for Supervisory Writs, the decedent, William A. Oddo, Jr., filed and received compensation for a claim with the Johns Manville Trust. In support, Ford provided a copy of email correspondence from a Trust representative, as well as a spreadsheet reflecting the status of Mr. Oddo’s claim.<sup>1</sup> Since filing its Reply, Ford received the attached written and signed correspondence from the same trust representative, explicitly stating that Mr. Oddo filed a claim with the Johns Manville Trust and that his claim has been paid. Ford requests that the record on Ford’s Application be supplemented with this correspondence as Exhibit “23.”

**WHEREFORE**, Ford Motor Company prays that this Second Motion to Supplement the Record with correspondence from Claims Resolution Management Corporation confirming the existence of William A. Oddo, Jr.’s claim with the Johns Manville Trust be **GRANTED**, and that the record be supplemented with the correspondence from Johns Manville Trust representatives as Exhibit “23” to Ford Motor Company’s Application for Supervisory Writs.

---

<sup>1</sup> See Ford Motor Company’s Reply in Support of its Application for Supervisory Writs, at Exhibit “22.”

**AFFIDAVIT OF VERIFICATION AND SERVICE**

STATE OF LOUISIANA

PARISH OF ORLEANS

**BEFORE ME**, the undersigned authority, personally came and appeared:

**JANIKA D. POLK**

who did depose and state that she is counsel for the Defendant/Applicant, Ford Motor Company, that she has read the Second Motion to Supplement the Record with correspondence from Claims Resolution Management Corporation confirming the existence of William A. Oddo, Jr.'s claim with the Johns Manville Trust, and the allegations contained therein are true and correct to the best her knowledge, information and belief; and that the Motion has been served (1) by hand delivery to the Honorable Piper Griffin, presiding over this action, Division "I", Civil District Court for the Parish of Orleans, 421 Loyola Avenue, New Orleans, Louisiana, 70112; (2) by Certified Mail to opposing counsel, Mr. Philip C. Hoffman, 1010 Common Street, Suite 2050, New Orleans, Louisiana 70112; (3) by electronic delivery to all counsel of record (see list of counsel below); and (4) by U.S. Mail to unrepresented parties this 22<sup>nd</sup> day of March, 2012.

  
**JANIKA D. POLK**

Sworn to and subscribed before  
me this 9<sup>th</sup> day of April, 2012.

  
Lee Blanton Ziffer (#32783)  
NOTARY PUBLIC  
My commission is for life.

Hon. Piper Griffin, Chief Judge  
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For the Parish of Orleans  
Division "P" – Section 14  
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Company, Inc. and B&B Engineering  
and Supply Company of Louisiana,  
Inc., and its Executive Officer  
Armand Hullinghorst*

*and*

*The Travelers Indemnity Company as  
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business in Louisiana, as the  
insurer of the following dissolved  
Louisiana entities: E.F. Burmaster  
& Son, Inc., Burmaster Salvage  
Co., and/or Burmaster Tractor And  
Truck Co.*

**EXHIBIT "23"**

April 5, 2012

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McGuire Woods LLP  
One James Center  
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Richmond, VA 23219-4030

**Re:** William Oddo  
Manville Trust Claim Files

Dear Mr. Sheets:

This letter responds to your request for verification of Manville Trust settlement information for claimant William Oddo, (SSN xxx-xx-9128, DOB 4/19/1930).

Pursuant to section I(1)(f) of the Manville TDP, upon request from a co-defendant for verification of a claimant's settlement information, the Trust is permitted to (1) confirm the existence of a claim, and (2) inform whether the claim is settled and paid.

Mr. Oddo has filed a claim with the Manville Trust. His claim is settled and paid.

Cordially,

  
Alek Pivec  
Paralegal



# Exhibit

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from Mr. Hubbard, who is the only product identification witness to claim that Mr. Bacon worked around CertainTeed asbestos cement pipe. Just Mr. Hubbard's five affidavits alone refer to almost 35 asbestos products that have never been identified in discovery in this case.

In addition, counsel for CertainTeed just discovered in late November that Mr. Hubbard, who, like the plaintiff, is represented by the Hissey Kientz firm, passed away in July 2010, almost one and one-half years ago. Thus, the prejudice to CertainTeed from plaintiff's failure to turn over in discovery the five signed affidavits from Mr. Hubbard – at a time when CertainTeed could question Mr. Hubbard about Mr. Bacon's exposures to the almost 35 asbestos products outlined in those five affidavits – cannot be remedied.

Plaintiff's failure to disclose these bankruptcy claim forms and co-worker affidavits until last October is inexcusable. So is her failure to ever disclose to CertainTeed and this Court that Mr. Hubbard is deceased. Discovery closed several months ago, pretrial proceedings, including the submission of a Pre-trial Conference Order and two pretrial hearings, have been concluded, and the case is scheduled for another jury sounding docket in late January. This Court even spent time at the October pre-trial hearing deciding a motion that concerned the scope of Mr. Hubbard's testimony at trial – a motion that is moot given that Mr. Hubbard passed away a year and a half ago. This case has already been listed for jury sounding dockets two times, in September and October 2011. If the Court's schedule had permitted, trial would have taken place last fall.

In these circumstances, the only fair result is to strike the testimony of Mr. Hubbard in its entirety. In addition, as a sanction for these non-disclosures, plaintiff should be assessed the fees and costs CertainTeed has incurred in preparing and filing this Motion.

## STATEMENT OF FACTS

This lawsuit was filed on July 30, 2008 by the family of Fred Bacon. Some 45 defendants were sued, including CertainTeed. Only CertainTeed remains as an active defendant.

**Plaintiff's discovery responses.** On December 22, 2008, plaintiff responded to the discovery requests that Union Carbide had served. (Exhibit A hereto.) Those discovery requests functioned as the one set of discovery served on the plaintiffs by all 45 defendants that had been sued. Interrogatory No. 6 requested the identity of any co-worker who could provide "product identification information." In response, plaintiff listed three individuals – Jasper Hubbard, James Holden and Rufus Smith – and stated that all of these individuals were clients of the same firm that represented plaintiff, the Hissey Kientz firm. Request for Production No. 16 asked for any witness statements – "[a] verbatim copy of every statement in the plaintiff/decedent's possession, custody or control made by the plaintiff/decedent and/or any individual relating to the claims made the basis of this lawsuit." In response, plaintiff stated:

"None at this time. Plaintiff reserves the right to supplement these responses as discovery is continuing."

Plaintiff made an identical response to Request for Production No. 44, which asked for "any affidavit, statement, claim form, or any document" submitted in connection with a claim made "to a settlement trust in conjunction with a bankruptcy proceeding."

Plaintiff never supplemented these responses, and, until ordered by the Court at the October 14, 2011 pretrial hearing, never produced the 11 witness affidavits she had obtained and the 19 bankruptcy trust claims she had submitted beginning in March 2009. She also never identified in discovery Brown Chesser – one of the co-workers who signed an affidavit.

**Depositions, motions and pretrial hearings.** As discovery progressed in the case, CertainTeed took the depositions of both Jasper Hubbard and James Holden – two of the three

product identification witnesses listed in plaintiff's discovery responses – on October 30, 2009 and December 28, 2009, respectively.<sup>1</sup> Plaintiffs also produced copies of depositions of both men from 2004 (Mr. Hubbard) and 2005 (Mr. Holden) that were taken in their own asbestos lawsuits. CertainTeed did not take the deposition of Rufus Smith, the third product identification witness identified by plaintiff, because plaintiff's counsel said that Mr. Smith was too old and frail to be deposed. But plaintiff did produce a 2005 deposition of Mr. Smith, again a deposition taken in his own asbestos lawsuit.<sup>2</sup>

At his deposition, Mr. Hubbard testified that he and Mr. Bacon had worked repairing CertainTeed asbestos cement pipes that had been installed on the Turret Chain Machine, a machine that made glassware, at the Corning glass plant Muskogee, Oklahoma. See Ex. B, at 37-59, 84-93. Although Messrs. Holden and Smith also worked with Mr. Bacon at the Corning plant, plaintiff stipulated at Mr. Holden's deposition in this case that he would have no testimony relevant to CertainTeed. See Ex. C, at 26. And Mr. Smith testified at his 2005 deposition in his own case that the name CertainTeed did not "ring a bell." Ex. E, at 66.

At his deposition, Mr. Hubbard also discussed Mr. Bacon's potential exposure to asbestos from asbestos pads and belts on various machines at the Corning plant, packing on equipment, and insulating/fire brick. Ex. B, at 36-37, 101, 106. Plaintiff's counsel stipulated during the deposition that Mr. Hubbard would offer no other testimony about asbestos products or manufacturers. *Id.* at 83-84.

Based on this deposition testimony, both plaintiff and CertainTeed produced expert reports and expert witnesses were deposed in 2010 and early 2011. Specifically, plaintiff

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<sup>1</sup> Excerpts from these depositions are Exhibits B (Hubbard) and C (Holden) hereto. Excerpts from Mr. Hubbard's 2004 deposition are Exhibit D hereto.

<sup>2</sup> Excerpts from Mr. Smith's deposition are Exhibit E hereto.

produced expert reports from an industrial hygienist, Jerry Lauderdale, and from a medical doctor, Dr. Sam Hammar, and CertainTeed took depositions of both experts. CertainTeed, in turn, produced expert reports from an industrial hygienist, Robert Spence, a pathologist, Dr. Mark Wick, a process engineer, Jack Krafchick, and an expert in human memory, Charles Weaver. All four experts were deposed. CertainTeed also produced three fact witnesses for deposition – three individuals whose careers at the Corning Muskogee plant spanned from the early 1960s until the plant shut down in 1987 – William Kolstad, Ken Sanders and Fred Dice. These three men – who had collectively designed, maintained and even rebuilt the Turret Chain Machine – all testified that the pipes on the Turret Chain Machine discussed by Mr. Hubbard at his deposition were not CertainTeed asbestos cement pipe, but were instead black metal pipes. Ex. F, at 25-27; Ex. G, at 37-38; Ex. H, at 20-23.<sup>3</sup> Since all three individuals now live some distance from Muskogee, in March 2011, CertainTeed took video depositions of all three for use at trial.

Discovery ended in March 2011, and a Pre-trial Conference Order was filed last June. Following that, plaintiff and CertainTeed filed multiple motions in limine and other motions. The Court held two pretrial hearings – one on August 18, 2011 and another on October 14. The case was also scheduled for the jury sounding dockets in September and October; if the Court's schedule had permitted, the case would have been tried at that time. The case is scheduled for another jury sounding docket on January 27, 2012.<sup>4</sup>

**Bankruptcy claim forms.** At the October 14 hearing, counsel for CertainTeed moved that the plaintiff be required to turn over any claims that she had submitted to bankruptcy trusts.

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<sup>3</sup> CertainTeed also obtained, by subpoena to Corning, pictures of the Turret Chain Machine at the Muskogee plant that showed the black metal pipes in question.

<sup>4</sup> A court-ordered settlement conference is scheduled for January 12, 2012.

Plaintiff's counsel took the position that CertainTeed could not enforce Union Carbide's discovery requests. Oct. 14 Tr. at 12-13 (Ex. I hereto). Plaintiff's counsel also stated that Carbide had been dismissed from the case in February 2010, and represented to the Court that, "[a]s of February 2010 and thereafter up until several months ago, Plaintiff had not made any bankruptcy claim submissions whatsoever." *Id.* at 13. Thus, he asserted, plaintiff was in "complete compliance" with Union Carbide's discovery requests. *Id.* The Court overruled plaintiff's objections. *Id.* at 17.

On October 25, pursuant to the Court's order, plaintiff produced copies of 19 submissions to bankruptcy trusts she had made. Contrary to plaintiff counsel's representation to the Court on October 14, 13 of those submissions had been made prior to Union Carbide's dismissal from the case in February 2010. Plaintiff's counsel, the Hissey Kientz firm, is listed as plaintiff's counsel on all 19 bankruptcy claims. Moreover, along with the 19 bankruptcy submissions, plaintiff produced 11 affidavits from Mr. Bacon's co-workers, including **five** affidavits from Mr. Hubbard, **two** from Mr. Holden, **three** from Mr. Smith, and **one** from the previously unidentified co-worker, Brown Chesser. These 11 affidavits had been submitted with 12 of the bankruptcy claims plaintiff has made.

Plaintiff's supplemental discovery responses, which summarize plaintiff's bankruptcy submissions, are Ex. J hereto. The 19 bankruptcy claim submissions themselves are Ex. K through CC, and are as follows (in chronological order of submission):

- H.K. Porter; submitted on March 3, 2009 (Ex. J, at 3 and Ex. K);
- U.S. Gypsum; submitted on March 19, 2009 (Ex. J, at 6 and Ex. L). Affidavit of James Holden dated May 2, 2007 also submitted;
- Fibreboard; submitted on March 19, 2009 (Ex. J, at 6 and Ex. M). Affidavit of James Holden dated June 15, 2007 also submitted;

- Owen-Corning; submitted on March 19, 2009 (Ex. J, at 6 and Ex. N). Affidavit of James Holden dated June 15, 2007 also submitted;
- Armstrong World Industries; submitted on March 19, 2009 (Ex. J, at 6 and Ex. O). Affidavit of Jasper Hubbard dated May 21, 2010 also submitted;
- Combustion Engineering; submitted on September 4, 2009 (Ex. J, at 2 and Ex. P). Affidavit of Rufus Smith dated July 17, 2009 also submitted;
- ARTRA; submitted on November 2, 2009 (Ex. J, at 3 and Ex. Q). Affidavit of Jasper Hubbard dated March 3, 2008 also submitted;
- Asbestos Claims Management Corporation (National Gypsum); submitted on November 2, 2009 (Ex. J, at 4 and Ex. R). Affidavit of Jasper Hubbard dated May 31, 2005 also submitted;
- ACandS; submitted on November 6, 2009 (Ex. J, at 2 and Ex. S). Affidavit of Brown Chesser dated August 25, 2011 also submitted;
- Plibrico; submitted on November 13, 2009 (Ex. J, at 3 and Ex. T). Affidavit of Rufus Smith dated January 10, 2007 also submitted;
- KACC (Kaiser Refractory); submitted on November 16, 2009 (Ex. J, at 4 and Ex. U). Affidavit of Jasper Hubbard dated November 9, 2009 also submitted;<sup>5</sup>
- DII Industries; submitted on November 16, 2009 (Ex. J, at 5 and Ex. V). Affidavit of Jasper Hubbard dated November 9, 2009 also submitted;
- Johns-Manville; submitted on December 15, 2009 (Ex. J, at 5 and Ex. W).
- GI Holdings (GAF); submitted on April 4, 2011 (Ex. J, at 3 and Ex. X). ;
- THAN; submitted on April 7, 2011 (Ex. J, at 4 and Ex. Y). Affidavit of Rufus Smith dated December 9, 2009 also submitted;
- Federal-Mogul (for Flexitallic); submitted on August 11, 2011 (Ex. J, at 5 and Ex. Z);
- Federal-Mogul (for Turner & Newall); submitted on August 11, 2011 (Ex. J, at 5 and Ex. AA);
- Asarco; submitted on August 12, 2011 (Ex. J, at 2 and Ex. BB);

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<sup>5</sup> Mr. Hubbard submitted different affidavits to the KACC and DII trusts, although both affidavits were signed on November 9, 2009.

- U.S. Minerals; submitted on August 11, 2011 (Ex. J, at 4 and Ex. CC).<sup>6</sup>

**Co-worker affidavits.** The bankruptcy trust claims that plaintiff submitted included 11 affidavits from four of Mr. Bacon's co-workers – Jasper Hubbard, James Holden, Rufus Smith and Brown Chesser. (For the Court's convenience, these 11 affidavits are assembled together in one exhibit – Ex. DD.) These 11 affidavits all discussed exposures to asbestos products that were **never** mentioned in the depositions of Messrs. Hubbard and Holden that CertainTeed took in this case, nor in the depositions of Messrs. Hubbard, Holden and Smith that were taken in 2004 and 2005 in their own asbestos lawsuits:

- May 31, 2005 Hubbard Affidavit. This Affidavit was submitted with Mr. Bacon's claim to the APMC (National Gypsum) bankruptcy trust. It claimed exposure to "National Gypsum asbestos-containing product" at the Corning plant in Muskogee. Mr. Hubbard did not, however, mention any National Gypsum products at either his 2004 or 2009 depositions.
- March 3, 2008 Hubbard Affidavit. This Affidavit was submitted with Mr. Bacon's claim to the ARTRA bankruptcy trust. It claimed exposure to 11 joint compound and similar products manufactured by Synkoloid at several jobsites, including the Corning Muskogee plant. None of these products were mentioned in Mr. Hubbard's 2004 and 2009 depositions.
- November 9, 2009 Hubbard Affidavit submitted to KACC bankruptcy trust. Mr. Hubbard signed two affidavits on November 9, 2009. The first one – which was submitted with Mr. Bacon's bankruptcy claims to the KACC bankruptcy trust – claimed exposure to seven insulating or refractory products at Corning-Muskogee. While Mr. Hubbard mentioned refractory products during his 2004 and 2009 depositions, he did not mention any of these specific products or Kaiser. Instead, he testified that the "majority" of refractory brick used at Corning "was either Narco or Green." Ex. D, at 111. See also Ex. B, at 67.

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<sup>6</sup> Plaintiff's discovery responses show that she has received, to date, approximately \$185,000 from five bankruptcy trusts, and that she has "deferred" the rest of her submissions. Based on the minimum amounts the "deferred" bankruptcy trusts pay for bankruptcy claims, CertainTeed calculates that plaintiff will receive at least an additional \$313,000 in compensation from her "deferred" trust claims. CertainTeed has also filed a motion with this Court seeking to continue the trial until plaintiff has received the settlement funds she is entitled to receive from these bankruptcy trusts, including from the claims she has "deferred," in order that CertainTeed may receive the full settlement credits to which it is entitled under Oklahoma law. See 12 O.S. § 832(H).

- November 9, 2009 Hubbard Affidavit submitted to DII Industries bankruptcy trust. This second Hubbard Affidavit signed on November 9, 2009 – which was submitted to the DII Industries bankruptcy trust – claimed exposure to 10 Harbison-Walker insulating and refractory products, as well as to insulating brick, at the Corning plant and one other jobsite. Again, while Mr. Hubbard mentioned refractory products during his 2004 and 2009 depositions, he did not mention any of these specific products or Harbison-Walker.
- May 21, 2010 Hubbard Affidavit. This Affidavit was submitted with Mr. Bacon's claims to the AWI Trust. It claimed exposure to Armatemp Insulating Cement at the Corning plant, a product that was not mentioned in Mr. Hubbard's 2004 and 2009 depositions.
- May 2, 2007 Holden Affidavit. This Affidavit was submitted with Mr. Bacon's claim to the United States Gypsum ("USG") bankruptcy trust. It listed exposure to five types of USG joint compound, spackling putty, and insulating block at Corning-Muskogee and one other jobsite. Mr. Holden did mention both joint compound and insulating materials in his 2005 and 2009 depositions, but he identified other brand names, not U.S. Gypsum. See Ex. GG, at 55, 71; Ex. C, at 17, 24-25.
- June 15, 2007 Holden Affidavit. This Affidavit, which was submitted with Mr. Bacon's claim to the Fibreboard and Owens-Corning bankruptcy trusts, listed exposure to OC's Kaylo block insulation, and Fibreboard's Pabco block insulation and insulating cement at the Corning plant. Mr. Holden did mention Kaylo and Pabco pipe covering in his 2005 deposition in his own case (Ex. GG, at 55), but he did not mention either block insulation or insulating cement. And he did not mention any products from these companies in his 2009 deposition in this case. Thus, Mr. Holden never testified about Kaylo or Pabco products in relation to Mr. Bacon.
- January 10, 2007 Smith Affidavit. This Affidavit was submitted in support of Mr. Bacon's claim to the Plibrico bankruptcy trust. It claims exposure to Plisulate Insulating Block No. 201, and lists several jobsites, including the Corning plant. This product was not mentioned in Mr. Smith's 2005 deposition.
- July 17, 2009 Smith Affidavit. This Affidavit, which was submitted in support of Mr. Bacon's claim to the Combustion Engineering bankruptcy trust, claims exposure to "Combustion Engineering asbestos-containing product(s)," and lists several jobsites, including Corning-Muskogee. No Combustion Engineering product was mentioned in Mr. Smith's 2005 deposition.
- December 9, 2009 Smith Affidavit. This Affidavit was submitted in support of Mr. Bacon's claim to the THAN bankruptcy trust. It claimed exposure to Paco Quik Set joint compound at the Corning plant. Although Mr. Smith recalled Bondex joint compound at his 2005 deposition (Ex. E, at 73-74), he did not mention THAN or any Paco products.

- August 25, 2011 Chesser Affidavit. This Affidavit was submitted in support of plaintiff's claim to the ACandS bankruptcy trust. It claimed exposure to LK pipe covering and block at the Corning plant. As noted above, Mr. Chesser was not listed as a co-worker witness in this case, he was not offered for deposition and no prior depositions were produced.

