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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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IN RE: NEW YORK CITY ASBESTOS LITIGATION

NYCAL
Index № 40000/88

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THIS DOCUMENT RELATES TO

ALL ASBESTOS CASES

Hon. Sherry Klein Heitler
Part 30

NOTICE OF MOTION

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PLEASE TAKE NOTICE that, upon the accompanying Affirmation of Alani Golanski, Esq., an attorney duly admitted to practice before this Court, dated December 20, 2011, the exhibits annexed thereto, and upon all the pleadings heretofore had herein, plaintiffs represented by their attorneys WEITZ & LUXENBERG, P.C., will move this Court, before the Honorable Sherry Klein Heitler, at IAS Motion Part, Room 130, at the Courthouse, Motion Submission Part, located at 60 Centre Street, New York, New York, on the 20th day of January, 2012, at 9:30 A.M., or as soon thereafter as counsel can be heard, pursuant to Section III.B of the Amended Case Management Order, for an Order

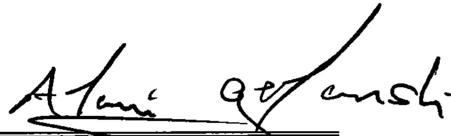
(1) vacating the Recommendation of the Special Master dated December 12, 2011, such Recommendation relating to the discovery of Federal bankruptcy trust settlement-related submissions and materials, and (2) vacating, rescinding and/or striking Paragraph XV(E)(2)(l) of the NYCAL Amended Case Management Order. This motion is occasioned by plaintiffs' objection to the Recommendation pursuant to Section III.B.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering papers, if any, are required to be served upon the undersigned at least seven (7) days prior to the return date hereof.

Dated: New York, New York
December 21, 2011

Respectfully submitted,

WEITZ & LUXENBERG, P.C.



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To:

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AFFIRMATION OBJECTING TO (1) THE SPECIAL MASTER'S RECOMMENDATION REQUIRING PRODUCTION OF BANKRUPTCY TRUST-RELATED FILINGS, AND (2) ACMO PARAGRAPH XV(E)(2)(l)

TABLE OF CONTENTS

A. Introduction 4

B. The Controlling Federal Scheme Precludes the State Court from Ordering this Discovery, and from Decreeing Trust Submission Deadlines 13

1. The Basis and Nature of the Federal Interest 13

2. Trust Distribution Procedures ("TDPs") Preclude State Court-Ordered Discovery of Claimants' Submission Materials Under the TDPs 25

3. The Nonpublic Nature of the Submissions 29

C. New York Law Also Requires Vacatur of That Portion of the Recommendation That Specifically Requires Disclosure of Non-Party Materials 28

D. ACMO ¶ XV(E)(2)(l) Conflicts with Trust Procedures 40

E. Conclusion 41

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

ALANI GOLANSKI, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following under the penalties of perjury:

1. I am associated with the law firm of Weitz & Luxenberg, P.C. (hereinafter "Weitz" or "W&L"), attorneys for plaintiffs in the above-captioned litigation, and have knowledge of the facts and circumstances of this action.

2. Pursuant to paragraphs III(B) and XV(E)(2)(l) of the Amended Case Management Order (amended as of May 26, 2011) ("ACMO"), this is an objection to, and appeal from, the Special Master's Recommendation dated December 12, 2011 and posted December 14, 2011 [annexed hereto as **Exhibit "1"**], concerning, in the first instance, non-party affidavits submitted to the federally administered bankruptcy trusts in support of plaintiff's trust claims, but also concerning the propriety of state tort-related discovery of any and all bankruptcy trust submissions by state tort plaintiffs, and further concerning the propriety of ACMO ¶ XV(E)(2)(l), which presently imposes upon NYCAL plaintiffs who "intend to file a proof of claim form with any bankrupt entity or trust" strict time limits within which to do so.