Some of the bankruptcy claim forms also give information about Mr. Bacon's asbestos exposures that were **never** discussed in any detail in discovery. For example, plaintiff's claim forms submitted to the Fibreboard and Owens-Corning trust state that Mr. Bacon "worked on pumps and turbines for reparation [sic] and they had insulation on them which [Mr. Bacon] came into contact with while working on them." Ex. M, at 7; Ex. N, at 7. Plaintiff's claim form to the ARTRA trust states that Mr. Bacon "[f]ixed heavily insulated pumps and turbines." Ex. Q, at 7. Similar statements about Mr. Bacon's work with and around insulation on pumps, valves, and turbines at Corning-Muskogee is included in several other bankruptcy claim forms.<sup>7</sup> Mr. Holden gave no testimony about pumps, valves or turbines during his deposition in this case. Mr. Hubbard gave some brief testimony about seeing Mr. Bacon remove packing from pumps or valves at the Corning plant (Ex. B, at 102-03), but few details were given. And he denied ever seeing Mr. Bacon work around any turbines at Corning. *Id.* at 77-78.

**Mr. Hubbard's death.** In late November 2011, counsel for CertainTeed discovered through an internet search that Mr. Hubbard had died in July 2010 (Ex. EE hereto). This was a complete surprise, given that plaintiff's counsel represented Mr. Hubbard and that he had implied at recent pretrial hearings in this case that Mr. Hubbard was living. For example, at the August 18, 2011 pretrial hearing, CertainTeed's counsel asked plaintiff's counsel if Mr. Hubbard was going to be appearing live at trial. In response, plaintiff's counsel stated: "I would expect

<sup>7</sup> See claim forms submitted to the Pflibrico Trust (Ex. T, at 7); the H.K. Porter Trust (Ex. K, at 7); the USG Trust (Ex. L, at 6); the APMC Trust (Ex. R, at 1); the KACC Trust (Ex. W, at 7); the AWI Trust (Ex. O, at 6); the DII Industries Trust (Ex. V, at 7); and the Federal-Mogul (Turner & Newall & Flexitallic) Trust (Ex. AA, at 6; Ex. Z, at 6).

him to. I can't promise it." 8/18/11 Tr. at 12 (Ex. FF). So too, at the October 14 pretrial hearing, plaintiff's counsel entered into a stipulation with CertainTeed's counsel under which plaintiff agreed to give CertainTeed's counsel "seven days' notice if she is unable to bring Jasper Hubbard **live** to trial." 10/14/11 Tr. at 4 (Ex. I) (emphasis added).

Also at the October hearing, this Court heard argument and ruled on a motion in limine filed by CertainTeed that addressed the scope of Mr. Hubbard's potential testimony at trial; the entire assumption behind CertainTeed's motion was that Mr. Hubbard would testify live at trial. Thus, counsel for CertainTeed summarized the point of CertainTeed's motion for the Court: "[T]his Court should not allow him [Mr. Hubbard] to then come in [to trial] and change his testimony." *Id.* at 24. To this argument, plaintiff's counsel responded:

"I believe the testimony, as it stands in his [Mr. Hubbard's] deposition **and the testimony that he may offer at trial**, it needs to go to the McIntosh County jurors." *Id.* at 25.

When the Court granted CertainTeed's motion, the Court noted that it could reverse that ruling if a "sufficient foundation is laid" for different testimony at trial by Mr. Hubbard. *Id.* at 26. That ruling, of course, was predicated on the assumption that Mr. Hubbard was alive and could testify at trial.

Given these statements by plaintiff's counsel last August and October, counsel for CertainTeed was astonished to discover in November that Mr. Hubbard had actually been deceased for almost a year and a half.

## ARGUMENT

### Mr. Hubbard's Deposition Testimony Should Be Stricken.

Jasper Hubbard is the only witness in this case to claim that Mr. Bacon worked with a CertainTeed product -- CertainTeed asbestos cement pipe at the Corning Muskogee plant. In late October, however, and only in response to CertainTeed's motion and this Court's Order, plaintiff

produced five product identification affidavits from Mr. Hubbard. These affidavits – two of which were signed before his 2009 deposition in this case and three of which were signed after that deposition – claimed exposure to 16 joint compound or similar products, almost 20 refractory or insulating products, and to Armaspray insulating cement. Yet **none** of these products outlined in Mr. Hubbard’s five affidavits were mentioned at all in his 2009 deposition (or mentioned in his 2004 deposition either).

Plaintiff’s utter failure to produce these affidavits in discovery in a timely manner has resulted in extreme prejudice to CertainTeed.<sup>8</sup> Mr. Hubbard died in July 2010. Thus, CertainTeed has been entirely denied for all time the chance to re-depose Mr. Hubbard in light of these five affidavits, and to see what he has to say about them. While these affidavits give information about other asbestos exposures that Mr. Bacon may have had at the Corning facility, there is very little detail. All of the affidavits are written to reflect Mr. Hubbard’s own exposure to these asbestos products; none mention Mr. Bacon. While all of these affidavits were submitted in support of claims to bankruptcy trusts by Mr. Bacon’s estate, they give no specific information whatsoever concerning Mr. Bacon’s exposures to these products. These details could have been developed through Mr. Hubbard’s deposition, had CertainTeed had the affidavits and been able to depose him about them. As a New Jersey trial court recognized in *Gaskill v. Abex*, 2010 WL 1484813 (N.J. Super. Apr. 1, 2010),

“In asbestos litigation, an accurate statement of work history is critical. It is only by investigation of a Plaintiff’s work history the

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<sup>8</sup> As set forth above, all 11 co-worker affidavits and 19 bankruptcy claim forms should have been produced in response to the discovery requests in this case. They should also have been produced pursuant to 12 O.S. § 3226(E)(2) (party must supplement discovery responses when “party know that the response was incorrect in some material respect when made” and “[t]he additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing...”) Here, plaintiff’s response in December 2008 – “[n]one at this time” – to the discovery requests seeking witness statements and bankruptcy claim forms was “incorrect ... when made.”

Defendants can learn about **all** of Plaintiff's asbestos exposure, an issue that is **central** to all asbestos cases." (Emphasis added.)

Thus, the opportunity to develop evidence on this "central" issue in this case – "all" of Mr. Bacon's asbestos exposures – has been irretrievably lost to CertainTeed.

Further prejudice to CertainTeed results from the fact that CertainTeed has formulated its entire defense in this case without benefit of the 11 affidavits from these four co-workers, and the 19 bankruptcy claim forms. Surely, the testimony of CertainTeed's industrial hygienist, Robert Spence, would be heavily influenced by testimony about Mr. Bacon's exposure to the products outlined in these 11 affidavits and 19 claim forms. Thus, while Mr. Spence opined that Mr. Bacon may have had significant exposure to asbestos from insulation products, these affidavits and bankruptcy claims point much more precisely to the brands and types of asbestos insulation products involved. And Mr. Spence had no information about Mr. Bacon's exposures to joint compound, refractory products, or work around pumps, valves, and turbines outlined in these affidavits and claim forms. Except for some vague testimony about packing on pumps and valves, these products and asbestos exposures have never before been identified in this case. The prejudice to CertainTeed from plaintiff's delayed and inaccurate discovery responses is severe. Discovery has been closed for months, the case is on the eve of trial, and, but for the Court's schedule, would have proceeded to trial last fall. Again, as a New Jersey trial court recognized in *Gaskill*, 2010 WL 1484813:

"Clearly, to have to start discovery anew in some areas, redo discovery already completed, revise expert reports and redo expert depositions would severely prejudice Defendants."

Accord *Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc.*, 139 N.J. 499, 520-21 (1995)

(plaintiff's "delayed production of undisclosed documents" has "significantly prejudiced [defendants'] trial preparation" because it has required defendant "to conduct additional

discovery, obtain revised expert reports, retain a new expert on damages, and engage in additional trial preparation.”).

In these circumstances, the proper remedy is to strike Mr. Hubbard’s testimony in its entirety. The five affidavits from Mr. Hubbard demonstrate that Mr. Hubbard’s deposition testimony is effectively only half the story concerning Mr. Bacon’s asbestos exposure. Many exposures, including to the almost 35 asbestos products listed in the five Hubbard affidavits, are not mentioned at all. At best, Mr. Hubbard’s deposition testimony is an incomplete account of Mr. Bacon’s asbestos exposures; at worst, his testimony is both misleading and inaccurate. Yet due to plaintiff’s actions – her nondisclosure of the bankruptcy claim forms and affidavits until just before trial and after Mr. Hubbard’s death – CertainTeed has been entirely deprived of its ability to develop through Mr. Hubbard’s testimony (either at his 2009 deposition or thereafter) the alternative asbestos exposures documented in those affidavits. As the passage from the *Gaskill* case quoted above recognizes, there can be no doubt that establishing alternative exposure, that is, other exposures to asbestos that could potentially have caused the plaintiff’s disease, are very important in the asbestos litigation. Thus, plaintiff’s nondisclosure of the co-worker affidavits and bankruptcy claim forms has greatly prejudiced CertainTeed. Because this significant prejudice cannot be remedied by taking another deposition of Mr. Hubbard, the only fair remedy is to bar Mr. Hubbard’s testimony entirely.

Such a result would be fully in accord with Oklahoma law. As explained in *Barnett v. Simmons*, 197 P.2d 12, 18 (Okla. 2008), a trial court has “inherent authority” to sanction litigants who appear before it “for abuse of the discovery process” or for “abusive litigation practices.” A failure to comply with discovery obligations, such as in this case, clearly falls within this category. *Barnett* also holds that sanction “must be both fair and related to the particular claim

or defense at issue.” *Id.* at 21. Here plaintiff’s failure for over three years to turn over five affidavits from its only product identification witness against CertainTeed is nothing short of astonishing. Mr. Hubbard’s intervening death has made the prejudice irreparable.

Although *Barnett* held that a discovery violation need not be willful or in bad faith to be sanctioned (197 P.3d at 19), here plaintiff or her counsel acted in bad faith. This is shown by the fact that two of the five non-disclosed Hubbard affidavits were signed on November 9, 2009 – just ten days after Mr. Hubbard’s October 30, 2009 deposition in this case – and yet discussed exposures to almost 20 refractory and insulating products that Mr. Hubbard and his counsel chose not to mention at the October 30 deposition. Indeed, in an effort to cut off questioning about other potential exposures to asbestos by Mr. Bacon, plaintiff’s counsel stipulated near the end of that deposition that Mr. Hubbard “will not offer any further testimony” about any additional asbestos products, manufacturers, or contractors other than what he had already discussed. Ex. B, at 83-84. Bad faith is also shown by the fact that plaintiff’s counsel undoubtedly knew that Mr. Hubbard had died, since as the May 2010 undisclosed affidavit shows, he was in contact with him just a few weeks before his death. Yet, at the pretrial hearings last August and October, plaintiff’s counsel implied repeatedly to both the Court and to CertainTeed’s counsel, that Mr. Hubbard was still living. Indeed, the Court and counsel spent time arguing a motion in limine about the scope of Mr. Hubbard’s testimony that is entirely moot given that he is deceased. Thus, striking Mr. Hubbard’s testimony is both fair and certainly related to the discovery failures at issue. *See also* 12 O.S. § 3237(B)(2)(b) (one of the remedies

for a discovery failure may be “prohibiting [party] from introducing designated matters in evidence”).<sup>9</sup>

The Oklahoma Supreme Court’s opinion in *Holm-Waddle v. Hawley*, 967 P. 2d 1180 (Okla. 1998), is somewhat analogous to the facts here. In that medical malpractice case, the plaintiff’s expert performed an autopsy on plaintiff’s decedent without notice to the other side; the decedent was then cremated and the ashes disposed of without any notice to the defendant. *Id.* at 1182. Once defendant’s counsel learned of the autopsy, it was too late – there were no organs left for examination. The trial court prohibited use by the plaintiff of any materials from the autopsy, and this ruling was upheld by the Oklahoma Supreme Court. Indeed, the Supreme Court held that the discovery violation was so egregious that a dismissal of the entire action would have been justified:

“[T]he trial court could have dismissed the action. The trial court chose instead to ameliorate the ill-gotten advantage by suppressing most of the evidence of the autopsy. No abuse of discretion has been demonstrated.” *Id.* at 1182-83.

So too here, plaintiff’s delay in turning over the five Hubbard affidavits has essentially resulted in the destruction of evidence. Mr. Hubbard’s death – which took place only after this lawsuit had been pending for two full years – has made it impossible for CertainTeed to explore the asbestos exposures alleged in those five affidavits in any detail; it is just as if this evidence had been destroyed by plaintiff’s actions. The Hubbard testimony is incomplete and misleading. Yet none of this would have occurred had plaintiff adhered to her discovery obligations and turned over the witness affidavits when she was supposed to do so. Thus, as in *Holm-Waddle*,

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<sup>9</sup> Although sanctions under 12 O.S. § 3237(B) must be premised upon violation of a court order, *Barnett*, 197 P.3d at 18, here the violation was of the Pre-trial Conference Order – which stated that discovery was complete months ago. Plaintiff’s failure to turn over the 11 affidavits and 19 bankruptcy claim forms in response to discovery requests caused discovery to be incomplete and thus to violate this Court’s Pre-trial Conference Order. See 12 O.S. § 3226(F) (providing for entry of pretrial order); 12 O.S. § 3237(B)(2) (allowing sanctions for violation of § 3226(F) order).

the appropriate remedy is to bar the testimony affected by plaintiff's discovery abuses, that is, Mr. Hubbard's deposition testimony.

Courts in other states have struck testimony by witnesses for similar discovery violations. For example, in *Stoney v. Cingular Wireless LLC*, 2009 WL 4250069 (D. Colo. Nov. 25, 2009), the court struck testimony of plaintiff's economic expert when plaintiff disclosed, a month before trial, a new supplemental report by that expert based on new facts that plaintiff had known for at least several months. *Id.* at \*4-\*7. The court held that the late disclosure violated the court's scheduling order and the plaintiff's discovery obligations, and was "neither substantially justified nor harmless." *Id.* at \*6. Accord *West Va. Dept. of Trans. v. Parkersburg Inn, Inc.*, 222 W. Va. 688, 698-700 (2008) (sustaining trial court's refusal to allow fact witness to testify as an expert when defendant failed to list witness as an expert in discovery responses). Indeed, in *Heath v. Zolotoi*, 221 F.R.D. 545, 548, 553 (W.D. Wash. 2004), a federal court entered a default judgment against a defendant for failure to turn over witness statements that were first disclosed to plaintiff at least two years after defendant had them, and just a week before the discovery cut off and four months before trial.

As stated by the New Jersey Supreme Court in *Abtrax Pharmaceuticals, Inc.*, 139 N.J. at 521:

"A litigant that deliberately obstructs full discovery corrupts one of the fundamental precepts of our trial practice – the assumption by the litigants and the court that all parties have made full disclosure of all relevant evidence in compliance with the discovery rules."

Plaintiff failed to adhere to that "fundamental precept" of our litigation system. For that reason, Mr. Hubbard's deposition testimony should not be allowed.

## CONCLUSION

For the reasons stated, Mr. Hubbard's testimony should be stricken in its entirety. In addition, plaintiff should be required to pay the reasonable costs and attorney's fees incurred by CertainTeed in preparing and filing this motion. See 12 O.S. § 3237(B)(2) (in addition to other sanctions for discovery failure, court may require party "to pay the reasonable expenses, including attorney fees, caused by the failure ...."); *Barnett*, 197 P.3d at 18 (§ 3237(B) makes imposition of fees and costs on sanctioned party mandatory).

Respectfully submitted,

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December \_\_, 2011

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served upon plaintiff's counsel via Federal Express on the \_\_\_ day of December, 2011.

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**IN THE DISTRICT COURT FOR McINTOSH COUNTY  
STATE OF OKLAHOMA**

LORRAINE BACON, Individually and as )  
Surviving Spouse and as Personal Representative )  
Of the Heir and the Estate of Fred W. Bacon, )  
Deceased, and on behalf of all wrongful death )  
Beneficiaries, )

Plaintiffs, )

v. )

AMETEK, INC., Successor in interest to )  
HAVEG INDUSTRIES, INC., et al., )

Defendants. )

No. CJ-08-238

**MEMORANDUM IN SUPPORT OF DEFENDANT CERTAINTIED CORPORATION'S  
MOTION TO DELAY TRIAL UNTIL PLAINTIFF COMPLETES HER BANKRUPTCY  
TRUST CLAIMS**

In October 2011, pursuant to this Court's Order, plaintiff produced 19 claim forms she has submitted seeking payments from various bankruptcy trusts.<sup>1</sup> Plaintiff also revealed that she has received to date approximately \$185,000 in settlements from five bankruptcy trusts. With respect to the other 14 bankruptcy trust claims that plaintiff has submitted, however, she states that she has "deferred" those claims for now. See Plaintiff's Supplemental Response to Interrogatory No. 4 (October 25, 2011) (attached as Ex. 1).<sup>2</sup>

As explained in detail below, assuming that plaintiff's 14 "deferred" bankruptcy claims are accepted by the various trusts, she will recover, at a minimum, a total of \$313,000 from these

<sup>1</sup> These 19 claims were submitted to 17 various trusts. The Owens Corning and Fibreboard claims were submitted to one trust. So were the Federal-Mogul (Flexitallic) and Federal-Mogul (Turner & Newall) claims.

<sup>2</sup> Plaintiff's supplemental response to Interrogatory No. 4 actually lists 12 claims as "deferred," but she has received payment for one of them (Plibrico Trust). Her supplemental response to Interrogatory No. 2 also lists three more pending bankruptcy claims (Federal-Mogul (Flexitallic), Federal-Mogul (Turner & Newall) and U.S. Minerals), and does not indicate whether or not these three claims have also been deferred. For purposes of this Motion, we have assumed that plaintiff has also deferred those three claims.

bankruptcy trusts. Under Oklahoma law, CertainTeed will be entitled to a dollar-for-dollar credit against any verdict in the amount of any settlements received by plaintiff. See 12 O.S. § 832(H). Plaintiff's obvious motivation, in deferring these claims, is to deprive CertainTeed of these settlement credits. That is, plaintiff seeks to defer recovery from those 14 bankruptcy claims until her lawsuit against CertainTeed in this Court is concluded so that her recovery from those 14 claims will not be offset against any verdict against CertainTeed. This would be massively unfair to CertainTeed, and represents an end-run around Oklahoma's settlement credit rules. This Court should not sanction such an unfair result.

Accordingly, this Court should continue any trial in this case until (1) plaintiff ends her voluntary deferral of these 14 bankruptcy claims and any settlements from these trusts have been paid; and (2) plaintiff submits and receives payment from any other bankruptcy trust to which she intends to submit a claim. In this way, this Court can assure that CertainTeed receives the full settlement credits to which it is entitled under Oklahoma law.

#### **STATEMENT OF FACTS**

At the October 14 pretrial hearing in this case, this Court ordered that plaintiff produce any claims she had submitted to any asbestos bankruptcy trusts. In response, plaintiff produced 19 claim forms and other documents that she had submitted to 17 bankruptcy trusts. The claim forms and other papers she produced showed that she has already collected approximately \$185,000 from five of the 19 bankruptcy trust claims that she has submitted. Specifically, she has collected \$87,713.14 from the USG Trust; \$15,468.75 from the ARTRA Trust; \$25,952.08 from the APMC (National Gypsum) Trust; \$29,750 from the Plibrico Trust; and \$26,250 from the Johns-Manville Trust. See Plaintiff's Supplemental Response to Interrogatory No. 2

(October 25, 2011) (attached as Ex. 1).<sup>3</sup> With respect to the other 14 bankruptcy trust claims that she has submitted, however, plaintiff states that she has “deferred” those claims for now. *Id.*, Supplemental Response to Interrogatory No. 4 and note 2, *supra*.

Attached to this memorandum as Ex. 3 is an Affidavit of Bradley Drew, a Managing Director at PACE Claims Services, a subsidiary of Navigant Consulting, Inc. Drew Aff. ¶ 2. Since he began at Navigant in 1991, Mr. Drew has worked almost exclusively in the area of asbestos claims and insurance issues. *Id.* ¶ 3. He is very knowledgeable concerning procedures and payments under asbestos bankruptcy trust. *Id.* ¶ 4. He has studied the Trust Distribution Procedures (“TDPs”) for over 50 bankruptcy trusts, bankruptcy trust claim forms, and payment procedures, including the trusts to which plaintiff has applied and deferred her claims. *Id.* ¶ 4, 6. Mr. Drew has calculated the minimum payment from these trusts that plaintiff may receive (assuming her claim is accepted by these trusts). *Id.* ¶ 6. As Mr. Drew explains, the minimum amount that plaintiff may recover from the 14 claims she has deferred is approximately \$313,000. *Id.* He adds that plaintiff may recover even more than this amount if she seeks from these trusts something other than the minimum amount available for mesothelioma claims (or, in the future, if these trusts revise their procedures and increase the payment percentages they are currently using). *Id.* ¶ 7.

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<sup>3</sup> Plaintiff’s supplemental response to Interrogatory No. 2 states that she has not recovered from the ARTRA Trust and received \$4,200 from the Plibrico Trust. But the trust claim documents she produced in October show signed releases for settlements of \$15,468.75 with the ARTRA Trust and of \$29,750 with the Plibrico Trust.