3. This Affirmation establishes that the federally supervised and administered bankruptcy trust scheme discussed at length herein, as well as State law privileges, afford plaintiffs protection (1) against the disclosure of their first-party trust submissions, (2) against disclosure of non-party supporting materials submitted to the trusts, and also (3) against the operation of ACMO ¶ XV(E)(2)(l), which directly conflicts with federally administered limitations periods and trust filing deadlines.[1]

4. Plaintiffs timely noticed their objection to the Recommendation via nycal.net posting and email transmission to Defense Liaison Counsel, pursuant to ACMO § III(B), on December 16, 2011.

A. INTRODUCTION

5. The intersection of the State tort system with the Federal bankruptcy trust mechanism presents some elusive issues. Because the important considerations at stake – implicating Federal constitutional and confidentiality concerns as well as State statutory interests – have been less than obvious in the context of ongoing NYCAL discovery practice, the litigants themselves have typically not focused on the interrelationship of the co-existing principles and

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[1] Plaintiffs in the case of *Andrucki et al., v. Aluminum Co.*, Index № 190377/10, et al. (Sup. Ct. NY County), filed a similar objection in their prior appeal to this Court from the Special Master's Recommendation issued June 25, 2011. That case ultimately settled, mooting that particular appeal.

interests. The judiciary, by extension, has not been called upon to do so, and has had no compelling reason for *sua sponte* exploration of the issue.

6. As relates to the discovery in State proceedings of claimant filings with the federally-created and -supervised bankruptcy trust system, the Federal scheme, upon examination, counsels a different approach from the one implemented by the ACMO. This approach has long been characterized by Paragraph XV(E)(2)(l), which presupposes a State court administrative right to compel claimant filings – and thereby the discovery that might arise therefrom – at odds with the federally sanctioned and administered limitations periods and deadlines.

7. Asbestos bankruptcy trust filings always occur, as a practical matter, in the context of the claimants' overall efforts, usually in a state tort system, to redress their grievances. Were each state court overseeing an asbestos action to prescribe bankruptcy filing requirements as a precondition to redress in the court – as does Paragraph XV(E)(2)(l) – the trusts' own, carefully scrutinized and managed scheduling programs would be vitiated, and in the conflict between State and federally-administered prescriptions, the Federal interests would impermissibly lose out and be negated.

8. The Federal trust scheme also merits careful consideration with regard to the discovery of claimant filings. The Federal confidentiality assurances

and interests reach all claimant filings with the trust. Moreover, the non-party materials are specially protected not only by the trust mechanism's superseding interests, but also by State law work product protections and the State legislative scheme placing the burden of production of liability-apportionment-related proofs squarely upon the trial defendants' shoulders. *See* CPLR 1603. With regard to the work product issue, the analysis, selection and compilation of non-party materials submitted to the trusts derive from, and directly reflect, counsel's theory of the particular plaintiff's case and counsel's mental impressions, and thereby falls squarely within the traditional concept of protected attorney work product.

9. The Recommendation now objected to notes that plaintiffs have produced to asbestos defendants in the State tort system some but not all of their trust claim-related submissions. The Special Master's ruling requires plaintiffs to produce "all materials submitted by or on behalf of plaintiffs with a bankrupt entity's trust, including, but not limited to, affidavits (including those signed by plaintiffs, plaintiffs' family members, or a non-party), sworn statements, proofs of diagnosis, extraordinary claim certificates, and signature/certification pages" [Exh. 1, at 2].

10. With particular regard to the non-party materials, given the assurances and representations afforded by the federally-supervised bankruptcy trust scheme, the Recommendation is incorrect in concluding that "any privilege

that might have attached to these non-party affidavits at the time they were prepared was vitiated once they were sent on, with the POCs, to the bankruptcy trust" [Exh. 1, at 2]. The trust-related settlement mechanism assures claimants/plaintiffs and non-parties alike that precisely the opposite will be the case; the Supremacy Clause requires that those assurances be effectuated if competing State interests are at issue.[2]

11. In the final analysis, however, the State discovery scheme is not necessarily a "competing" one. In this respect, the Recommendation also errs in so narrowly construing the purpose of "[t]he rule regarding non-disclosure of materials offered in attempt to settle a claim" to be limited solely to the numbers involved – *i.e.*, "to prevent a party who attempts to settle a claim by making an offer (or demand) from having that number (or accompanying statement) used against it at trial as evidence of the true value of the claim. Nothing of that sort is at stake here" [Exh. 1, at 2].

12. Rather, that rule far more broadly reaches discovery efforts related to claims of liability or non-liability, as well as issues of damages, both of which go to the heart of the discovery issues here. *American Re-Insurance Co. v. United States Fidelity & Guaranty Co.*, 19 A.D.3d 103, 104 (1st Dep't 2005) ("settlement

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[2] *See* U.S. Const., art. VI, cl. 2; 11 U.S.C. §§ 101 *et seq.*, 524(g)& (h); Federal Trust Distribution Procedures discussed herein; FED. R. EVID. 408; CPLR 4547; CPLR 3101(a), (b), (c) & (d).

privilege" shielding materials from discovery applies when such "settlement-related materials" are sought "for a purpose [relating to] liability") (citing CPLR 4547).

13. While the filing with a bankruptcy trust of information responsive to the State tort defendant's proper disclosure requests does not, of course, shield the underlying information from discovery – and plaintiffs do not and have never claimed otherwise – the filed documents themselves – created and submitted expressly and solely for purposes of the Federal confidential settlement mechanism – are neither discoverable by defendants in the tort system, nor admissible in the tort action.

14. In this way, the discovery provisions set forth in our Civil Practice Law and Rules harmonize the defendants' interests in obtaining Article 16-related liability and apportionment information with (1) the plaintiffs' federally and locally protected confidentiality and settlement-related privacy interests, and (2) the strong Federal interest in a workable, efficient and confidential trust claims mechanism.

15. Not long ago, the Honorable Garrett E. Brown, Jr., eloquently described the pressing Federal interest underlying the trust mechanism at issue in this appeal. Deliberating upon and ultimately confirming the representative Burns and Roe Enterprises, Inc. ("BREI") Fourth Amended Plan of Reorganization, Judge Brown iterated the view that "Section 6.5 of the TDP [Trust Distribution

Procedures] makes all information submitted by a claimant in support of the claim 'privileged' and 'confidential'." *In re Burns & Roe Enters.*, № 08-4191 (GEB), 2009 U.S. Dist. LEXIS 13574, at *21 (D.N.J. Feb. 23, 2009). The Court further noted testimony in the record that "the Bankruptcy Court would retain jurisdiction over any disputes which may arise." 2009 U.S. Dist. LEXIS 13574, at *47.

16. The *Burns & Roe* Court further recited the proposed findings of fact submitted by one of the insurers then objecting to confirmation of the BREI plan, one such proposed finding declaring that:

> In the event that the Trust would seek to tender any claims for coverage to an insurer, the insurer's contractual and legal rights to discover information and documentation relating to any asbestos-related claims would also be compromised by the TDPs. Under the TDPs, the submissions made by the claimant to the Trust would be treated as confidential. The TDPs provide that the Trust would preserve the confidentiality of such submissions unless ordered to disclose the materials to a third party in response to a subpoena, or the Trust, with the consent of the TAC and the Legal Representative, elects to disclose such materials. TDP § 6.5.

2009 U.S. Dist. LEXIS 13574, at *53 fn. 7.

17. Notwithstanding such objections, Judge Brown concluded that urgent Federal interests – including the ever-present context involving a "substantial number of asbestos personal injury claims that had been asserted against the Debtors prior to the Petition Date and the substantial number of such claims that remained unresolved on the Petition Date, [as well as] the Court['s] find[ing] that the Debtors would likely be subject to substantial future Demands

for payment arising out of the same or similar conduct" – compelled confirmation of the Plan. 2009 U.S. Dist. LEXIS 13574, at *96.