Copies of the 19 bankruptcy claim forms and other materials that plaintiff produced with her supplemental interrogatory responses on October 25 are attached as Ex. 2 hereto.

## ARGUMENT

### **This Court Should Continue the Trial Until Plaintiff Ends Deferral of These 14 Bankruptcy Claims and Receives the Settlements To Which She Is Entitled from These Trusts.**

Oklahoma law provides that, if plaintiff obtains a verdict against CertainTeed, CertainTeed is entitled to a set-off from any verdict for prior settlement monies received. Thus, O.S. § 832(H) provides, in the relevant part:

“When a release, covenant not to sue, or similar agreement is given in good faith to two or more persons liable in tort for the same injury or the same wrongful death: (1) ... it reduces the claim against others to the extent of any amount stipulated by the release or the covenant, or in the amount of the considerations paid for it, whichever is greater....”

As matters now stand, the potential credits against any verdict from plaintiff's bankruptcy claims is only \$185,000, which is the amount that plaintiff has received for the five bankruptcy claims that she has not deferred. If, however, plaintiff had pursued her 14 claims against the other bankruptcy trusts instead of deferring them, an additional \$313,000 (and possibly more) would be credited against any verdict against CertainTeed.

Plaintiff's decision to defer these 14 bankruptcy claims is an obvious attempt to deprive CertainTeed of the settlement credits to which it would otherwise be entitled under Oklahoma law. There is no other plausible explanation for the deferral of these claims. Indeed, commentators have noted that asbestos plaintiffs often defer filing of bankruptcy trust claims until after they have recovered in the tort system in order to avoid giving solvent defendants any credits or set-offs for amounts received as a result of bankruptcy claims. See William P. Shelley et al., “The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts,” *17 Norton Journal of Bankruptcy Law and Practice*, 257, 282 (2008) (plaintiffs sometimes “delay their submission of claims to trusts” “to maximize the damage recovery from

tort defendants by preventing a judgment reduction on account of recoveries from 524(g) trusts.”); Mark A. Behrens, “Pennsylvania Moves Forward with Considering Asbestos Trust Recoveries when Calculating Tort System Awards,” 26 *Mealey’s Litig. Reports: Asbestos* 34 (Sept. 7, 2011) (without “interface between the trust and tort systems,” “asbestos claimants can potentially ‘double dip’ – obtain trust recoveries and tort damages for the same injury”).

This sort of “double dipping” by the plaintiff is contrary to the policies under 12 O.S. § 832(H). The entire reason for this statutory provision giving defendants credit for amounts paid by others in settlement is to “codif[y] the rule against double recovery ....” *Morava v. Central Okla. Med. Group*, 26 P.3d 779, 783 (Okla. App. 2001).

There is an obvious and simple solution to avoid unfairness in this case. This Court cannot compel plaintiff to end deferral of these 14 bankruptcy trust claims. But this Court does have control over the scheduling of its own docket. See *Boston v. Buchanan*, 89 P.3d 1034, 1044 (Okla. 2004) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (Cardozo, J.) (“power is inherent in every court to control the disposition of the causes on its docket.”)). Thus, it is fully within this Court’s authority to continue the trial in this case until plaintiff ends her voluntary deferral of these 14 bankruptcy claims and receives any settlements from these trusts to which she is entitled (along with any settlements from any bankruptcy trusts to which she intends to submit a claim in the future). That continuance would avoid any unfairness to CertainTeed. It would also be fair to the plaintiff. It would assure that she would receive full compensation for her injuries, and only avoid a result under which she could “double dip” – that is, recovering fully in the tort system from CertainTeed and then receiving at least another \$313,000 from a set of bankruptcy trusts.

## CONCLUSION

For the reasons stated, this Court should continue the trial date in this case until the plaintiff either receives payment for the 14 bankruptcy claims that she has deferred (or those claims are denied); and (2) submits and receives payment for any other bankruptcy trust claim she intends to submit.

Respectfully submitted,

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December \_\_, 2011

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served upon plaintiff's counsel via Federal Express on the \_\_\_\_ day of December, 2011.

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STATE OF NEW JERSEY ) SS:

COUNTY OF MERCER )

**AFFIDAVIT OF BRADLEY DREW**

1. My name is Bradley Drew. I am over the age of 18 and competent to make this Affidavit.
2. I am a Managing Director at PACE Claims Services, a subsidiary of Navigant Consulting, Inc. I have worked at Navigant since July 1991. I received a Bachelor's of Science degree in Aeronautical & Astronautical Engineering in 1987 and a Masters of Business Administration in 1991, both from the University of Illinois.
3. During my career at Navigant, I have worked almost exclusively in the area of asbestos claims and insurance issues. I have helped companies manage data concerning asbestos claims and settlements. I have also been deeply involved in helping insurance companies understand and manage U.S. asbestos claims. I have provided testimony relating to asbestos claims management in several court cases, and have given presentations on management and trends in asbestos claims at numerous industry conferences.
4. I am also quite knowledgeable concerning procedures and payments under asbestos bankruptcy trusts. I have studied the Trust Distribution Procedures ("TDPs") for over 50 asbestos bankruptcy trusts, bankruptcy trust claim forms, and payment procedures.
5. I have reviewed the supplemental discovery responses and 19 bankruptcy claim forms submitted by the plaintiff in the *Bacon* case. As I understand these materials, the plaintiff has recovered approximately \$185,000 for five of these claims -- \$87,713.14 from the USG Trust; \$15,468.75 from the ARTRA Trust; \$25,952.08 from the APMC (National Gypsum) Trust; \$29,750 from the Plibrico Trust; and \$26,250 from the Manville Trust. I also understand that plaintiff has "deferred" for now her 14 claims against the other bankruptcy trusts to which she has submitted claims.
6. I have studied the TDPs for the trusts that will process the other 14 claims, including the amounts that plaintiff will receive for these 14 claims if she elects to receive the minimum amounts available at this time from these trusts for a mesothelioma claim. These minimum amounts are as follows:

H.K. Porter:	\$1,260
Fibreboard:	\$14,850
Owens-Corning:	\$21,500
AWI:	\$22,000
Combustion Engineering:	\$36,247.50
ACandS:	\$8,670
KACC:	\$24,500
DII (Harbison-Walker):	\$71,662.50

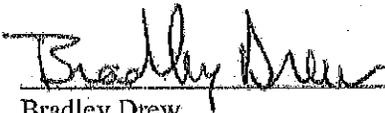
GI-Holdings: \$13,330  
THAN: \$45,000  
Federal Mogul (T&N): \$12,000  
Federal Mogul (Flexitallic): \$3,000  
Asarco: \$37,400  
U.S. Minerals: \$1,250

These amounts total approximately \$313,000.

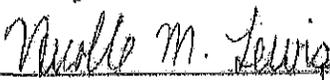
7. If, however, the plaintiff in *Bacon* elects to seek from these Trusts something other than the minimum amount that may be received from these trusts, additional amounts may be available. There is also a possibility that plaintiff may receive additional funds from these trusts in the future if, for example, these trusts revise their procedures and increase the payment percentages they are currently applying for claims submitted to them.

\* \* \*

I declare under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
Bradley Drew

Sworn to and subscribed before me on this 2<sup>nd</sup> day of December, 2011.

  
\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_

Nicole M. Lewis Notary Public New Jersey My Commission Expires 08-07-2018 No. 2030359
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# Exhibit

G

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
IN RE: NEW YORK CITY : NYCAL  
ASBESTOS LITIGATION :  
-----X  
ALFRED D'ULISSE and MARGARET D'ULISSE, : Index No. 113838/04  
 :  
Plaintiffs, : Hon. Louis B. York  
 :  
-against- :  
 :  
AMCHEM PRODUCTS, INC., *et al.*, :  
 :  
Defendants. :  
-----X

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT  
CHRYSLER LLC'S MOTION FOR LEAVE TO RENEW**

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## PRELIMINARY STATEMENT

Defendant DaimlerChrysler Corporation ("Chrysler"), by its attorneys, Lynch Daskal Emery LLP, respectfully submits this memorandum of law in support of its motion, pursuant to CPLR §§ 2221(e) and 4404(a), for leave to renew its January 17, 2007 motion ("January 2007 post-trial motion") for an Order vacating the recklessness finding, for remittitur, and for judgment, or, in the alternative, for new trial.

On November 21, 2007, almost one year after a jury rendered a verdict for plaintiff in this multi-defendant asbestos products liability matter, plaintiff produced for the first time sworn admissions he made in two settlement releases and exposure admissions in claim forms filed with five asbestos bankruptcy trusts. These statements include product exposure evidence, the jury's consideration of which would have altered the verdict substantially. Chrysler must be granted leave to renew its January 2007 post-trial motion on the ground that had these facts been known at the time the motion was made, they likely would have changed the Court's determination on the motion, and the Court would have set aside the verdict. After granting leave to renew, the Court should grant Chrysler's January 2007 post-trial motion and enter judgment for Chrysler, or in the alternative, order a new trial with costs and attorneys' fees, including all such costs and fees incurred in connection with the trial.

The relevant facts are set forth in the accompanying Affirmation of Scott R. Emery, Esq. in Support of Chrysler LLC's Motion for Leave to Renew (the "Emery Aff.") and are not repeated here.

## ARGUMENT

### POINT I

#### THIS COURT SHOULD GRANT CHRYSLER'S MOTION FOR LEAVE TO RENEW ITS JANUARY 2007 POST-TRIAL MOTION

##### I. The Standard for Motions for Leave to Renew

A motion for leave to renew “shall be based on new facts not offered on the prior motion that would change the prior determination...” CPLR § 2221(e)(2); *see also Azzopardi v. Amer. Blower Corp., et al.*, 192 A.D.2d 453, 453-54, 596 N.Y.S.2d 404, 405 (1st Dep’t 1993) (granting motion for leave to renew where party presented new facts not previously available). Such a motion is “intended to bring to the court’s attention new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court’s attention.” *Tishman Constr. Corp. of New York v. The City of New York*, 280 A.D.2d 374, 376-77, 720 N.Y.S.2d 487, 490 (1st Dep’t 2001). Although it is generally true that a motion to renew must be based on newly-discovered facts, a court has discretion to grant renewal even upon facts known to the movant at the time of the original motion. *See Wilder v. May Dep’t Stores Co.*, 23 A.D.3d 646, 648, 2005 N.Y. Slip Op. 09089 (2d Dep’t 2005). *See also Strong v. Brookhaven Mem’l Hosp. Med. Ctr.*, 240 A.D.2d 726, 726, 659 N.Y.S.2d 104, 105 (2d Dep’t 1997). Indeed, even where the “vigorous requirements” for renewal are not met, a motion for renewal may be granted in the interest of justice and based on substantive fairness principles. *See Garner v. Latimer*, 306 A.D.2d 209, 209-210, 761 N.Y.S.2d 657, 658 (1st Dep’t 2003) (internal citation omitted); *see also Mejia v. Nanni et al.*, 307 A.D.2d 870, 871, 763 N.Y.S.2d 611, 612 (1st Dep’t 2003).

**II. Justice Demands that Chrysler Be  
Granted Leave to Renew its January 2007  
Post-trial Motion Because the Newly-Revealed  
Evidence Would Have Directly Impacted the  
Verdict and the Court's Determination on the Motion**

As detailed in the Emery Aff., due to plaintiff's misrepresentations and omissions and violation of the New York City Asbestos Litigation Case Management Order, the information upon which this motion is based was unavailable to Chrysler until November 21, 2007. *See* Emery Aff. at ¶¶ 13, 19. On that date, plaintiff disclosed for the first time: (i) pre-trial settlement releases with Garlock and Ingersoll Rand in which Mr. D'Ulisse admitted that he was exposed to asbestos-containing products manufactured by those companies; (ii) a claim submitted to the Johns-Manville Personal Injury Settlement Trust on plaintiff's behalf in which plaintiff's counsel affirmed that Mr. D'Ulisse had been exposed to Johns-Manville brakes; and (iii) claim forms submitted by Arthur Luxenberg, Esq. on plaintiff's behalf to the Amatex, Celotex, Eagle-Picher, and Combustion Engineering bankruptcy trusts that contain admissions of Mr. D'Ulisse's exposures to various products. *See id.* at ¶ 20.

By filing a Note of Issue on November 15, 2005, plaintiff affirmed that discovery was complete in this matter. Chrysler relied on that representation together with the fact that plaintiff had a duty, under the New York City Asbestos Litigation Case Management Order, to file any proofs of claims with bankruptcy trusts no later than 90 days before trial. *See id.* at ¶ 22. Finally, and perhaps most notably, Chrysler relied on Mr. D'Ulisse's trial testimony in which he denied exposure to Amatex, Celotex, and Eagle-Picher products, mentioned his use of just one category of Johns-Manville products (building materials), and did not mention use of Garlock, Ingersoll Rand, Anchor, or Combustion Engineering products. *See id.* at ¶¶ 24, 40. Chrysler counsel made reasonable efforts prior to and during trial to ascertain any additional information

regarding Mr. D'Ulisse's product exposure. *See id.* at ¶¶ 38, 40-41. That plaintiff misrepresented to the Court that the information existed and withheld it until November of 2007 made it impossible for Chrysler to present this information to the Court at the time of its January 2007 post-trial motion. As such, Chrysler should be granted leave to renew the motion.

## POINT II

### **THIS COURT SHOULD GRANT CHRYSLER'S MOTION FOR JUDGMENT OR, IN THE ALTERNATIVE, A NEW TRIAL WITH COSTS AND ATTORNEYS' FEES**

#### **I. The Applicable Standards**

Pursuant to CPLR § 4404(a),

the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

*See also Ewanitsko v. Verdi Equities*, 31 A.D.3d 493, 494, 818 N.Y.S.2d 254, 255 (2d Dep't 2006) (setting aside jury verdict where the verdict could not have been reached on any fair interpretation of the evidence). Similarly, CPLR § 5015(a)(2) allows a party relief from judgment on the grounds of (i) newly-discovered evidence if the introduction of the evidence at trial would probably have produced a different result or (ii) fraud, misrepresentation, or other misconduct of an adverse party. *See Amalfi v. Post & McCord*, 250 A.D. 408, 414, 294 N.Y.S. 633, 640 (1st Dep't 1937) (a party is entitled to a new trial on the ground of newly-discovered evidence where, as here, it appears that the "evidence was not and could not have been discovered in the exercise of reasonable diligence before the trial, that it is material and not merely cumulative or of an impeaching character in the sense of affecting credibility only as distinguished from having probative force by showing a different state of facts and that on a new

trial it would probably change the result”) (internal citations omitted); *Prote Contracting Co., Inc. v. Board of Educ. of the City of New York*, 230 A.D.2d 32, 39, 657 N.Y.S.2d 158, 163 (1st Dep’t 1997) (ordering new trial where post-trial evidence not previously available warranted relief from judgment); *Swarzina v. Knight & Timoney, Inc., et al.*, 265 A.D. 33, 36, 37 N.Y.S.2d 579, 581-82 (1st Dep’t 1942); and *Rivera v. Rumax Realty Corp.*, 256 A.D. 277, 277-78, 9 N.Y.S.2d 880, 880-81 (1st Dep’t 1939) (each ordering new trial with costs where newly-discovered evidence directly contradicted plaintiff’s trial testimony).

**II. Judgment Should Be Granted for Chrysler Because Plaintiff Withheld Information the Timely Disclosure of Which Would Have Led The Jury to a Different Verdict**

Plaintiff’s willful non-disclosure of product exposure admissions smacks of fraud and led to a verdict that should not stand. Indeed, where, as here, there is “clear evidence of a gross fraud practiced upon the court” and the attack on the verdict is not “collateral, long-delayed or merely reflect[ive] of a disappointed or ill-prepared litigant’s second thought,” a court has the “power and exercises it to nullify its own verdict or judgment, thus fraudulently procured.” *See McCarthy v. Port of NY Authority*, 21 A.D.2d 125, 129, 284 N.Y.S.2d 713, 717 (1st Dep’t 1964). A trial court only requires ordinary diligence with respect to discovering the evidence at issue before the trial. *See Frohlich v. Zeltzer*, 185 A.D. 103, 110, 173 N.Y.S. 15, 20 (1st Dep’t 1918). Had the jurors been aware that Mr. D’Ulisse had admitted exposure to Garlock, Anchor Packing, and Ingersoll Rand products, they would have likely apportioned liability to those entities. *See Emery Aff.* at ¶¶ 29, 45. Similarly, had the jurors known that Mr. D’Ulisse had admitted exposure to Johns-Manville products, Johns-Manville would have appeared on the verdict sheet and liability likely would have been apportioned to it. *See id.* at ¶ 63.

Finally, had the jurors been aware that claim forms would be submitted on Mr. D'Ulisse's behalf to Amatex, Celotex, Combustion Engineering, and Eagle-Picher asbestos bankruptcy trusts containing sworn statements by Arthur Luxenberg, Esq. that Mr. D'Ulisse had been exposed to asbestos-containing products manufactured by those companies, they very likely would have apportioned a percentage of liability to those entities. *See id.* at 77. Indeed, because Mr. Luxenberg was acting in his authorized capacity as plaintiff's attorney at the time he made those sworn statements, the statements are admissible against plaintiff. *See Bellino v. Bellino Constr. Co., Inc.*, 75 A.D.2d 630, 631, 427 N.Y.S.2d 303, 303 (2d Dep't 1980).

Justice Helen Freedman has ruled that statements in proofs of claims forms like those filed on Mr. D'Ulisse's behalf with the Johns-Manville, Amatex, Celotex, Eagle-Picher, and Combustion Engineering trusts are admissions:

[W]hile the proofs of claim are partially settlement documents, they are also presumably accurate statements of the facts concerning asbestos exposure of the plaintiffs. While they may be filed by the attorneys, the attorneys do stand in the shoes of the plaintiffs and an attorneys' [sic] statement is an admission under New York law. *Therefore, any factual statements made in the proofs of claim about alleged asbestos exposure of the plaintiff to one of the bankrupt's products should be made available to the defendants who are still in the case.*

Emphasis added. *Drabczyk v. Amchem Prods., Inc., et al.*, (Supreme Court, Erie County, Decision and Order filed January 18, 2008, J.H.O. John P. Lane, Index No. 2005/1583) (*citing* Justice Freedman's oral decision on the record dated December 11, 2003, and filed December 18, 2003 in the *Negrepoint v. A.C.&S., Inc.* matter, New York County, Index No. 120894/01) (emphasis added).

Where a jury's apportionment of liability is against the weight of the evidence, a verdict will properly be set aside. *See Yalkut v. City of New York*, 162 A.D.2d 185, 188, 557 N.Y.S.2d 3, 6-7 (1st Dep't 1990). Here, had the jury been aware of Mr. D'Ulisse's sworn admissions that he

was exposed to Garlock and Ingersoll Rand products and the fact that he was exposed to the asbestos-containing products of five bankrupt entities, it would have allocated liability to all seven of those entities, thus materially changing its verdict and apportionment determination.

### **III. In the Alternative, the Interests of Justice Would Be Served By Granting a New Trial**

In determining whether to grant a new trial, “the court should weigh the likelihood and degree of the false testimony, the affront to the court, and the probability of changing the result against the degree of diligence exercised by the moving party and the time and manner in which the new trial is sought.” *McCarthy*, 21 A.D.2d 125, 128, 284 N.Y.S.2d 713, 716 (internal citations omitted). As is true in Chrysler’s case, “it must appear that the evidence was not and could not have been discovered in the exercise of reasonable diligence before the trial.” *Frohlich v. Zeltzer*, 185 A.D. 103, 109-110, 175 N.Y.S. 15, 21 (1st Dep’t 1918). In *McCarthy*, defendant moved to set aside the verdict and for new trial where the consideration of supplemental evidence would have established the false testimony of plaintiff. *See McCarthy*, 21 A.D.2d at 128, 284 N.Y.S.2d at 716. The court noted that corroborative affidavits and exhibits sufficiently served as evidence of gross fraud upon the court and affirmed the lower court’s Order of a new trial. *See id.* *See also Hawkins v. Regan, Inc.*, 39 A.D. 2d 908, 910, 332 N.Y.S.2d 767, 770 (2nd Dep’t 1972) (granting defendant’s motion for new trial on the ground of newly-discovered evidence where the evidence contradicted plaintiff’s testimony and noting that “[t]he interests of justice are not served by denying this defendant the right to present highly material evidence”); *see also Frohlich*, 185 A.D. 103, 110, 173 N.Y.S. 15, 20 (noting that “the probative force of the newly-discovered evidence is only considered in determining whether it is probable that the result would be different on a new trial” and granting new trial where if the newly-discovered evidence were found to be true, it “tend[ed] strongly to show that the testimony of the [prevailing

party] was not worthy of credence and render[ed] it highly probable that the judgment...[was]...erroneous”).

Here, the newly-revealed evidence of Mr. D’Ulisse’s asbestos exposures, intentionally and bold facedly withheld from Chrysler until long after trial, would have changed the jury’s verdict findings. That the Weitz firm procured a verdict through fraud should not be condoned or ignored. Under these circumstances, Chrysler is entitled to a new trial with costs and attorneys’ fees.

### CONCLUSION

For the foregoing reasons and the reasons stated in the Emery Aff., defendant Chrysler LLC respectfully requests that this Court: (i) grant it leave to renew its January 17, 2007 post-trial motion for an Order vacating the recklessness finding, for remittitur, and for judgment, or, in the alternative, for new trial; (ii) upon granting Chrysler leave to renew, grant its motion for judgment, or in the alternative, a new trial with costs and attorneys’ fees, including all such costs and fees incurred in connection with the trial and (iii) grant Chrysler other such and further relief as this Court deems just, including the award of costs and attorneys’ fees.

Dated: New York, New York  
January 22, 2008

Respectfully submitted,

LYNCH DASKAL EMERY LLP  
Attorneys for *Defendant Chrysler LLC*

By:   
\_\_\_\_\_  
Scott R. Emery

264 West 40th Street  
New York, New York 10018  
(212) 302-2400

TO: Jerry Kristal, Esq.  
Weitz & Luxenberg, P.C.  
180 Maiden Lane, 17th Floor  
New York, NY 10038

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

RECEIVED  
JAN 23 2008  
IAS MOTION  
SUPPORT SERVICE

-----X  
IN RE: NEW YORK CITY : NYCAL  
ASBESTOS LITIGATION :  
-----X  
ALFRED D'ULISSE and MARGARET D'ULISSE, : Index No. 113838/04  
 :  
Plaintiffs, : Hon. Louis B. York  
 :  
-against- :  
 :  
AMCHEM PRODUCTS, INC., *et al.*, :  
 :  
Defendants. :  
-----X

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT  
CHRYSLER LLC'S MOTION FOR LEAVE TO RENEW**

Scott R. Emery  
LYNCH DASKAL EMERY LLP  
Attorneys for Defendant Chrysler LLC  
264 West 40th Street  
New York, New York 10018  
(212) 302-2400

# Exhibit

H

Attachment H

0001

1 V I R G I N I A:  
2 IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN  
3 -----X  
4 JAMES L. DUNFORD, )  
5 Plaintiff, )  
6 -vs- ) Case No: CL-25113  
7 HONEYWELL CORP., et al., )  
8 Defendants. )  
9 -----X  
10 HONORABLE THOMAS D. HORNE  
11 Leesburg, Virginia  
12 Wednesday, December 10, 2003  
13 9:03 a.m.  
14 Job No.: 1-26846  
15 Pages 1 - 108  
16 Reported by: T. R. Hollister  
17  
18  
19  
20  
21  
22

♀  
0002

1 The motions hearing was held at:  
2  
3 LOUDOUN COUNTY CIRCUIT COURT  
4 Courtroom 2B  
5 18 East Market Street  
6 Leesburg, Virginia 20178  
7 (703) 777-0270  
8  
9 Pursuant to notice, before T. R.  
10 Hollister, Notary Public for the Commonwealth of  
11 Virginia.  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

♀  
0003

1 A P P E A R A N C E S  
2 ON BEHALF OF PLAINTIFF:  
3 JAMES C. LONG, ESQUIRE  
4 WEITZ & LUXENBERG, P.C.  
5 180 Maiden Lane  
6 New York, New York 10038-4925  
7 (212) 558-5500  
8 MARC C. GRECO, ESQUIRE  
9 GLASSER & GLASSER, P.L.C.  
10 Crown Center, Suite 600  
11 580 East Main Street  
12 Norfolk, Virginia 23510  
13 (757) 625-6787  
14 ON BEHALF OF DEFENDANT DAIMLERCHRYSLER, FORD  
Page 1

Attachment H

15 MOTOR COMPANY and GENERAL MOTORS:  
16 STEVEN R. WILLIAMS, ESQUIRE  
17 MICHAEL R. DAGLIO, ESQUIRE  
18 SAMUEL L. TARRY, JR., ESQUIRE  
19 MCGUIRE WOODS, L.L.P.  
20 901 East Cary Street  
21 Richmond, Virginia 23219-4030  
22 (804) 775-1000

♀  
0004

1 A P P E A R A N C E S (cont.)  
2 ON BEHALF OF DEFENDANT STANDARD MOTOR PRODUCTS:  
3 SHEPHERD D. WAINGER, ESQUIRE  
4 KAUFMAN & CANOLES, P.C.  
5 150 West Main Street, Suite 2100  
6 Norfolk, Virginia 23510-1609  
7 (757) 624-3015  
8 SUSAN J. COLE, ESQUIRE  
9 BICE COLE LAW FIRM  
10 2801 Ponce De Leon Boulevard  
11 Suite 550  
12 Coral Gables, Florida 33134  
13 (305) 444-1225  
14 ON BEHALF OF DEFENDANT CUNNINGHAM AUTO PARTS  
15 d/b/a FAIRFAX AUTO PARTS HERNDON, INC.:  
16 NEIL J. MacDONALD, ESQUIRE  
17 HARTEL, KANE, DeSANTIS,  
18 MacDONALD & HOWIE, L.L.P.  
19 6301 Ivy Lane, Suite 800  
20 Greenbelt, Maryland 20770  
21 (301) 486-1200  
22

♀  
0005

1 A P P E A R A N C E S (cont.)  
2 ON BEHALF OF DEFENDANTS TOTAL AUTO PARTS  
3 HERNDON, INC. and HORN MOTORS, INC.:  
4 JONATHAN D. FRIEDEN, ESQUIRE  
5 ODIN, FELDMAN & PITTLEMAN, P.C.  
6 9302 Lee Highway, Suite 1100  
7 Fairfax, Virginia 22031  
8 (703) 218-2100  
9

10 ALSO PRESENT: Steve Roberts, McGuire Woods  
11 Information Technology  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

♀  
0006

1 P R O C E E D I N G S  
2 THE COURT: Good morning to all of you.  
3 All right. There are a number of motions that are  
4 on the docket today. Did counsel discuss an order  
5 in which we might take these up?

Attachment H

6 MR. WILLIAMS: Your Honor, we did not.  
7 Steve Williams for McGuire Woods for General Motors  
8 and DaimlerChrysler. It makes most sense to us, we  
9 think, to handle the motion for sanctions first,  
10 because it could prove dispositive and moot the rest  
11 of the docket.

12 THE COURT: All right. Go ahead with the  
13 motion for sanctions then.

14 MR. WILLIAMS: Thank you, Your Honor.  
15 We have something of a multimedia presentation here  
16 today, Your Honor. This is Mr. Roberts from my  
17 office. And he will be operating the equipment.  
18 Hopefully we'll be able to go forward without having  
19 any glitches.

20 Your Honor, I guess I need to start off  
21 by saying that we're not at all happy to be arguing  
22 this here today. I've got to say that I personally

♀  
0007

1 have never brought a motion for sanctions in my  
2 career. And so this is something of a monumental  
3 event for us. We thought long and hard before we  
4 brought this, but we concluded that we needed to  
5 bring it because of the comprehensiveness and  
6 pervasiveness of the deception that has occurred in  
7 the discovery of this case.

8 We thought before the events of the last  
9 two weeks that our brief that we filed on the 26th  
10 pretty well laid out the pattern of deception. We  
11 now know from what we've learned in the intervening  
12 time that it was actually woefully inadequate. And  
13 so now I would like to go ahead and start with the  
14 order of how we intend to proceed.

15 The first issue we'd like to address to  
16 the Court is why this issue is important subsequent  
17 to the case. Bring up the next thing. The next  
18 thing we'd like to talk about, and this will take  
19 the bulk of our presentation, is the time line  
20 detailing the Plaintiff's pattern of deception. And  
21 this will take a fair amount of time.

22 Third. we'd like to address up front

♀  
0008

1 what we consider maybe the possible Plaintiff's  
2 responses. We haven't received a written response  
3 yet, so a little bit of this may be anticipatory.  
4 Finally, we'd like to talk about what we would like  
5 at the conclusion of this hearing.

6 So let's go ahead and start off with why  
7 this issue is important subsequent to the case. In  
8 a nutshell, the Plaintiff's theory of this case is  
9 that the Plaintiff's peritoneal mesothelioma was  
10 caused by exposure to asbestos and its only exposure  
11 to asbestos came from working around friction  
12 products manufactured by the Defendants in this  
13 case. Now, this is the position that was taken by  
14 Plaintiff and his counsel through over two years of  
15 discovery since the case was first filed. We have  
16 constantly heard through discovery in this case that  
17 the Plaintiff's only exposure was at the two gas  
18 stations that he worked at, one back in the early  
19 '80s. Go on to the next slide.

20 I now would like to address why this is

21 an important issue from our perspective. And I'm  
22 not revealing any strategic secrets here. I mean

♀  
0009

1 this is pretty straightforward and I think everybody  
2 involved in the case understands our defense. We  
3 basically have two prongs. The first is that  
4 science has proven that asbestos-containing friction  
5 products, the kind that Mr. Dunford alleges caused  
6 his peritoneal mesothelioma, do, in fact, not cause  
7 the disease. And so the second prong of our  
8 defense, which is really the essential one, is that  
9 the Plaintiff must have had some other asbestos  
10 exposures that led to the disease for which he  
11 brought this case.

12 Go to the next slide. Now, I know this  
13 is a difficult slide to see and I don't want to  
14 cover the science in any great detail, because if we  
15 move on to the later motions, Mr. Tarry will do that  
16 in our motion to strike the Plaintiff's causation  
17 witnesses. But basically this slide pretty easily  
18 depicts the science prong of our defense. The chart  
19 on the side shows the proportion of mortality rate  
20 for various occupations for the disease of  
21 mesothelioma. And let me start off by saying that a  
22 proportion of mortality rate of under 2 generally is

♀  
0010

1 held by science by epidemiology to indicate there is  
2 no causation. PMR's above 2 indicate a strong  
3 association or causation. The highlighted entry  
4 there is motor mechanics. And I've got to stop  
5 right here and say Mr. Dunford was not even a motor  
6 mechanic. He worked at a gas station but that is  
7 the occupation that most closely approximates the  
8 entry on this chart. And you can see that the  
9 proportion of mortality rate for motor mechanics is  
10 well below 2.

11 Now, by contrast, if you look at the top  
12 of the chart, which is not highlighted, there are a  
13 couple of occupations that have significantly higher  
14 proportion of mortality rates. Among them  
15 construction, which is well past 2, and then  
16 plumbers which exceeds 4. I'm going to come back to  
17 those in a little bit. But that really demonstrates  
18 our science case in a nutshell.

19 Let's go on to the next slide. Because  
20 of the pattern of deception in this case, we're not  
21 left at the conclusion of discovery with what I call  
22 an eviscerated defense. Simply put, since we're not

♀  
0011

1 allowed because we don't have the information to put  
2 on the alternative causation defense at least from  
3 the discovery responses, this is the defense we  
4 would have been left with. Defendants did not cause  
5 the Plaintiff's peritoneal mesothelioma, but we  
6 don't know who or what did. Now, I've got to tell  
7 you that's obviously not a very appealing jury  
8 argument. It's much better for us to be able to go  
9 in and have our experts point to exactly what the  
10 cause was than just to have them throw their hands  
11 up and say we don't know.

Attachment H

12 Go to the next slide. Now, this is going  
13 to be the bulk of our presentation. It's the time  
14 line detailing the Plaintiff's pattern of deception.  
15 Bring up the next slide. You can see we have a lot  
16 of entries here. I'm going to go through some of  
17 them in some detail and I'm going to hit the high  
18 points on others. But I need to orient you on what  
19 the slide presents. On the top, the blue entries  
20 indicate events in this case. And by and large  
21 those are discovery events and depositions and the  
22 like.

♀  
0012

1 On the bottom of the slide the entries in  
2 red are events that represent other claims or, in  
3 fact, even another case. And the interesting thing  
4 or important thing to note at the outset, and I will  
5 remind the Court of this when we get to it, is that  
6 although those entries are put on the time line in  
7 chronological order, we didn't know anything of the  
8 red entries until November 7, 2003. So for ease of  
9 presentation, we're going to go roughly in  
10 chronological order. But a lot of this is  
11 backfilling in on our part with information that  
12 we've learned within the last month and in some  
13 instances within the last week or so.

14 Go ahead and bring the first entry up.  
15 Okay. We start with the first entry -- and go ahead  
16 with the description. On March 23, 2001, and this  
17 entry is on both sides of the time line, because  
18 this is when the Plaintiff was diagnosed with  
19 peritoneal mesothelioma. So this set the whole  
20 chain of events in motion.

21 Go to the next program. Bring up the  
22 event. About five months after his diagnosis, the

♀  
0013

1 Plaintiff filed his motion for judgment in this  
2 case, alleging that the Defendants in this case, who  
3 are largely manufacturers and distributors of  
4 friction products, caused Mr. Dunford's peritoneal  
5 mesothelioma. But now we know that something else  
6 happened on August 22nd. So bring up the next  
7 event.

8 On that date we now know that the  
9 Plaintiff's New York law firm, Weitz & Luxenberg,  
10 filed a proof of claim against a company called  
11 H. K. Porter. And that's a distributor of  
12 asbestos-containing products largely used in the  
13 construction industry. I don't have an exhaustive  
14 list of what their products might be. The  
15 Plaintiff's counsel may be able to fill you in in  
16 greater detail. But suffice it to say, they were  
17 not a supplier of friction products at the  
18 Plaintiff's gas stations.

19 Go ahead and bring the frame up. And I  
20 just want to show you that -- and we'll run through  
21 this quickly -- this is one of the proofs of  
22 claim -- they really fall into two categories. One

♀  
0014

1 is kind of a computer printout that Weitz &  
2 Luxenberg's firm filed on behalf of a large number

Attachment H

3 of clients. And this is one of those types. The  
4 second is a more individual claim and we come to  
5 some of those later on.

6 Let's go to the next event. I told you  
7 we'd go in chronological order, but we need to  
8 backfill in a little bit based upon what we now know  
9 to be the case. Bring up the event. On the 29th of  
10 June, 2001, Weitz & Luxenberg filed a proof of claim  
11 against Babcock and Wilcox. And let's go ahead and  
12 put that claim up on the screen if we could. Okay.  
13 This is the first page of the claim. No, I guess  
14 that's not the first page of the claim. Can we go  
15 back? Okay. This is the first page of the claim.  
16 It's right in the middle and it's a little bit  
17 difficult to read. But the first part asks, the  
18 first question, do you claim the injured party's  
19 asbestos exposure is attributable to any of the  
20 following entities. And then -- go ahead and bring  
21 that up if you can. The Babcock and Wilcox Company  
22 is checked "yes." Let me tell you just briefly.

♀  
0015

1 Babcock and Wilcox by and large was a supplier of  
2 heavy industrial equipment, boilers and the like,  
3 which would have been, you know, going into  
4 buildings and into industrial sites. So, you know,  
5 again, it's not an exposure that you would expect at  
6 the gas station.

7 Let's go to the next. Okay. This is  
8 part 3. And I've got to tell you that in the  
9 interest of time, we have excerpted some of these  
10 documents, so -- to kind of highlight them for the  
11 presentation. Under the Exposure History section,  
12 we have the Plaintiff indicating not only exposure  
13 at the two gas stations which we know about from the  
14 motion for judgment in this case, but under exposure  
15 site number 3, we see land-based construction,  
16 various sites and occupation 30. I don't know what  
17 that is because I don't have the code, but it's not  
18 really important for today. What is, is that it is  
19 alleging exposure at construction sites.

20 Bring up the next exposure site. And  
21 that's exposure site number 4 where we see, yet  
22 again, exposure at various construction job sites.

♀  
0016

1 And then bring up the final part of this. This is  
2 important and we'll see this time and time again.  
3 On the signature of claimant or authorized agent  
4 section, it is very clear what these proof of claims  
5 are. It reads, "To the best of my knowledge the  
6 information contained in this proof of claim is true  
7 and complete." And then it has a signature. And we  
8 see that it is Lisa Nathanson Busch who is an  
9 attorney from Weitz & Luxenberg, dated June 29th,  
10 2001. And in case there's any doubt as to what the  
11 legal efficacy of this proof of claim is, the clause  
12 underneath the signature removes all doubt.  
13 "Penalties for presenting a fraudulent claim is a  
14 fine of up to \$500,000 or imprisonment for up to  
15 five years or both subject to 18, USC 152 and 3571."  
16 So it seems pretty evident from the form itself the  
17 significance of what these forms are.

Attachment H

18 Let's go to the next event if we could.  
19 Okay. This is the last date that we need to  
20 backfill in. This is actually -- was the most  
21 surprising to me, because we've only very recently  
22 learned about it. Go ahead and bring up the

♀

0017

1 description.  
2 We now know that Plaintiff on June 5th,  
3 2001, filed a different lawsuit against traditional  
4 asbestos defendants in New York City. This really  
5 took us aback. We learned this within the last ten  
6 days. And I'll explain the circumstances in a  
7 little bit, but I'd like to go ahead and bring up  
8 the summons if we could. This is the summons for  
9 the New York action. You see that the date filed  
10 was June 5th, 2001. And you can see, I've  
11 highlighted the Plaintiff's name. And because of  
12 the way they do things in New York when they have a  
13 multi-plaintiff complaint and they do it  
14 alphabetically, you can see that Mr. Dunford and his  
15 wife's name are kind of buried in the middle, which  
16 may be of some import. It may not. But it  
17 certainly would have made it much more difficult for  
18 us to find this.  
19 Go to the next page, would you? I just  
20 want to run through the list of defendants. And you  
21 can see that I've highlighted some of them. On this  
22 page, AC and S, Congoleum Corporation. Go to the

♀

0018

1 next page. Minnesota Mining and Manufacturing  
2 Company, which is commonly referred to as 3M. North  
3 American Refractory Company, which is NARCO.  
4 Plibrico Company and United States Mineral Company.  
5 The significance of the highlighting, Your Honor, is  
6 we're going to see additional time line events that  
7 reference those companies. And we'll come back to  
8 them.  
9 The significance at this juncture of this  
10 complaint is we see that in the New York suit, which  
11 was filed 6 weeks before they filed the motion for  
12 judgment in this case, they named 82 defendants,  
13 which are by and large traditional asbestos  
14 defendants. And zero defendants from this case are  
15 named in that lawsuit. So, basically, it appears  
16 that we have two cases going on on a parallel track.  
17 Let's go to the next time line event if  
18 we could. We're back to our case now. And we'll go  
19 in straight, chronological order through the rest of  
20 the time line. On November 7, 2001 DaimlerChrysler,  
21 Ford and General Motors served interrogatories and  
22 requests for production on the Plaintiff. Next

♀

0019

1 event.  
2 The next event is January 22, 2002 and  
3 the Plaintiff first answers the interrogatories and  
4 requests for production served by DaimlerChrysler,  
5 Ford and General Motors. I don't intend to go  
6 through those discovery responses in their entirety,  
7 but there are some that I need to cover in some  
8 detail. So let's first take up DaimlerChrysler's

Attachment H

9 first interrogatories and request for production.  
10 Okay. This is interrogatory number 3. And it  
11 basically says, state whether you have ever filed  
12 any other lawsuit for personal injuries, and if so,  
13 for each lawsuit state the following. And then it  
14 asks a bunch of identifying information about where  
15 it was filed, when it was filed, the docket number,  
16 and the name of each party and the disposition or  
17 current status of the suit.

18 You can see that the answer is not  
19 applicable. Now, this was served on us January 22,  
20 2002. We now know, thought we didn't know it at the  
21 time, that that answer is false. Because the New  
22 York suit had already been commenced before they

♀  
0020

1 even filed the motion for judgment in this case.  
2 Let's go to the next one. Okay. These  
3 are from the requests for production of documents  
4 served by DaimlerChrysler. And it's a part of the  
5 same discovery set. Bring those up. Number 11  
6 requests them to produce all affidavits of exposure  
7 related to Plaintiff's alleged asbestos exposure.  
8 Now, we can't tell right now whether they had any of  
9 those at the time. They indicate -- they make some  
10 objections and then they answer, Plaintiff does not  
11 have any such material. At the time we don't know  
12 right now if that was true or not, but we do know  
13 that they have such materials now. And we also know  
14 that they have never supplemented their response to  
15 that. Although, they have produced some materials.  
16 I want to be fair on that point. But this discovery  
17 response is still outstanding.

18 Number 12, however, is a different case.  
19 All testimony and discovery responses, statements,  
20 affidavits, pleadings or other documents prepared  
21 outside this litigation which relate in any way to  
22 alleged exposure to asbestos. Same objections and

♀  
0021

1 then they indicate Plaintiff does not have any such  
2 materials. We now know, based upon what we have  
3 learned, that that was false at the time they said  
4 it. Because we know that the New York lawsuit had  
5 been filed in June of the following year. And there  
6 were pleadings in that case, which we'll talk about  
7 a little bit later, that clearly are responsive to  
8 that request. And some of the material has yet to  
9 be produced to this day. I'll come to that later in  
10 the presentation. Let's go on to the next one.

11 Okay. The next thing we want to talk  
12 about is Ford's discovery requests. Let's go ahead  
13 and bring up interrogatory 6. Interrogatory 6 is  
14 kind of a standard interrogatory in asbestos  
15 litigation. Basically, it says, identify all  
16 present and prior employment except those employers  
17 identified in the amended motion for judgment.  
18 Include full-time, part-time or self-employment.  
19 For each employment state the following, and we  
20 asked for a bunch of details. The reason we asked  
21 for this is obvious, because the second prong of our  
22 defense is alternative causation. So we want to

♀

Attachment H

0022

1 know what other employment he might have had. But  
2 for the purposes of today, the subpart that is  
3 really critical is subpart J, which it asks for them  
4 to tell us whether to your knowledge you were  
5 exposed to asbestos-containing products, and, if so,  
6 what products and how do you believe you were  
7 exposed. Let's go to the answer.

8 Okay. In response to that we basically  
9 get two employers. The first employer is a company  
10 called Western Foods, truck driver, construction  
11 sites in Virginia. We now know from his deposition  
12 that what this is, he was driving, basically, a  
13 chuck wagon around construction sites throughout  
14 Virginia. And the year is 1984 to 1985.

15 Subpart J, the answer, Plaintiff was not  
16 exposed to any asbestos-containing products during  
17 his employment in trucking. We now know that that  
18 was false when it was served. We know and it will  
19 come to various documents to demonstrate that, but  
20 that answer remains in effect today. It's never  
21 been supplemented. And that remains the answer that  
22 is on the record today.

♀  
0023

1 Similarly, the second employer,  
2 self-employed in construction, general residences  
3 in Virginia 1986 to 2001. Again, he indicates  
4 Plaintiff was not exposed to any asbestos-containing  
5 products during his employment in construction. I'm  
6 going to show you example after example after  
7 example that demonstrate that that was false, when  
8 he served this. And we know from his file in the  
9 New York suit 6 months before these responses that  
10 they knew it was false when it was served. Let's go  
11 on.

12 Go ahead and blow up number 8 if you  
13 could. Interrogatory number 8 asks for information  
14 concerning his employment at the two gas stations  
15 where he contends he was exposed to asbestos and it  
16 has a bunch of details. But the thing I want to  
17 address right now in subpart F, it asks for him to  
18 tell us whether any safety equipment or protective  
19 devices were provided to you and your coworkers.  
20 And, if so, a description of the equipment or  
21 devices. And then there's kind of a typo that's on  
22 the end. And one of my associates just wanted me to

♀  
0024

1 make it clear that they retyped these. That's their  
2 typo and not ours.

3 But in any event, subpart F asks for  
4 information about safety equipment. And we see that  
5 for each of the employment sites, the Gulf service  
6 station in Reston, we see that he answers, no, he  
7 didn't use any safety protective devices. And at  
8 the Herndon Texaco he also answers no. Now, unlike  
9 some of the other discovery responses that we've  
10 addressed up to this point, we don't have any reason  
11 to believe one way or the other that that's not  
12 true. I just highlight it for the Court right now  
13 because it will become important later on in the  
14 presentation.

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15 Let's go on to interrogatory number 9.  
16 Number 9 requests them to -- excluding any Defendant  
17 in this action, state the name of every person  
18 and/or entity claimed to have caused or contributed  
19 to your asbestos-related illness. And then we ask  
20 for specific details like talking about whether a  
21 lawsuit was filed and then information about the  
22 lawsuit. Similar to their response to

♀  
0025

1 DaimlerChrysler's interrogatories, they indicate not  
2 applicable. And interestingly enough for both of  
3 these they don't interpose any objections. The  
4 answer is just, there aren't any.  
5 We now know because of the New York  
6 lawsuit that was filed 6 months before these were  
7 served that that was false at the time they answered  
8 it. And it remained false for a period of time. At  
9 some point later on in the time line we'll talk  
10 about the supplementation, such as it is.  
11 Let's go on for now. Well, this just  
12 indicates and you will see for the overwhelming  
13 majority of the discovery responses Mr. Dunford  
14 himself verified these. But let's go on to General  
15 Motors' set if we could. Okay. Go on to  
16 interrogatory number 1. Interrogatory number 1 asks  
17 with respect to the specific brand of  
18 asbestos-containing products allegedly used by you,  
19 please state the following. And then it asks for a  
20 bunch of additional details about the  
21 asbestos-containing products. Again, you can see  
22 this is central to our defense of the case, because

♀  
0026

1 we need to know what asbestos products he was using  
2 that might have caused his injury.  
3 Okay. Can you bring up the answer,  
4 please. Okay. I'm not going to read this in its  
5 entirety, but what you see from this answer is that  
6 he alleges that he was exposed to a variety of  
7 different asbestos-containing products at the two  
8 gas stations. Then he goes on and explains how he  
9 thinks he was exposed at the gas stations. And then  
10 at the bottom, he indicates those manufacturers who  
11 he thinks -- manufacturers and distributors that he  
12 thinks were responsible for the products at the gas  
13 station. And you get this list and it says  
14 including but not limited to Honeywell Corporation,  
15 Total Auto Parts Herndon, Fairfax Auto Parts  
16 Herndon, Foreign Motors, Federal Motor Products,  
17 Atlas Automotive Inc., Standard Motor Products,  
18 General Motors Corporation, DaimlerChrysler  
19 Corporation, and Ford Motor Company. So you see a  
20 bunch of friction products manufacturers. What you  
21 don't see here is any information about any  
22 nonfriction products, asbestos-containing products

♀  
0027

1 that he used. And there are no nonfriction product  
2 manufacturers listed. We'll see from later  
3 instances in the time line that this interrogatory  
4 response was false by omission at the time that it  
5 was served because it was wasn't limited to just the

Attachment H

6 gas stations. He was supposed to provide us with  
7 information concerning all asbestos-containing  
8 products. And it remains false today.  
9 Let's go on. Okay. Finally -- can you  
10 highlight that? Again, this is another  
11 interrogatory asking about training this time with  
12 respect to use of respiratory or protective  
13 equipment. And he indicates here, no, client was  
14 never given such instructions. And I just highlight  
15 this issue for the Court, again, and I will tie it  
16 up with a later time line entry.  
17 But let's go on in the interest of time  
18 to the next entry which is February 8, 2002. And  
19 Cunningham Auto Parts, another co-Defendant, serves  
20 interrogatories on the Plaintiff. And we'll come  
21 back to the responses in a little bit. Let's go to  
22 the next entry.

♀  
0028

1 On March 14, 2002, the Plaintiff amends  
2 his answers to interrogatories and requests for  
3 production served on DaimlerChrysler, Ford and  
4 General Motors. And the interesting thing is this  
5 amendment came the day before we took his discovery  
6 deposition. I want to kind of go through this a  
7 little quicker, but I want to show the Court what  
8 the supplementations actually were. With respect to  
9 DaimlerChrysler's interrogatories, go ahead and  
10 bring that up if you could. State whether you have  
11 ever filed any other lawsuit for personal injuries  
12 and if so for each lawsuit state the following. The  
13 answer is the same as it was the first time, not  
14 applicable. It is no truer then than it was when  
15 they first served the responses because we know that  
16 they filed the New York suit.  
17 Similarly with the responses to the  
18 request for production -- go ahead and bring those  
19 up -- it's kind of the same issue that we went  
20 through in detail the last time. Back up a little  
21 bit. Just back up to the request for production if  
22 you could. Next. Yes. Okay. On numbers 11 and

♀  
0029

1 12, we talked about these already. 11 asks for  
2 affidavits of exposure. We don't know at this time  
3 if they had any or not. But we now know they have  
4 some and these answers still stand. They have not  
5 been supplemented and they indicate that they don't  
6 have any. Number 12, however, again, is different  
7 because it asks for all pleadings prepared outside  
8 this litigation. And we now know because of the New  
9 York lawsuit that that was false when they filed it  
10 the first time and it remained false even when they  
11 supplemented it in March. Quickly, let's go on to  
12 Ford's.  
13 Ford's interrogatory number 6, you may  
14 recall, asks for the employment history information.  
15 Subpart J asks whether to your knowledge you were  
16 exposed to asbestos-containing products, and, if so,  
17 what products and how do you believe you were  
18 exposed. Just bring up the answers briefly. We're  
19 back to the same two work sites, Western Foods from  
20 1984 to '85. And he indicates in the

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21 supplementation, Plaintiff was not exposed to any  
22 asbestos-containing products during this employment

♀  
0030

1 in trucking. That was false when they served it the  
2 first time and it's false in their supplementation  
3 as well. Let's go to the second.

4 Self-employed construction, general  
5 residences in Virginia, 1986 to 2001, basically a  
6 15-year period. Again, they indicate that he wasn't  
7 exposed to any asbestos-containing products. And we  
8 know that was false when they served it the first  
9 time. It's false in the supplementation. Finally,  
10 let's go to General Motors.

11 Go on through to tab 9C, I think it is.  
12 Okay. Again, General Motors interrogatory number 1  
13 asks for details about the types of  
14 asbestos-containing products allegedly used by him.  
15 Bring up the answer. I haven't compared it in any  
16 detail, but it appears to be the same answer that  
17 was given the last time in which he is basically  
18 describing his work at the gas stations and the  
19 products he used there and gives the same product  
20 list. And, again, that was false by omission when  
21 they first served it and it remains false by  
22 omission here because it doesn't cover any of the

♀  
0031

1 other asbestos exposures that he had.

2 Let's go on to -- bring up interrogatory  
3 number 3 if you could. This is a little bit  
4 different. With respect to the specific brands of  
5 asbestos-containing products, which you did not use  
6 but from which you allege asbestos exposure, please  
7 state the following. So basically, this is designed  
8 to give details about the products that he might  
9 have worked around or been around at some point in  
10 his life but that he did not work with directly.  
11 They indicate, see answer to Question 1. And the  
12 answer to Question 1 just details the exposure at  
13 gas stations. Again, this is false by omission.

14 Similarly with interrogatory number 4,  
15 state in your own words how you believe you were  
16 exposed to any and all sources of asbestos or  
17 radiation. I'm just concentrating on the asbestos  
18 part for purposes of today. Again, they interpose  
19 an objection and then he indicates, see answer to  
20 Question 1 in regards to asbestos exposure. And  
21 we'll see time and time again as we go through the  
22 later instances in the time line where that is

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0032

1 false.

2 All right. Let's go on to the next event  
3 if we could. On March 15, 2002, the Defendants take  
4 the Plaintiff's discovery deposition. And in the  
5 interest of time, I'm not going to put up any  
6 excerpts from that deposition. I can just tell you  
7 that throughout the discovery deposition, he  
8 steadfastly denied any exposure to asbestos other  
9 than what he got at the gas stations, and that  
10 includes household exposure and exposure from the  
11 various construction jobs that he had. And we'll

Attachment H

12 see better instances of that in a little bit.  
13 Let's go on to the next event. April 30,  
14 2002, the Plaintiff -- go ahead -- answers  
15 Cunningham Auto Part's interrogatories. And I don't  
16 want to spend a lot of time on these, because  
17 they're not really -- I don't have a particular dog  
18 in this fight. They're not our client. But go  
19 ahead and bring up interrogatory 14 if you could.  
20 Go ahead and bring that up larger. That asks, at  
21 this time on April 30, 2002, have you settled with  
22 any person or party any claim or part of a claim

♀  
0033

1 being asserted in this case for which money or other  
2 benefit was received. And he indicates at this  
3 time, no. I don't know one way or the other whether  
4 this was true when it was served. But we now know  
5 subsequently that he did. As of the point I left my  
6 office yesterday, I had not seen the supplementation  
7 to that. They may very well have supplemented it,  
8 but that remains in effect otherwise.

9 Let's go to event 12. Okay. June 20th,  
10 2002. Two things happened on this day that are kind  
11 of related. In the morning, weitz & Luxenberg take  
12 the Plaintiff's de bene esse deposition in the  
13 morning with a view towards preserving his testimony  
14 for trial. And in the afternoon the Defendants  
15 complete the Plaintiff's discovery deposition, which  
16 we started in March. Let's play some of the video  
17 deposition.

18 (whereupon a video clip is played of  
19 Mr. Dunford's deposition.)

20 "QUESTION: At any job have you ever  
21 held at any time in your life do you  
22 believe you were ever exposed to

♀  
0034

1 asbestos?

2 "ANSWER: Yes.

3 "QUESTION: Which job?

4 "ANSWER: I would say Reston Gulf and  
5 Herndon Texaco.

6 "QUESTION: Okay. Were you ever  
7 exposed to asbestos through any of  
8 your family members?

9 "Objection. Calls for speculation.

10 "ANSWER: Can I answer that?

11 "QUESTION: Yes, you can answer.

12 "ANSWER: I don't think so, no.

13 "QUESTION: Were you ever exposed to  
14 asbestos to the best of your knowledge  
15 at any of your residences?

16 "Objection. Calls for speculation.

17 "QUESTION: You can answer.

18 "ANSWER: No."

19 (The video clip is stopped.)

20 MR. WILLIAMS: Okay. Stop it right  
21 there. I want to make a comment here, Your Honor.  
22 We see here basically he's asked by his counsel

♀  
0035

1 whether he was exposed to any asbestos at any of his  
2 job sites. And we hear about the gas station

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3 exposure at Reston Gulf and Herndon Texaco. And he  
4 stops it at that. We don't hear about any other  
5 exposure. And he specifically goes on to disavow  
6 any exposure from any of his family members or from  
7 any of his residences. We'll see later on from  
8 information that we recently learned that that is  
9 false. Let's go to the next clip.

10 (Whereupon the video clip of  
11 Mr. Dunford's deposition is continued.)

12 "QUESTION: I believe you did some  
13 roofing work at some point during your  
14 life. Is that right?

15 "ANSWER: Yes.

16 "QUESTION: Do you remember when,  
17 about when that was?

18 "ANSWER: Fairly recently. During the  
19 time when I had my own company.

20 "QUESTION: Okay. What type of  
21 roofing work did you do?

22 "ANSWER: Reroof. Tear off. That's

♀  
0036

1 pretty much about the time what I did.  
2 A couple tear-offs. Reroofing is what  
3 you would call it.

4 "QUESTION: Did any of that work  
5 involve the removal or application of  
6 shingles?

7 "ANSWER: Yes.

8 "QUESTION: Do you know whether any of  
9 those shingles contained asbestos?

10 "ANSWER: No.

11 "QUESTION: No, you don't know or no  
12 they didn't?

13 "ANSWER: No, I don't know."

14 (The video clip is stopped.)

15 MR. WILLIAMS: Go on to the next clip.

16 (Whereupon the video clip of  
17 Mr. Dunford's deposition is continued.)

18 "QUESTION: And when you did any of  
19 this remodeling work, do you believe  
20 that you may have been exposed to  
21 asbestos?

22 "ANSWER: No.

♀  
0037

1 "QUESTION: Why do you say that?

2 "ANSWER: It was mainly new  
3 construction. All the construction I  
4 mainly done was in new building  
5 construction or new remodeling or  
6 something like that."

7 (The video clip is stopped.)

8 MR. WILLIAMS: Okay. Stop. The last two  
9 clips in conjunction were really questions by his  
10 counsel about his work in construction. And it's a  
11 little vaguer [sic] there because in the first  
12 instance he indicates he doesn't know whether he was  
13 exposed to any asbestos products while he was doing  
14 roofing work. But then on the remodeling side he  
15 says, no, he was not exposed to any asbestos. We're  
16 going to talk about his construction work in greater  
17 detail here.

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18 But the long and the short of it is, we  
19 now know he clearly had exposure during his  
20 construction work. Let's do the last clip.  
21 (Whereupon the video clip of  
22 Mr. Dunford's deposition is continued.)

♀  
0038

1 "QUESTION: Now, I want to put the  
2 time that you were at Reston Gulf  
3 together with the time that you were  
4 at Herndon Texaco. And I have a few  
5 questions for you generally on those  
6 two places. At any time when you  
7 worked at either of those stations,  
8 especially when you were doing the  
9 cleanup or watching the brake repair  
10 work or doing the tire work, did you  
11 ever wear a mask like a painter's  
12 mask?

13 "ANSWER: No.

14 "QUESTION: Did you ever wear a  
15 respirator?

16 "ANSWER: No."

17 (The video clip is stopped.)

18 MR. WILLIAMS: Okay. Let's stop it right  
19 there. And, again, I'm just highlighting this for  
20 the Court, much like we did with the discovery  
21 responses about the defective masks and respirators.  
22 Again, we don't have any reason to doubt that he did

♀  
0039

1 not use such masks at the gas stations. But it's  
2 going to become a very important fact in a little  
3 bit on the time line.

4 Let's go to the next event if we could.  
5 Okay. On the 29th of July 2002, two things  
6 happened. The Plaintiff authorizes his New York  
7 firm, Weitz & Luxenberg, to file a proof of claim  
8 against AC and S, Incorporated. And AC and S, we're  
9 going to go through this in some detail, but AC and  
10 S was a distributor of asbestos-containing products  
11 by and large used in the construction industry,  
12 among other places.

13 The second event was Plaintiff executes  
14 release and indemnity for settlement with AC and S,  
15 Incorporated. Let's go ahead and bring up the  
16 claim. All right. This is the proof of claim for  
17 his claim against AC and S. And let's go ahead and  
18 drop down to the AC and S exposure history if we  
19 could.

20 On job site 1, AC and S, Incorporated  
21 exposure, we see that it's construction. And the  
22 exposure dates are 1986 to the present and the

♀  
0040

1 occupation is builder. We know when we compare that  
2 to his discovery responses, the one that asked  
3 about, you know, basically his employment history,  
4 we now know that from 1986 to the present, that kind  
5 of matches up with the time that he was  
6 self-employed in the construction industry. Go to  
7 the next one.

8 Job site 2, construction job sites. And

Attachment H

9 the exposure dates are 1984 to December 1985.  
10 There's no occupation listed, but if we match it up  
11 with what we were told in the interrogatory  
12 responses, we now know that this must be describing  
13 his work for Western Trucking when he drove the  
14 chuck wagon to various construction sites because  
15 the dates match up. Let's go on.

16 And all this is is the power of attorney  
17 executed by Mr. Dunford on the 29th of July  
18 authorizing Weitz & Luxenberg to bring this claim  
19 against AC and S. Let's go on to the next document.  
20 Now, Your Honor, I must say, this is a release and  
21 indemnity agreement. And I understand from your  
22 court order that the Plaintiff was required to

♀  
0041

1 produce all such releases for your in camera  
2 inspection. I would not normally throw this on the  
3 screen, because as a result of the in camera  
4 production, these are subject to a protective order  
5 in general. I've got to say, this one was not  
6 submitted in camera to you, so it's not subject to  
7 the protective order. We got this later on.

8 Let's go on to the next page if we could.  
9 You know, there's a lot of standard release language  
10 in here. That really doesn't concern us here today,  
11 but there is one part that I do need to cover in  
12 some detail. Will you bring up the section? This  
13 is the attestation part. And in this, the  
14 releases -- and the releases are James Dunford and  
15 his wife Catherine Dunford. The releases further  
16 state, one, that each of them is of legal age with  
17 no mental disability of any kind and fully and  
18 completely competent to execute this release and  
19 indemnity on his or on her own behalf.

20 Two, that this release and indemnity has  
21 been explained to each of them and each knows the  
22 content as well as the effect thereof. And,

♀  
0042

1 importantly, 3, claimant verified that between  
2 January 1, 1958 and December 31, 1974, he/she worked  
3 with or in proximity to asbestos or  
4 asbestos-containing products attributable to AC and  
5 S, Incorporated and for which claimant alleges AC  
6 and S, Incorporated is legally liable. I want to  
7 stop right there.

8 We know that Mr. Dunford was born in  
9 1967. We know that he worked for the gas stations  
10 in the '80s. So we know a couple of things. This  
11 doesn't have anything to do with his work at the gas  
12 stations. And it likely doesn't have anything to do  
13 with his occupational exposure. The only conclusion  
14 that I can draw is that if he's able to verify that  
15 he was exposed between '58 and '74 when he would  
16 have been 7 years old, that exposure had to have  
17 come from his household. And we'll see some  
18 corroboration on that later on.

19 Next paragraph. Releases further  
20 knowledge that they had executed this instrument at  
21 the consultation with their attorney or being  
22 afforded the opportunity to consult with an

♀

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0043

1 attorney. And each of the undersigned hereby  
2 declare under penalty of perjury, pursuant to 28 USC  
3 section 1746 that the foregoing is true and correct.  
4 This puts the lie to their discovery  
5 responses in about as succinct a fashion as I can  
6 imagine. Let's go on.  
7 October 24, 2002, Weitz and Luxenberg  
8 filed a proof of claim against Amatex Trust. Amatex  
9 was yet another company that supplied  
10 asbestos-containing materials for the construction  
11 industry. I don't want to go into any detail, but  
12 let's bring it up and I'll cover it briefly. Let's  
13 go on to the next page. Can you bring up section C?  
14 Section C is the exposure information to  
15 justify the proof of claim against Amatex. And you  
16 see that there are four listed. And the  
17 instructions say, for each industry alleged, please  
18 provide the year of first exposure and the year of  
19 last exposure, the state in which exposure occurred,  
20 and the occupation that resulted in exposure to  
21 Amatex asbestos textile products. And then we have  
22 a source code. And number 1 is shipyard. Number 2

♀  
0044

1 is insulation. And number 3 is textile. So we see  
2 four different exposures. The primary exposure --  
3 the first two, although it's not very descriptive, I  
4 assume those pertain to the gas station, because  
5 he's listed as an attendant and the years match up  
6 roughly.  
7 The third, however -- the third exposure  
8 is 1986 to 9999, and I believe that means to the  
9 present. And the occupation is builder. And the  
10 exposure code is 1 and/or 2. Well, we don't think  
11 he worked at a shipyard, so it's insulation.  
12 And the fourth exposure, which is also 1  
13 and/or 2 insulation, is 1984 to 1985. And there's  
14 no occupation listed, but it matches up roughly with  
15 the time that he worked as a chuck wagon driver at  
16 the various construction sites.  
17 Bring up the next blurb if you could.  
18 Again, I'm going to speed these up in a little bit.  
19 But this, yet again, has another one of those  
20 clauses designed to make sure that everybody  
21 involved knows the seriousness of this. And the  
22 highlighted portion says that to the best of my

♀  
0045

1 knowledge the information contained in this proof of  
2 claim as well as the support information submitted  
3 with this form is true and complete and is submitted  
4 with a declaration of its accuracy under penalty for  
5 presentation of a fraudulent claim of a fine of up  
6 to \$500,000 or imprisonment for up to five years or  
7 both in accordance with titled USC section 182.  
8 Basically attesting that under federal law it's not  
9 filed as a false claim. And we see the same person  
10 from Weitz & Luxenberg, Lisa Nathanson Busch, signed  
11 that on October 24, 2002.

12 As an aside, I've got to say when I got  
13 these proofs of claims I was somewhat interested to  
14 see who Ms. Busch might be. So I looked her up on

Attachment H

15 their web page and it appears that she's an attorney  
16 who was admitted into practice in 1994.

17 Let's go on to the next event. All  
18 right. The next event occurred on December 3rd of  
19 2002. The Plaintiff executes a confidential general  
20 release of all claims for settlement with 3M in the  
21 New York lawsuit. Now, I'm not going to put this  
22 release up. I know you've seen this in camera. But

♀  
0046

1 I've got to come back to those discovery responses  
2 in the video clip that I asked you to keep in mind.  
3 3M, generally, among other things is  
4 involved in asbestos litigation because they were  
5 the largest manufacturer of protective equipment,  
6 masks and respirators. Well, we know from his  
7 discovery responses and his deposition testimony  
8 that he's not claiming that he ever used a mask or  
9 a respirator at the gas stations. We also know from  
10 his discovery responses and from his testimony that  
11 he's claiming his only asbestos exposure was at the  
12 gas station. If he didn't use them at the gas  
13 station, where did he use them? Well, I would  
14 suggest to you, Your Honor, the logical answer is in  
15 the construction industry, which is where they are  
16 widely used. Let's go on.

17 The next event is December 12, 2002.  
18 Weitz & Luxenberg filed yet another proof of claim  
19 and this time it's against the Eagle Picher  
20 Industry's personal injury trust. I don't want to  
21 cover this in any detail but there's just one  
22 interesting aspect of this. Go ahead and bring it

♀  
0047

1 up. Go to the next page if you could. All right,  
2 go on to part 4 of the next page. Can you bring up  
3 the part 4 occupational exposure to Eagle Picher  
4 products, please? All right. We see the date of  
5 exposure began 1982 and it ends in 2003. His  
6 occupation is listed as attendant. His description  
7 of job duties are working with, installing,  
8 repairing and/or removing asbestos-containing  
9 materials or in proximity to other construction  
10 trade installing, repairing and/or removing  
11 asbestos-containing materials in industrial and/or  
12 commercial construction maintenance sites. And then  
13 it lists the industry code as industry 17, which is  
14 construction trade.

15 Okay. Go on to the next blurb. And then  
16 it goes on to say -- to ask for him to describe how  
17 and why asbestos products were used at the site.  
18 Asbestos insulating cement being handled by injured  
19 persons or by other trades in work areas adjacent to  
20 injured persons. And then it says see a bunch of  
21 attachments. But then you go down to the bottom and  
22 it says describe how injured party was exposed to

♀  
0048

1 Eagle Picher products. Worker in direct contact  
2 with Eagle Picher Industry's asbestos-containing  
3 materials as well as like materials being used by  
4 other insulation, construction trades on site.

5 And then it goes on to do something we

Attachment H

6 haven't seen yet. Rather than just implicating a  
7 manufacturer, it names a specific product. Eagle  
8 Picher "Super 66" insulating cement. So we don't  
9 have a generic, vague allegation here. We've got a  
10 specific product that the Plaintiff is claiming  
11 caused him injury.

12 Let's go on. And this is just the  
13 signature page. It's very similar although it  
14 doesn't mention the code section. I mean it  
15 basically indicates that it's being filled out  
16 under penalty of perjury.

17 Let's go on. We'll see this from time to  
18 time as an attachment to various proofs of claim, as  
19 well as in the New York suit. And it lists his  
20 occupational history and then we've got the  
21 construction job sites.

22 Let's move on to the next event if we

♀

0049

1 could, Steve. All right, January 24, 2003, Weitz &  
2 Luxenberg files a proof of claim against United  
3 States Mineral Products, which is yet another  
4 company that supplied products, I think, to the  
5 construction industry. Let's just skip the document  
6 if we could because it is similar to the rest.

7 The next event is February 24, 2003. Two  
8 events here. The Plaintiff executes a release in  
9 covenant not to sue for settlement with North  
10 American Refractory Company, commonly referred to as  
11 NARCO. And then the second event is proof of claim  
12 appears to have been submitted but it is undated.  
13 I'm not going to talk about the release, because  
14 that's part of the protective order. But as a part  
15 of it, I mean, I've got to tell you that the  
16 Plaintiff swore he was exposed to the products at  
17 NARCO. But let's bring up the proof of claim if we  
18 could. Go on to the next page. Can you bring up  
19 that section at the bottom?

20 All right. What exposure evidence is  
21 attached and it checks living claimant. And then it  
22 says statement and it refers back to the release

♀

0050

1 that she or he was exposed to an asbestos-containing  
2 products manufactured or distributed by NARCO and  
3 they checked that. So the release mentions that.

4 Let's go on. Then it asks them to  
5 explain which NARCO asbestos-containing products for  
6 which this claim claims exposure. Then we get this  
7 blurb. Upon information and belief client was  
8 exposed to NARCO asbestos-containing products  
9 including but not limited to Stazon, Unicote,  
10 Aerogun, Hot Gun, Narcocast, Narcolite, and/or  
11 Narcogun. All of these are refractory products.  
12 They're not used in garages. I assume they are used  
13 in industrial settings and in construction sites,  
14 industrial sites.

15 Go ahead and go back. Can you go back to  
16 the page before and blow up -- no. I'm sorry, the  
17 same page but not the blow up. Do you see the  
18 paragraph down at the bottom in all caps? Can you  
19 bring that up?

20 The proof of claim then says by

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21 submitting this form to Honeywell, Weitz & Luxenberg  
22 represents that the above information is true and

♀  
0051

1 correct based on diligence conducted by Weitz &  
2 Luxenberg in investigating this claim and that  
3 claimant was exposed to NARCO asbestos-containing  
4 products. I don't think anything else needs to be  
5 said about that.

6 Let's go on to the next event. Go on to  
7 May 30th. The next event is May 30, 2003. Weitz &  
8 Luxenberg filed a proof of claim against the  
9 Plibrico Company. Yet, again, I mean I looked at  
10 their web site. They appear to be, yet again, to be  
11 a company that makes refractory-type products. And  
12 at one point, I think, made asbestos-containing  
13 brick, which would have been used in the  
14 construction trade. Let's just skip the document  
15 and go on.

16 The next event is July 14, 2003. Weitz  
17 and Luxenberg filed a proof of claim against  
18 Congoleum Corporation. Now, the Congoleum  
19 Corporation, as I understand it, is the company that  
20 manufactures floor tile. And I guess they might  
21 make other products, but that's really what they're  
22 known for. And at one point I believe that floor

♀  
0052

1 tiles contained asbestos. So we must assume that  
2 this is filed against them for the supply of  
3 asbestos-containing products to the construction  
4 industry. And I've got to stop right here and tell  
5 you that the summons we saw from the New York  
6 complaint, we received that stapled to the back of  
7 this proof of claim against the Congoleum  
8 Corporation. We got that on December 2nd. But I'm  
9 going to come back to this document in a minute.  
10 But that's how we learned about the New York suit.  
11 But it was apparently just stapled to the back of  
12 this proof of claim.

13 Let's go ahead. Put the claim up. Bring  
14 up the exposure information at the bottom. Yet  
15 again, we see exposure information; exposure date,  
16 1982 to the present; list the gas stations. It then  
17 goes on to list construction and construction job  
18 sites.

19 Let's go on to the next event. Okay.  
20 The next event is a couple of days later, July 16,  
21 2003. And in this instance the Plaintiff executes  
22 release and indemnity for settlement for Congoleum

♀  
0053

1 Corporation. I would note that this was not  
2 included in the production for in camera inspection,  
3 so it's not subject to the protective order. We can  
4 go ahead and put it on the screen. It has a bunch  
5 of standard release language. And what I'm really  
6 interested in for purposes of today is the  
7 attestation clause. And the undersigned further  
8 states that each of them is of legal age with no  
9 mental disability of any kind and is fully and  
10 completely competent to execute this release and  
11 indemnity on his or her own behalf.

Attachment H

12 Two, that the above release and indemnity  
13 has been explained to them and that they know the  
14 contents as well as the effect thereof. And then  
15 paragraph 3 has something to do with Congoleum  
16 Corporation's huge docket of 84,000 claims, not  
17 really relevant for today.

18 Number 4, though, is that claimant was  
19 exposed to asbestos-containing products  
20 manufactured, sold or distributed by Congoleum or  
21 for which Congoleum has legal liability. The  
22 undersigned further states that they executed this

♀  
0054

1 instrument after consultation with their attorney or  
2 the opportunity to consult with an attorney. Each  
3 of the undersigned hereby declares under penalty of  
4 perjury pursuant to 28 USC 1746 that the foregoing  
5 is true and accurate.

6 Go on. And then what we've got is we've  
7 got the signature of Mr. Dunford and his wife. And  
8 we also have a statement of exposure, as if the  
9 information in the first was not sufficient enough.  
10 Statement of exposure, I, James Dunford, under  
11 penalty of perjury state that I was exposed to  
12 asbestos-containing products manufactured, sold or  
13 distributed by Congoleum or for which Congoleum has  
14 legal liability. James Dunford.

15 Let's go to the next event. All right.  
16 On August 20th, 2003, we requested by letter that  
17 the Plaintiff's counsel supplement Plaintiff's  
18 discovery responses under rule 4:1E. The reason we  
19 did that, Your Honor, is because you look at the  
20 date. It's August 20th. We have a discovery cutoff  
21 of November 7th. And we want to make sure we have  
22 an opportunity to explore all the things we need to

♀  
0055

1 do before discovery closes. And basically we just  
2 asked that they do so by September 12, 2003. We  
3 never got a response to this letter.

4 Let's go on to the next event. The next  
5 event is August 26th, 2003. Defendants take the  
6 deposition of Plaintiff's wife, Catherine Dunford.  
7 And I've got to tell you this was kind of a  
8 watershed date, because this is what gave us the  
9 first inkling that everything might not be right in  
10 this case.

11 Go ahead and bring up the transcript  
12 excerpt. I'm just going to go through the  
13 transcript. The question was, "Okay. Now I  
14 understand that your husband has recently settled  
15 with at least one defendant in this lawsuit. Are  
16 you aware of that?"

17 What prompted this question is we knew  
18 that the Plaintiffs had settled with one of our  
19 co-Defendants, Honeywell. And we wanted to know  
20 some information about that. And so Mrs. Dunford's  
21 answer is yes.

22 And then the question is, "Was it more

♀  
0056

1 than one or just one?" And the answer is, "One.  
2 One in this lawsuit, yeah."

Attachment H

3 This must have prompted something in my  
4 associate's head, because the next question he asks,  
5 "Okay. How about outside this lawsuit, who was the  
6 other one?"

7 "MR. LONG: I'm going to object to that  
8 question.

9 "QUESTION: You said one in this lawsuit,  
10 what did you mean?"

11 "MR. LONG: You can answer, Cathy."  
12 So the answer is, "You asked me, in this  
13 lawsuit, so I said yes, one in this lawsuit."

14 "QUESTION: Okay. So there wasn't an  
15 earlier payment that you guys got from somebody that  
16 wasn't actually named in the lawsuit?"

17 "ANSWER: Earlier, no. Uhn-uh."  
18 And then I think the flag has gone off in  
19 my associate's head, because the next question is,  
20 "Or after?"

21 "ANSWER: There was a bankruptcy company,  
22 I don't know the name of them. We didn't never, I

‡

0057

1 don't know them.

2 "QUESTION: And when did you get that  
3 payment or payments?"

4 "ANSWER: I don't know what month, a few  
5 months ago, six, eight months ago, I don't know."

6 I guess the payments came as a complete  
7 shock to us because we'd been through almost two  
8 years of discovery. The Plaintiff in his discovery  
9 responses and his own deposition steadfastly denied  
10 that there's been exposure to any products other  
11 than those manufactured or supplied by the companies  
12 involved in this case. And here we learn that there  
13 is at least one out there. So let's go to the next  
14 event.

15 A couple of days later on August 28th,  
16 being a bright guy, my associate then serves request  
17 for production of documents numbers 21 through 23 on  
18 Plaintiff. Bring that up if you could. I've got to  
19 tell you. I'm not going to show you the cover  
20 letter, Your Honor. But the cover letter that  
21 accompanied this discovery request made it very  
22 clear that we thought the information we were

‡

0058

1 requesting here was already covered adequately by  
2 our original requests. But then we asked them to  
3 respond to this if they felt differently.

4 Can you bring up request number 22? All  
5 documents related to Plaintiff's claims against any  
6 person or entity not named in the amended motion for  
7 judgment. This request includes but is not limited  
8 to any proof of claim, supporting documentation and  
9 resolution of any such claim.

10 There are really close to a half a dozen  
11 interrogatories for request for production that  
12 requested this information, but we wanted to be  
13 safe.

14 Let's go to the next time line event if  
15 we could. And that is September 10th, 2003. On that  
16 date, weitz & Luxenberg refuses by letter to produce  
17 any documents responsive to Ford's request to

Attachment H

18 produce number 22, this thing we just saw. I've got  
19 to stop right there. Go ahead and bring the letter  
20 up, first, though. "We are unwilling to provide you  
21 with any proofs of claim which have been filed on  
22 behalf of our clients."

♀  
0059

1 Up to now throughout the discovery every  
2 response duplicated with this information was either  
3 not applicable or we don't have any in our  
4 possession. This is the first time that we're aware  
5 that they really have an objection to producing this  
6 information and it's in letter form.

7 Let's go on to the next time line event  
8 if we could. November 17th, 2003. At about the  
9 same time, we're starting to go through expert  
10 discovery. And this is very important, because all  
11 of these facts that we've discussed right now are  
12 really central to the case, but they really impact  
13 fairly significantly on the expert testimony that's  
14 being prepared for this case. On this date the  
15 Defendant deposed Plaintiff's causation expert,  
16 Dr. Taub. And let me tell you right now we learned  
17 at that deposition that Dr. Taub was provided by  
18 counsel for Plaintiff only with information  
19 concerning the alleged exposure at the gas station.  
20 There was nothing provided to Dr. Taub concerning  
21 the household exposure or the exposure in the  
22 construction industry.

♀  
0060

1 So let's see the excerpt if we could. Go  
2 to the next page. Steve, what I want you to do  
3 right here is if you could you blow up lines 11  
4 through 24?

5 I don't want to cover this in any detail  
6 but for whatever reason if we have to go forward on  
7 the later motion, Mr. Tarry will cover this. But  
8 what they're talking about here is Dr. Taub's  
9 conclusion that he must have been exposed to a  
10 significant amount of asbestos. And the question is  
11 very inartful, I must say, is "Okay." And the  
12 answer from Dr. Taub, "But certainly he ingested a  
13 significant amount because I believe, I do believe,  
14 by the way the asbestos did cause his disease."

15 "QUESTION: Right."

16 That's another articulate question.

17 "ANSWER: And assuming it did, and  
18 assuming this was the only place" -- and by "this"  
19 he's meaning the garages -- "he could get it because  
20 it's the only place he admits he was exposed to. So  
21 I say therefore on that basis there I say it's  
22 significant. You may find that to be circular, but

♀  
0061

1 on the other hand it probably is not circular. But  
2 it probably is not circular."

3 I find it circular in the extreme. He  
4 finds that Mr. Dunford was exposed to significant  
5 asbestos and it must have come from the gas stations  
6 because that's what he was told by the Plaintiff.  
7 This points out the huge impact that all of this has  
8 had on the case.

Attachment H

9 Let's go on to the next time line event.  
10 September 18th, 2003. Mr. Tarry then deposes  
11 Plaintiff's causation expert, Dr. Suzuki. And,  
12 again, we learn at the deposition that Dr. Suzuki  
13 was only provided with information concerning the  
14 gas stations exposure and no information about any  
15 household exposures or any exposures during  
16 construction -- during his work in the construction  
17 industry.

18 Let's go on to the next event and skip  
19 the transcript. The next event is October, 13th,  
20 2003. Weitz & Luxenberg filed a proof of claim  
21 against a Manville Personal Injury Trust, yet  
22 another company or entity that's not named in this

♀  
0062

1 case. And we're going to skip the proof of claim.  
2 It's very similar to the other ones, but I would  
3 just note that the Manville Personal Injury Trust is  
4 the granddaddy of asbestos litigation. That's where  
5 you go if you have a claim that you want to be paid  
6 on for exposure to asbestos.

7 Let's go to the next event. All right.  
8 That's October 15th, 2003. Weitz & Luxenberg  
9 then -- we're still in expert discovery -- deposes  
10 our causation expert, Dr. Gibbs. And this is really  
11 egregious and I want to go through the transcript in  
12 some detail, because what you'll see here is, what  
13 we've got is them asking a series of questions about  
14 our expert's opinions, which we now know is based on  
15 a fiction.

16 Let's go to the actual excerpts if we  
17 could. Bring up lines 20, to 25. All right.  
18 Dr. Gibbs has just summarized what he thinks the  
19 issues of the case are. And then the next question  
20 from Plaintiff's counsel is, "Did you form an  
21 opinion regarding the histology of Mr. Dunford's  
22 mesothelioma?"

♀  
0063

1 "ANSWER: Yes.  
2 "QUESTION: What is your opinion?  
3 And the answer is, "I think it is  
4 histopathic."

5 I wasn't at the deposition but I think  
6 that might be a court reporter error from what we  
7 see later on. I think the word is idiopathic,  
8 which, you know, means we don't know what the cause  
9 is.

10 Let's go on. Bring up line 16 through 20  
11 at the top if we could. Dr. Gibbs goes on to say,  
12 "The reason why I have an opinion of this being  
13 idiopathic is, number one, that I have not seen any  
14 substantive evidence of heavy amphibole asbestos  
15 exposure from the various depositions, from the  
16 medical records, and so forth."

17 He's saying that -- there are two types  
18 of asbestos, amphibole found in the products that  
19 would have been used in July. So he places a lot of  
20 emphasis on the absence of amphibole asbestos  
21 exposure. Go to lines 5 through 17. "Would you go  
22 ahead then with the other factors?"

♀

Attachment H

0064

1 "ANSWER: If you'll allow me to finish, I  
2 will tell you why I regard this as idiopathic.  
3 Number one, I could not identify any source of a  
4 potential, substantial amphibole exposure. Number  
5 two, the only claim to exposure is chrysotile  
6 materials which, as far as I can see, are not  
7 associated with the development of mesothelioma.  
8 And number three" -- I think that should be his --  
9 "his work was brief, intermittent exposure friction  
10 products. There's no epidemiological evidence that  
11 indicates that those were at increased risk of  
12 developing mesothelioma."  
13 Right here I've got to tell you that if  
14 we had been provided in discovery the information on  
15 household exposure and his construction exposure,  
16 the opinions and the bases for them would have been  
17 significantly different.  
18 Let's go to the next time line. October  
19 22, 2003. Ford files its motion to compel. Let's  
20 go to the next time line event. While that motion  
21 is pending, on November 3, 2003 -- let's see what  
22 we've got -- Weitz & Luxenberg filed a proof of

♀

0065

1 claim against the Rutland Fire Clay Company. This  
2 is yet another manufacturer of asbestos-containing  
3 refractory products for use in the construction  
4 industry. Let's just skip the document and go on.  
5 Okay. The big X there and I referenced  
6 this when I first started explaining what the time  
7 line would show. The X marks the point in time  
8 where we first learned about some of the events that  
9 are in red at the bottom of the time line. Because  
10 up until that point in time, we didn't know about  
11 any of these because the materials had not been  
12 produced. But a lot happens on November 7th, so  
13 let's bring up that day.  
14 First off, discovery closes. Formal  
15 discovery is over in the case. On that date the  
16 Plaintiff answers for its interrogatory number 9 and  
17 requests for production of number 22. And the way  
18 they did that was in an interesting way, Your Honor.  
19 There was actually a hearing scheduled for that date  
20 on our motion to compel. And I think, as we walked  
21 into the courthouse, our lawyer was handed this  
22 supplemental answers. But let's see what they

♀

0066

1 actually say, if we could.  
2 Go ahead and bring up the document if we  
3 could. Okay. If you could highlight interrogatory  
4 number 9, please. All right. Interrogatory number  
5 9, just to remind the Court, basically asked for  
6 them to provide information on the following topic:  
7 "Excluding any Defendant in this action, state the  
8 name of every person or entity claimed to have  
9 caused or contributed to asbestos-related illness.  
10 For each person or entity state" -- and then it has  
11 a bunch of details.  
12 And the answer originally and as  
13 supplemented was not -- well, we now have a new  
14 answer. And for the first time the Plaintiff

Attachment H

15 interposes objections which we would submit were  
16 waived the first time and certainly the second time  
17 they answered this. But the answer is as follows:  
18 "Plaintiff objects to providing information  
19 Plaintiff has agreed to keep confidential in  
20 connection with confidential settlement agreements."  
21 And then further objections. And then it indicates  
22 that Plaintiff has not entered into any settlements

♀  
0067

1 whose terms are not confidential. So basically  
2 we've got an objection and not a whole lot of  
3 information.  
4 They did not at this time, however,  
5 supplement any of these other discovery responses  
6 that we talked about earlier this morning requesting  
7 basically the same information. So those remain  
8 false to this day. I don't know how you would  
9 characterize what that means.  
10 Requests for production number 22. Now  
11 we're getting to some information. Plaintiff  
12 interposes an objection and then they say,  
13 "Notwithstanding Plaintiff's objection, please see  
14 attached." And attached were some of the documents  
15 that were requested in the earlier time line. And  
16 then it indicates that Plaintiff will provide all  
17 other bankruptcy claims submitted on behalf of  
18 Plaintiff including bankruptcy of Babcock and  
19 Wilcox, AC and S and Rutland Fire Clay Company. And  
20 then it goes on to say Plaintiff has not entered  
21 into any settlement whose terms are not  
22 confidential. So what we learned here is they're

♀  
0068

1 going to give us some stuff now on November 7th and  
2 we can expect some stuff in the future.  
3 Let's go on to the next event if we  
4 could, November 7th. As a part of the argument on  
5 our motion to compel which occurred after we were  
6 handed the supplemental packet, Plaintiff's counsel  
7 tells the Court that all information concerning  
8 other claims have been or will be produced. Now,  
9 there's an exhibit caveat, which I'm sure Your Honor  
10 is aware of. But I'd like to bring up the  
11 transcript from the hearing if we could. Go to the  
12 actual page. This is after Mr. Daglio argues for  
13 production of material. And the Court says, "All  
14 right. Yes, sir?"  
15 "MR. GRECO: Your Honor, with respect to  
16 other claims against other Defendants, we've  
17 produced the bankruptcy proof of claim with the  
18 exception of two that we're pulling out of storage  
19 and providing to Mr. Daglio. The only thing that  
20 we're claiming that we're keeping that we should --  
21 that we're entitled to not produce and that is  
22 pursuant to confidential agreements we've agreed to

♀  
0069

1 keep confidential, the settlement amounts. And, in  
2 particular, as far as documents the releases.  
3 That's all we're asking to keep confidential."  
4 Well, I mean I hate to say it, Your  
5 Honor, but we know now that this was not entirely

Attachment H

6 accurate. We know it for two reasons. First off,  
7 there were more than two bankruptcy proofs of claim  
8 that they were looking for. And I'll come back to  
9 that and demonstrate that to the Court.

10 But the other thing is, you know, we're  
11 waiting to this date to get the complaint and some  
12 associated pleadings out of the New York case.  
13 They've never produced that. So by claiming that  
14 the only thing they want to keep is the settlement  
15 releases, that's just not accurate.

16 Let's go on to the next event. This is  
17 the hearing on the motion to compel, resulting in  
18 the court's order of compelling production. Let's  
19 bring the order up if we could. Go ahead and  
20 highlight the paragraph after the order. "Ordered  
21 as follows, Defendants motion to compel with respect  
22 to information and documents regarding claims

0070

1 against nonparties is granted except as follows:  
2 Plaintiff shall produce to the Court all releases,  
3 settlement agreements, and settlement amounts in  
4 camera within ten days." And I know from your order  
5 that they did produce some material in conformity  
6 with that order. But we now know they omitted at  
7 least two settlement releases from that submission.

8 Let's go on to the next actual date. And  
9 that's November 10, 2003. At this time Defendants  
10 request by letter that Plaintiff's counsel certify  
11 compliance with the Court on the November 7th, 2003  
12 order. I mean I put this in the category, Fool me  
13 once, shame on you. Fool me twice, shame on me. So  
14 we sent a letter on out. And bring up the two  
15 paragraphs if you could. Where we basically  
16 confirmed what was represented in court and suggest  
17 that we've had an opportunity to review the  
18 documents that were produced with the supplemental  
19 discovery responses and believe that all the  
20 entities have not been identified and all documents  
21 have not been produced.

22 We now know that that is, in fact, true.

0071

1 But I think the interesting or critical aspect about  
2 this letter is we never received a response to this  
3 letter. I mean this is dated November 10th. We  
4 didn't get word one out of the information that was  
5 supposed to be forthcoming to us until after we  
6 filed our motion for sanctions.

7 Let's go on to the next time line if we  
8 could. November 25th, 2003. In this juncture Weitz  
9 & Luxenberg -- we're exchanging motions in limine  
10 and we filed our motions in limine and the Plaintiff  
11 filed theirs. And in response to ours, Weitz &  
12 Luxenberg responds to the Defendants' motion in  
13 limine to exclude their causation witnesses,  
14 Drs. Taub and Suzuki, which we talked about before.

15 Let's bring up the answer. This -- and I  
16 need to spend some time on this, because I think  
17 this symbolizes more than anything the complete harm  
18 and problem created by this pattern of deception.  
19 This is what they say in support of their argument  
20 that their causation experts should not be excluded.

Attachment H

21 First, Plaintiff's counsel provided  
22 Plaintiff's sworn testimony to Dr. Suzuki and

♀  
0072

1 Dr. Taub to aid them in rendering their expert  
2 opinion concerning the cause of Plaintiff's disease.  
3 Well, we now know that the sworn testimony from the  
4 Plaintiff was false. So that's a problem.

5 "The sworn testimony and interrogatory  
6 responses that were provided to Plaintiff's medical  
7 experts are the only evidence established in this  
8 action to date concerning the Plaintiff's exposure  
9 to asbestos products." That's a mind-boggling  
10 sentence to me. I think what they're basically  
11 saying there is because, you know, we haven't  
12 produced this information we've given -- this is the  
13 only thing that's going to be evidence in this case  
14 so they can establish their pick.

15 They go on to say "The fact that  
16 Plaintiff's counsel has filed proofs of claim with  
17 other bankrupt entities does not mean that Plaintiff  
18 as of this date has demonstrated any exposure to  
19 products manufactured by those bankruptcy entities."

20 I don't know exactly what to make of  
21 that, because as we've seen those proofs of claim  
22 were submitted by and large under penalty of

♀  
0073

1 perjury. We also know now -- we didn't know at the  
2 time -- that he's executed releases indicating  
3 exposure to specific products. So that sentence, I  
4 don't to this day do not comprehend.

5 It goes on to say, "Simply put, counsel  
6 for Plaintiff has withheld nothing from its experts  
7 and with the possible exception of products  
8 manufactured by the former Johns Manville Company  
9 and Congoleum Corporation, no evidence has been  
10 adduced by Plaintiff's counsel that Mr. Dunford was  
11 exposed to asbestos."

12 Now, I need to stop right here because  
13 this sentence is interesting because in the November  
14 7th supplementation where they handed us a packet of  
15 documents, they gave us the proof of claim for Johns  
16 Manville Company. But this is the first instance in  
17 this brief that we've ever heard about the Congoleum  
18 Corporation. So, I mean, that kind of took us aback  
19 and suggests that perhaps we didn't have everything.

20 Finally, they say at trial Defendants  
21 counsel will be free to cross-examine Plaintiff's  
22 experts on any issue that is relevant including

♀  
0074

1 alleged exposure to asbestos not referenced by James  
2 Dunford. I'm going to come back to this in a little  
3 bit, Your Honor, but cross-examination doesn't cut  
4 it.

5 Let's go on to the next event, Steve.  
6 11/26/2003. This is the day we file our sanctions  
7 motion. And this is also the day that the Court  
8 enters order finding in camera materials  
9 discoverable. Put the order up if we could. Go  
10 ahead and blow up that section.

11 In your order, Your Honor, you indicate

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12 the documents that were submitted to you in camera.  
13 And it is basically a list of three releases. We  
14 now know that there are five releases, so two are  
15 not submitted. And the two that were not submitted  
16 were for the AC and S exposure which indicates  
17 childhood exposures and the Congoleum exposure,  
18 which actually has a statement of exposure saying  
19 that he was exposed to Congoleum products.  
20 Let's go on to the next event. December  
21 1st, 2003. On this date Weitz & Luxenberg produces  
22 various proofs of claim, releases, settlement offers

♀  
0075

1 and claimant information forms. And as of this  
2 date, settlement offers outstanding for \$350,000  
3 with the Manville Personal Injury Trust. We know  
4 that from an offer that was included in the packet  
5 that we received.  
6 Let's go ahead to Weitz & Luxenberg's  
7 cover letter that accompanies these materials. It's  
8 dated December 1st of 2003. Bring up the proof of  
9 claim section if you could. I'm sorry, go back.  
10 You see what they list? They list what they sent  
11 us. And they sent us various proofs of claim and  
12 then various release forms. You saw in camera the  
13 3M, NARCO and Bendix releases, but we also have  
14 Congoleum Corporation and AC and S. And then a  
15 bunch of different information as well, various  
16 claimant information forms that we have not heard  
17 about, but we're happy to receive nonetheless.  
18 Bring up the second page of the letter.  
19 Go back to the letter if you could. I've  
20 highlighted the aggregate settlement total in the  
21 case up to now, which is \$2,227,500. We asked for  
22 the letter that was produced to you in camera that

♀  
0076

1 set out the individual amounts. But then we talked  
2 to the Plaintiff and we agreed at that juncture not  
3 to push for that information, because it's not  
4 really central to what we're dealing with here. But  
5 that number suggests to us that is a lot of  
6 settlements. We're not exactly sure where the money  
7 matches up, but it's a significant amount of money.  
8 Blow up the final paragraph. They then  
9 indicate, finally, "In response to your letter of  
10 December 1, 2003, at this time we are not providing  
11 you with correspondence between Weitz & Luxenberg  
12 and our clients, checks issued to our clients,  
13 correspondence between Weitz & Luxenberg and Glasser  
14 & Glasser as well as internal memoranda and  
15 e-mails." The interesting thing about this cover  
16 letter is nowhere in this cover letter does it  
17 indicate the existence of the New York lawsuit, does  
18 it indicate that they're withholding any pleadings  
19 from the New York lawsuit. And that is a  
20 fundamental problem for us.  
21 Let's go on to the next time line.  
22 December 2, 2003. This is after they have produced

♀  
0077

1 the whole set of stuff we get in the mail. A proof  
2 of claim filed against the Plibrico Company. We've

Attachment H

3 already talked about them earlier. I put them on  
4 the bottom. But we got this kind of as an  
5 afterthought.

6 Let's go on to tab 38C. I mean there's  
7 something else that occurred on December 2nd, 2003  
8 that is really central to the case. And this is the  
9 last event on my time line. Go back and put up the  
10 actual events. On this day, counsel for  
11 DaimlerChrysler, Ford and General Motors  
12 independently obtain the complaint on the New York  
13 case filed on 6/5/2001. It was never produced to  
14 us. We sent somebody to the court based upon  
15 putting two and two together after seeing the  
16 summons. We'll put up the verified complaint on the  
17 screen. A verified complaint, I assume that that  
18 means what I think it means. And you can see that  
19 James Dunford and Catherine Dunford are listed as  
20 Plaintiffs. Just go through it. I mean it's the  
21 same list of Defendants that we saw on the summons.  
22 Okay. Keep going. Go to the last page

♀  
0078

1 of the verified complaint. Can you bring up  
2 paragraph one? Plaintiffs -- and these are the lead  
3 plaintiffs, et al., by their attorneys Weitz &  
4 Luxenberg their verified complaint respectfully  
5 repeat and reallege -- I guess they've got a  
6 standard complaint that they reference in New York.  
7 And is fully incorporated herein as it pertains to  
8 the defendants in the aforementioned caption. Now,  
9 we didn't get a certified copy of the standard  
10 complaint, but we do have a certified copy of the  
11 verified complaint. And if I could hand that up to  
12 the Court.

(Bailiff handing document to the Judge.)

13 When we went to the courts, Your Honor,  
14 we found something extremely -- something else  
15 extremely interesting in the file. I would like to  
16 go to that next if we could. Before we do that, go  
17 to the next page, Steve. No. This is the page. As  
18 a part of the verified complaint, we have this  
19 paragraph. "Deponent is an associate of the firm  
20 Weitz & Luxenberg, P.C., counsel to the plaintiff in  
21 the within action. Deponent has read the foregoing  
22

♀  
0079

1 summons and verified complaint and knows the  
2 contents thereof. The same is true to deponent's  
3 own knowledge except as to the matter therein stated  
4 together alleged on information and belief." And  
5 there are none of those.

6 And then as to those matters the deponent  
7 believes to be true. This verification is made by  
8 deponent and not by plaintiffs because plaintiffs  
9 reside outside of the county of New York where  
10 plaintiffs' counsel and deponent maintain their  
11 office. Dated June 1, 2001, six or seven weeks  
12 before they filed the motion for judgment in this  
13 county.

14 Okay. Let's go to the next documents.  
15 There's one document that I'm going to show you  
16 today, Your Honor. This is the one that symbolizes  
17 the whole pattern of deception here. It was filed

Attachment H

18 on June 13, 2001 and it is a part of the official  
19 court file. I have handed you a certified copy of  
20 that as well.

21 It's something called the plaintiffs'  
22 initial fact sheet. It lists individual details

♀  
0080

1 about the plaintiffs. Let's go to the second page,  
2 which is more important. Paragraph 8 says at this  
3 preliminary stage of the proceedings please provide  
4 as much of the following information that is  
5 presently available, work sites, inclusive dates,  
6 and trade or occupation for each site. We have this  
7 box, it says see attached list for work to be  
8 provided. But then it gives dates 1982 to the  
9 present. Well, we know from 1982 to the present he  
10 worked at the gas stations and he worked in the  
11 construction industry. And if there were any doubt  
12 about that, in the trade occupation box, it lists  
13 auto mechanic -- we know now he was not an auto  
14 mechanic -- carpenter, construction, gas attendant,  
15 household exposure. And this was submitted and  
16 filed June 13, 2001. This document, the two-page  
17 document here symbolizes in our minds the deception  
18 that has gone on at every step of the way in this  
19 case.

20 I'm done with the time line. Let's just  
21 go back to the slides, the Powerpoint slides, Steve.  
22 I know that we've covered a lot of ground

♀  
0081

1 here. I'd like to just quickly recap what in our  
2 own minds we perceive to be the most egregious of  
3 deceptions.

4 Let's put the first one up. This is a  
5 big one. The Plaintiff's discovery responses remain  
6 false today. We've covered a number of discovery  
7 responses which were false when they were served.  
8 They supplemented them. They were false then and  
9 the remain false today. And among those  
10 specifically are their responses to  
11 DaimlerChrysler's interrogatory number 3, the  
12 request for production of number 12; Ford's  
13 interrogatory numbers 6 and 9; General Motors'  
14 interrogatory number 1. And that's just ours.

15 Let's go to second bullet. We also  
16 consider it particularly egregious Plaintiff's  
17 untruthful testimony about lack of household and  
18 construction exposures. Given the overwhelming,  
19 voluminous record in this case filed at the bottom  
20 of the time line, there can be no doubt that he was  
21 exposed and that he basically attests to his  
22 exposure in other contexts. And yet at his

♀  
0082

1 deposition he specifically disavowed them.  
2 Go to the third bullet. This is tough  
3 for us to understand. It's not just that they filed  
4 a claim alleging exposure to companies, but some of  
5 the proofs of claim actually make allegations of  
6 exposure to specific products. And, for example,  
7 Eagle Picher's "Super 66" cement. NARCO's Stazon,  
8 Hot Gun, Narcogun and the like. Those just didn't

Attachment H

9 come out of thin air. I mean you make an allegation  
10 of exposure to a specific product there must be some  
11 basis for that. And we find it egregious that we  
12 were never told about that in the discovery of this  
13 case.

14 Let's go to the next bullet. Plaintiff's  
15 testimony about masks and respirators. We find this  
16 egregious not because he testified that he didn't  
17 use them at the gas stations, because we suspect  
18 that's true. But the implication, you know, is that  
19 when you combine the fact that he didn't use them at  
20 the gas stations but that he settled then with the  
21 mask and respirator company, it just red flags the  
22 issue as to where he actually used them. And we now

♀  
0083

1 know it was in the construction industry, but he  
2 didn't tell us that in discovery.

3 Let's go to the next bullet. Repeated  
4 violations of the Court's orders. The first  
5 violation is the original case management order  
6 entered in this case years ago basically required a  
7 conformity with Virginia rules that the Plaintiff  
8 seasonably supplement his discovery responses. He  
9 ordered it in a seasonable manner and I think it  
10 meant as soon as practicable. Well, we don't have  
11 seasonable supplementation or otherwise for some of  
12 these discovery responses. Some of them remain  
13 false to this very day. And we're a month outside  
14 the discovery period and less than a month from  
15 trial.

16 Finally, the Plaintiff's refusal to  
17 provide information about all other claims  
18 exposures. And in particular I'm extremely agitated  
19 about not ever getting the New York pleadings from  
20 the Plaintiff. The case was filed six weeks before  
21 they filed their motion for judgment in this case.  
22 The fact information sheet was filed, you know, four

♀  
0084

1 weeks before. We had to go out and get those  
2 ourselves. And that's just unacceptable.

3 Let's go to the next slide. Let me stop  
4 right here. We haven't received a written response.  
5 And I don't want to spend a long time on this. But  
6 I do want to try to anticipate what might be some of  
7 the possible responses we might hear today. And  
8 I've got to tell you, I don't have it on the slide,  
9 but one possible response is an abject apology. An  
10 abject apology, in my opinion, would be better late  
11 than never, but it doesn't cure our problem here.  
12 Our problem is that the deception started at the  
13 beginning of the case, went through discovery. And  
14 the apology just doesn't cut it. We constructed a  
15 defense based upon fiction. And any apology at this  
16 juncture is good from the standpoint that it doesn't  
17 compound the deception, but it doesn't cure it.

18 We may also hear today that the deception  
19 was unintentional. I'd like to hear about that if  
20 we could. And while it may be -- I don't know -- it  
21 may be that various lawyers involved in this case  
22 did not intentionally deceive. There are two

♀

Attachment H

0085

1 entities of people that did. One is James Dunford.  
2 we now know that his discovery responses were false.  
3 He verified them. And we also know that at the same  
4 time he was executing releases for exposure to  
5 products that he denied on this side of the ledger,  
6 we basically have proof of the fact it was going on.  
7 There is also another entity not clean on  
8 this and that is the law firm of Weitz & Luxenberg.  
9 Their signature is all over the proofs of claim.  
10 There is no way, as a law firm, they didn't know  
11 that he was making exposure allegations based on his  
12 construction trade and his own household exposure,  
13 particularly in light of the fact that the first  
14 thing they did was file suit against a different set  
15 of defendants in New York. There's no doubt that  
16 they, as a firm, knew about his exposure.  
17 Let's go to the second bullet. I don't  
18 mean to be flip here, but we may hear that this is  
19 just the way it's done in New York City. And my  
20 nonflip initial reaction is well, we're not in New  
21 York City. But if we hear this, it causes me even  
22 graver concerns because right now what we're

♀  
0086

1 addressing right here is a single instance of fraud.  
2 Although, it's pervasive and comprehensive and goes  
3 throughout the entire case, I hope we don't hear  
4 anything about this is the way it's done in New York  
5 City. Because that, to my mind, creates a future  
6 problem than what we have to address here today.  
7 Let's go to the third bullet. We may  
8 hear -- and I don't know. I hope I've demonstrated  
9 why we filed the motion for sanctions. But we may  
10 hear that the motion was not necessary and we could  
11 have worked it out. In our mind, when we look at  
12 the pattern going back to the inception of this  
13 case, carrying through from when we first heard  
14 about possible other exposures at Mrs. Dunford's  
15 deposition, carrying through the discovery, carrying  
16 through the fact that we've asked for certifications  
17 that have not been responded to, we didn't think  
18 there was any way this could be worked out. And it  
19 needed to be brought to the Court's attention.  
20 Okay. Next bullet. We may hear there  
21 that there's really no harm or foul because we now  
22 know the truth. And there are a couple of possible

♀  
0087

1 tacts this could take. And we saw one in their  
2 reply to our motion in limine to exclude their  
3 causation experts. And that is, well, you could  
4 just cross-examine our witnesses at trial, you know,  
5 with the information that you now have. I hope I've  
6 demonstrated that that's just insufficient on its  
7 face because we have compiled through investigation,  
8 discovery and a lot of work a defense that's based  
9 upon fiction. And it can't be remedied by  
10 cross-examination at trial.  
11 We may also hear that, if necessary, we  
12 could have additional discovery taken in the case to  
13 clean up all these issues. Well, again, I go back  
14 to the issue that from day one we were looking for

Attachment H

15 evidence of alternative causation and it was  
16 withheld from us and we constructed a defense that  
17 basically cut that out of the case. We spent a lot  
18 of time and a lot of money in investigation in  
19 selection of experts, in preparing those experts,  
20 and I don't think our clients should be put to the  
21 additional task of having to conduct additional  
22 discovery merely because at this late date, we found

♀  
0088

1 what I hope is the full measure of the fraud.  
2 Let's go to the next slide. In any  
3 event, where we're at right now, no matter what the  
4 response is, we think there are a number of  
5 questions that demand answers. Put the first one  
6 up. Why hasn't the Plaintiff amended his discovery  
7 responses to reflect the truth? I can't figure that  
8 one out for anything in the world. I mean we have  
9 these discovery responses that were false when they  
10 were served. They were false when they were  
11 supplemented. And now they know that we know that  
12 they're false and we still don't have the truth.

13 Put up the second one. This is a  
14 question that -- I don't know. I think that the  
15 event that I've described in the time line raises  
16 questions. Did Weitz & Luxenberg perpetrate fraud  
17 upon this Court, the New York State Court or both?  
18 I don't know about the New York Court, and that's,  
19 unfortunately to say, really not my concern. I  
20 think we've demonstrated through the time line that  
21 we clearly have fraud upon this Court.

22 Go to the next slide. Similarly, I guess

♀  
0089

1 the events -- and we went through them -- did Weitz  
2 & Luxenberg perpetrate fraud upon this Court the  
3 bankruptcy trusts? I mean all of those proofs of  
4 claim indicate that they're being submitted under  
5 the bane of perjury. And that the subject  
6 conviction of a federal -- a felony conviction and a  
7 fine of \$500,000 and imprisonment of up to five  
8 years. You know, I've got to believe that they  
9 didn't take those lightly. I don't know. I don't  
10 know whether they're perpetrating fraud on the  
11 trusts. But I know that when you look at what we've  
12 seen here today, there's fraud on this Court.

13 Let's go to the next question. And I  
14 don't know the answer to this either. Why, when  
15 ordered to do so did the Plaintiff fail to turn over  
16 all releases for in camera inspection? I mean I've  
17 got a couple of ideas about that. And it has to  
18 do -- you know, one answer is it could be  
19 inadvertent. Or it could have to do with the  
20 substance of the actual releases. The attestation  
21 clause in the AC and S release basically has  
22 Mr. Dunford swearing that he was exposed to AC and S

♀  
0090

1 products between 1958 and 1974. Well, we know he  
2 wasn't working then, so we know that that must, if  
3 anything, clearly implicate household exposure,  
4 which he's denied since the beginning of time.  
5 Similarly, they failed to turn over the Congoleum

Attachment H.

6 releases. That also has specific statement of  
7 exposure. And we didn't hear about that at any  
8 point in our discovery in this case. So that might  
9 be. It might be inadvertent. I'm going to be  
10 interested to hear about that.

11 Finally, and this is the kicker, why did  
12 the Defendants have to go to New York to obtain the  
13 pleadings on their own? I mean -- or to put it  
14 another way, when was the Plaintiff going to produce  
15 the verified complaint and the initial fact sheet?  
16 If we didn't get it before today, I've got to  
17 believe they were never going to produce it. But  
18 I'll be interested in hearing about that as well.

19 Go to the next slide. This leads me back  
20 to where I think I've started. I've got to tell you  
21 we're not happy to be here arguing this. This is  
22 not something that comes up in our normal practice.

♀  
0091

1 As I mentioned earlier on, I've never brought a  
2 motion for sanctions. But I hope that the pattern  
3 of deception, which started actually from day one in  
4 this case and has continued through to today,  
5 demonstrates why we felt we were compelled to do so  
6 for the court.

7 We want a number of things out of this.  
8 Put up the first. The first thing we want is a  
9 dismissal with prejudice as against Ford, General  
10 Motors and DaimlerChrysler. Now I know that  
11 dismissal with prejudice is an extreme measure  
12 normally not taken lightly. But there are a number  
13 of factors that we think merit dismissal with  
14 prejudice in this case.

15 The first is -- and I can't put it any  
16 other way -- from day one the Plaintiff's case in  
17 this lawsuit was a fiction. Plaintiff withheld all  
18 of the information from us at every step of the way.  
19 And we got it -- I mean we finally developed it  
20 after the close of discovery. I mean you view what  
21 has occurred in this case in the light of just  
22 having the New York complaint on file, which by the

♀  
0092

1 way, the best we can tell, is still a current case  
2 underway in New York. We can't think that there  
3 would be any greater or more pervasive fraud that  
4 you can imagine.

5 Again, I understand that this is going to  
6 be -- this is a harsh result from the Plaintiff.  
7 But he verified the interrogatory responses. He  
8 testified falsely at his depositions, including a de  
9 bene esse deposition, which was taken to preserve  
10 his testimony for trial. The jury would have seen  
11 that if we hadn't been able to catch this and bring  
12 it to the court's attention. And he executed all  
13 those releases, indicating exposure to other  
14 products. So that in and of itself, I think, merits  
15 dismissal with prejudice.

16 Now, you've got the case going on in New  
17 York. And he's received a lot of settlement money.  
18 I guess that would ameliorate somewhat the harsh --  
19 potential harsh result that we have here today. But  
20 I don't think that really plays into the factor

21 here. The other thing I would note in  
22 justification -- and I don't want to go into law,

♀  
0093

1 but we have repeated court order violations. And I  
2 think that that ties in with our request for a  
3 dismissal with prejudice as well.

4 At this juncture, we want the Court, in  
5 addition to dismissing the case with prejudice, to  
6 strike certain of the Plaintiff's witnesses. We  
7 want the Court to strike the Plaintiff himself and  
8 Drs. Taub and Suzuki. Now, I understand this may  
9 seem peculiar in light of the first bullet point  
10 that we put up there. And I guess I can answer that  
11 in two ways. I wish we could dismiss this case with  
12 prejudice about 15 different times, because I think  
13 the conduct that has occurred would merit it. But I  
14 think in and of itself, in addition to the dismissal  
15 with prejudice, because we have the actual false  
16 testimony of the plaintiff and the testimony from  
17 his causation experts based upon false information,  
18 information that was not provided to them, that that  
19 also merits striking his witnesses.

20 Put up the next one. We would like the  
21 Court as well -- and we would ask the Court to award  
22 Ford, DaimlerChrysler and General Motors all fees

♀  
0094

1 and expenses incurred since January 22, 2002. The  
2 reason we picked that date is that's the date at  
3 which the Plaintiff first served his verified  
4 interrogatory responses, which as we discussed this  
5 morning, were false when he served them. Everything  
6 else builds upon that date. And we would request an  
7 opportunity to present our billing statement in  
8 camera for the Court's inspection. I don't have  
9 them here today because in the event the Court  
10 orders this, I'm going to have to separate out some  
11 of the stuff that occurred before January 22nd. But  
12 we could get that to the Court pretty quickly.

13 Finally, we ask for you to revoke the pro  
14 hoc admissions of Plaintiff's New York counsel. My  
15 practice takes me outside the Commonwealth a great  
16 deal. I practice in a number of other  
17 jurisdictions. So I understand very well the  
18 implication to revoke somebody's pro hoc admissions.  
19 But I've got to tell you, if you don't do it in this  
20 case, I don't know when you would ever do it. And  
21 the bottom line here, I think, with all of the  
22 relief that we've requested, if it's not granted in

♀  
0095

1 this case, when will it ever be granted? I mean we  
2 spent a long time going through the pattern here.  
3 And we just can't contemplate a set of circumstances  
4 that would justify this relief more than anything  
5 else.

6 Subject to the Court's questions, I'm  
7 finished here. I would offer to the Plaintiff's  
8 counsel, if they want to use any of the documents or  
9 slides that we have put up, Mr. Roberts will do his  
10 best to pull them up. It may take a little bit  
11 because he's got some complicated bar code

Attachment H

12 arrangement that I'm not familiar with, but he will  
13 do his best. Thank you.

14 THE COURT: Thank you. Gentlemen,  
15 response?

16 MR. LONG: Yes, Your Honor. Your Honor,  
17 I honestly do not know quite where to begin. My  
18 name is James Long, by the way, of Weitz &  
19 Luxenberg. I guess I should start with an apology.  
20 I do apologize to this Court and to my adversaries  
21 for any confusion or consternation that we caused  
22 them. I am unable to answer many of these questions

♀  
0096

1 that were raised by Mr. Williams. I can answer some  
2 of them, but not all of them. In a nutshell, Judge,  
3 I can tell you this is what happened: I head a unit  
4 at Weitz & Luxenberg that is responsible for filing  
5 all of our cases that are not filed in New York  
6 City, such as out-of-state work, everywhere else in  
7 New York except New York City. When I got this  
8 case, we called Glasser & Glasser, engaged them as  
9 co-counsel. I conducted an investigation through my  
10 client, filed the complaint in Virginia through  
11 Glasser & Glasser. And I proceeded along that track  
12 for two years.

13 I think what has occurred here is that  
14 there were two different tracks that were being  
15 followed by different people at Weitz & Luxenberg.  
16 I was completely unaware that bankruptcy claims had  
17 been filed. I was completely unaware that there was  
18 an action filed in New York City. I was completely  
19 unaware that there were any settlements in this case  
20 until Cathy Dunford testified about it on August  
21 26th. I had no knowledge of that. Up until that  
22 point in time, as far as I was concerned, it was a

♀  
0097

1 Virginia State case against the five brake  
2 manufacturers and three distributors and that's how  
3 I prepared my case, that's how I prepared my  
4 witnesses. That's how I prepared my experts. When  
5 I found out August 26th after Cathy Dunford  
6 testified that she had a settlement, I went back to  
7 the office, discovered that she was correct. She  
8 had two or three actually. Honeywell, the  
9 Defendants knew about. There were also settlements  
10 with NARCO and 3M.

11 And I do need to comment very briefly on  
12 3M. I think we got a little far afield with respect  
13 to the exact nature of the 3M settlement. 3M made  
14 not only masks but they also made  
15 asbestos-containing tape. And I only point that out  
16 to say that I don't think you should necessarily  
17 draw the conclusion from Mr. Dunford's answers that  
18 he never used masks or respiratory protection at his  
19 deposition as an outright lie. There is an  
20 alternative theory of liability against 3M, which is  
21 that he could have been exposed to their  
22 asbestos-containing tape.

♀  
0098

1 In any event, Judge, after August 26th I  
2 knew that there were settlements. I found out

Attachment H

3 sometime after that that proofs of claim had been  
4 filed. I wrote a letter to the Defendants telling  
5 them that I was not going to give them proofs of  
6 claim absent an order from the court directing me to  
7 do so, because that's what we do in New York and the  
8 other jurisdictions that I practice in. We take the  
9 position that proofs of claim are for settlement  
10 purposes and that they're not discoverable. And  
11 then we let the judge in the jurisdiction where we  
12 are decide whether they are discoverable, which is  
13 why they got that September 10th letter saying I'm  
14 not going to turn them over until I'm told to turn  
15 them over. And after I was told to turn them over,  
16 I turned them over.

17 I asked our bankruptcy people for all the  
18 proofs of claim that were filed. They gave them to  
19 me. I turned them over. Later on they gave me two  
20 more, which were for Congoleum and -- help me,  
21 Steve.

22 MR. WILLIAMS: Plibrico. Not.

♀  
0099

1 MR. LONG: Plibrico? No. It wasn't  
2 Congoleum and Plibrico. Anyway, there were two  
3 additional ones I turned over, Judge. Three days  
4 later they walk up to me and give me another one,  
5 which is Plibrico and say we've also filed this one.  
6 I faxed it to Mr. Tarry the same day that I got it.  
7 That's all I can tell you. I've tried very hard to  
8 be on the up and up here. I was going by the sworn  
9 testimony from my client when I prepared my expert  
10 witnesses and everything that I did in this case.  
11 And I cannot account for what somebody else did on a  
12 parallel track with respect to a lawsuit that I  
13 didn't know existed and the bankruptcy claims that I  
14 didn't know existed. That's pretty much all I can  
15 say.

16 THE COURT: Well, Mr. Dunford knew of it,  
17 didn't he?

18 MR. LONG: I suppose he did. But I  
19 didn't know. He didn't tell me that.

20 THE COURT: He's the Plaintiff.

21 MR. LONG: Absolutely, Your Honor.

22 THE COURT: Don't you think he's deceived

♀  
0100

1 the Court, deceived counsel?

2 MR. LONG: I don't know that, Your Honor.  
3 He has a 9th grade education. I don't think you  
4 should draw that conclusion unless he's here and you  
5 ask him that yourself. He is not the brightest star  
6 in the heavens. And I can't answer that question  
7 for him.

8 THE COURT: Surely he would know if he  
9 was a party to a lawsuit in New York, wouldn't he?

10 MR. LONG: Not necessarily.

11 THE COURT: No?

12 MR. LONG: I don't think so, Your Honor.  
13 He did not verify that New York complaint. I think  
14 it was verified by us.

15 THE COURT: Well, he had to furnish the  
16 information that went into the lawsuit.

17 MR. LONG: He did for this lawsuit.

18 THE COURT: How about the New York  
19 lawsuit?

20 MR. LONG: It's the same information.

21 THE COURT: Well, in the page that  
22 counsel highlighted -- what is this called --

♀

0101

1 initial fact sheet, page 2. It lists what his  
2 occupations were. He must have been the person that  
3 furnished that information.

4 MR. LONG: He did. That's in the  
5 testimony, too. He was in construction and he did  
6 work on a chuck wagon truck. And he did work at the  
7 garages where the brake work was going on. That's  
8 all accurate as far as it goes as to what he did  
9 throughout his work life. That's what I'm saying to  
10 you. But I can't comment too much on that, Your  
11 Honor. I didn't even know it existed, the New York  
12 lawsuit.

13 THE COURT: You didn't know, but your law  
14 firm did.

15 MR. LONG: Absolutely, yes.

16 THE COURT: So what do you think the  
17 Court ought to do?

18 MR. LONG: I need some time to think  
19 about that.

20 THE COURT: well, I can tell you that  
21 counsel makes a rather persuasive argument to begin  
22 with to have me dismiss this case with prejudice

♀

0102

1 against these three parties. That's compelling.  
2 I'll go back here and think about it, but it's not  
3 going to take me very long, I don't believe.

4 Beyond that, if asked for sanctions by  
5 way of cost, attorneys fees incurred for a rather  
6 substantial period of time, what do you think of  
7 that?

8 MR. LONG: I'd like to see the numbers or  
9 I'd like to know more details about their proposal  
10 and why they used January 22, 2002 as the cutoff  
11 point. I didn't come prepared to address that  
12 today.

13 THE COURT: We're going to take a brief  
14 pause. I need to take a break for a second anyway.

15 (A break was taken.)

16 THE COURT: All right. Yes, sir?

17 MR. WAINGER: Your Honor, if I may? Your  
18 Honor, my name is Shep Wainger. I represent  
19 Standard Motor Products. I have filed a written  
20 adoption of Ford, General Motors and  
21 DaimlerChrysler's motion. I would adopt that here  
22 today. I believe we have been equally defrauded and

♀

0103

1 would ask the Court to award us the same relief as  
2 Ford, General Motors, and DaimlerChrysler. Thank  
3 you.

4 MR. MacDONALD: Your Honor, may I? Your  
5 Honor, Neil MacDonald on behalf of Defendant  
6 Cunningham Auto Parts doing business as Fairfax Auto  
7 Parts Herndon. As of last evening, we were able to  
8 resolve our case with the Plaintiff. But it's still

Attachment H

9 awaiting for paperwork release. To the extent that  
10 somehow falls out, which I do not anticipate, we  
11 would want to have the opportunity to -- we've  
12 adopted this motion formally under the pleading. So  
13 we would want to have the opportunity if, in fact,  
14 the settlement somehow drops out, which, again, I  
15 don't anticipate, but I would want to have the  
16 opportunity to come back here and ask for relief  
17 from Your Honor.

18 MR. FRIEDEN: Good morning, Your Honor.  
19 My name is Jon Frieden of Odin, Feldman & Pittleman.  
20 My clients in this case are Total Auto Parts Herndon  
21 and Horn Motors, Inc. I'm in a similar position to  
22 Mr. MacDonald. I have settled my -- my clients have

♀  
0104

1 settled with the Plaintiff as of two days ago, which  
2 we have on paper. I do not expect it to fall  
3 through. We have filed a written adoption of this  
4 motion so we just reserve the right, if for some  
5 reason it does fall through, to seek the same  
6 relief. We obviously don't expect that to happen,  
7 Judge.

8 THE COURT: Did you have anything  
9 further, gentlemen?

10 MR. WILLIAMS: No, Your Honor. Just one  
11 housekeeping matter. I have a set of slides for the  
12 Court.

13 THE COURT: They should be made a part of  
14 the record.

15 MR. WILLIAMS: Yes, Your Honor. And I  
16 would request that we go ahead and submit them to  
17 the Court.

18 THE COURT: Yes, sir.

19 MR. GRECO: If I may, Your Honor. Marc  
20 Greco, Glasser & Glasser also appearing on behalf of  
21 Plaintiff. To the extent there has been a request  
22 for sanctions, Your Honor, I hope you appreciate I

♀  
0105

1 am in a difficult position. There has not been any,  
2 as I understand, allegations made with respect to  
3 specific conduct by Glasser & Glasser. Do I  
4 understand that correct?

5 MR. WILLIAMS: Your Honor, the  
6 presentation stands. I have no reason to make any  
7 specific allegation against Glasser & Glasser.

8 MR. GRECO: On that basis I have not  
9 tried to defend anything done by my firm. If there  
10 are any questions from the Court, to the extent I  
11 can answer them, I'd be happy to answer them.

12 THE COURT: well, I'd ask you the same  
13 question. Wouldn't Mr. Dunford be the best source  
14 of the information with respect to these various  
15 lawsuits that have been brought in this case?

16 MR. GRECO: I believe -- I can say at the  
17 very least he could answer more than I could and I  
18 believe he would be a good source.

19 THE COURT: All right. Thank you.

20 In almost 22 years on the bench, this is  
21 probably the most egregious case of a discovery  
22 abuse that I have ever seen if not the worst. This

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Attachment H

0106

1 is a case where not only the Court's orders have  
2 been defrauded, but there's been a deception  
3 employed in discovery process that brings us here  
4 today. The Court has set aside three weeks on its  
5 calendar to try this case.

6 Now, I will accept the proffer of counsel  
7 that there was a problem internally with how this  
8 case was handled in New York and in Virginia and  
9 that the law firm somehow or other did not exchange  
10 the kind of information that was necessary in order  
11 to promptly respond to discovery. But that doesn't  
12 excuse Mr. Dunford. He's the Plaintiff. The lawyer  
13 tries the case, but the source of information has to  
14 be the Plaintiff. And this information could only  
15 come from the Plaintiff. And if there's any  
16 question as to whether or not the Plaintiff should  
17 or should not have furnished certain information, he  
18 could have brought that to the attention of his  
19 attorneys and he didn't do that.

20 whether you consider these sanctions  
21 under rule 412 for failure to comply with the  
22 Court's order or whether you consider it under 801,

♀  
0107

1 271.1, that is a fraud being perpetrated upon the  
2 Court, I think this is sanctionable. And I think  
3 the only remedy that can be applied at this point in  
4 time is to dismiss this case with prejudice against  
5 the DaimlerChrysler, Ford Motors, General Motors and  
6 Standard Motor products. The other two Defendants  
7 have apparently settled their cases in this case.

8 I see no reason to impose any further  
9 sanctions in this case based on the proffer of  
10 counsel. And I don't believe that charging  
11 Mr. Dunford the court costs in this case or  
12 attorneys' fees is appropriate. I think the Court  
13 sanction is appropriate.

14 Would you draw an order to that effect?

15 MR. WILLIAMS: Certainly, Your Honor.

16 THE COURT: The case is removed from the  
17 trial docket. Thank you, gentlemen.

18 (The hearing concluded at 11:11 a.m.)  
19  
20  
21  
22

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0108

CERTIFICATE OF SHORTHAND REPORTER

1 I, T. R. Hollister, the court reporter  
2 before whom the foregoing hearing was taken, do  
3 hereby certify that the foregoing transcript is a  
4 true and correct record of the testimony given; that  
5 said testimony was taken by me stenographically and  
6 thereafter reduced to typewriting under my  
7 supervision; and that I am neither counsel for,  
8 related to, nor employed by any of the parties to  
9 this case and have no interest, financial or  
10 otherwise, in its outcome.  
11  
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Attachment H

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T. R. HOLLISTER  
Court Reporter

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