18. Even more particularly, the Court concluded that:

> the Demands outside of the procedures prescribed by the Plan would likely threaten the Plan's purpose to deal equitably with Claims and future Demands [and that] there is a significant risk that, absent implementation of the procedures described in the Plan to address Trust Claims, the Debtors would be rendered unable to satisfy Demands. [Accordingly, t]he Court concludes that the Plan comports with the Bankruptcy Code's requirements for the issuance of a channeling injunction to enjoin entities from taking legal action to recover, directly or indirectly, payment in respect to Trust Claims against the Reorganized Debtors or their property.

2009 U.S. Dist. LEXIS 13574, at *96-97.

19. With this glimpse into the reality of the Federal courts' serious approach to the bankruptcy trust scheme and, in particular, its TDP provisions, it becomes clearer that State courts interacting with such provisions are compelled to go to great lengths to construe the TDP protections liberally and to enforce them.

20. This Affirmation establishes that any and all submissions to the litigation trusts created by the bankruptcy reorganization plans are confidential settlement materials, and that it is only by virtue of such submissions that the Federal asbestos trust system is able to function and effectuate efficient and mutually beneficial settlements of the claims. This accords with the TDP provisions, which typically permit disclosure of trust submissions upon "the permission of the holder" of the confidentiality right, namely, the trust claimant

[*see, e.g.*, AC&S, Inc. TDP, annexed hereto as **Exhibit "2"**, at ¶ 6.5].

21. However, and as a logically related point, plaintiffs respectfully submit that the ACMO prescription at paragraph XV(E)(2)(l) – which presently imposes upon plaintiffs who "intend to file a proof of claim form with any bankrupt entity or trust" strict time limits within which to do so – is unconstitutional and impinges upon the Federal administration of, and sole authority over, the bankruptcy-related trusts.

22. The federally-supervised TDPs expressly address claims filing limitations periods and deadlines, and render infirm State administrative rules that conflict with such provisions. *See generally Burns & Roe, supra*, 2009 U.S. Dist. LEXIS 13574, at *22 ("Section 5.1(a)(2) of the TDP . . . provid[es] for exceptions not available in the tort system, such as the statute of limitations being tolled if the claimant filed a claim against another defendant in the tort system").

23. Indeed, illustrative of the length to which the TDPs go in precisely setting forth claimants' filing deadlines is the AC&S TDP [Exh. 2]. Section 5.1(a)(2), for example, recites:

> All unliquidated Trust Claims must meet either (i) for claims first filed in the tort system against ACandS prior to the Petition Date, the applicable federal, state or foreign statute of limitation and repose that was in effect at the time of the filing of the claim in the tort system, or (ii) for claims not filed against ACandS in the tort system prior to the Petition Date, the applicable federal, State or foreign statute of limitation that was in effect at the time of the filing with the Trust. However, the running of the relevant statute of

> limitation shall be tolled as of the earliest of (A) the actual filing of the claim against ACandS prior to the Petition Date, whether in the tort system or by submission of the claim to ACandS pursuant to an administrative settlement agreement; (B) the tolling of the claim against ACandS prior to the Petition Date by an agreement or otherwise, provided such tolling is still in effect on the Petition Date; or (C) the Petition Date.
>
> If a Trust Claim meets any of the tolling provisions described in the preceding sentence and the claim was not barred by the applicable federal, state or foreign statute of limitation at the time of the tolling event, it shall be treated as timely filed if it is actually filed with the Trust within three (3) years after the Initial Claims Filing Date. In addition, any claims that were first diagnosed after the Petition Date, irrespective of the application of any relevant federal, state or foreign statute of limitation or repose, may be filed with the Trust within three (3) years after the date of diagnosis or within three (3) years after the Initial Claims Filing Date, whichever occurs later. However, the processing of any Trust Claim by the Trust may be deferred at the election of the claimant pursuant to Section 6.3 below.

[Exh. 2, at 18-19].

24. ACMO Paragraph XV(E)(2)(l) effectively renders Section 5.1(a)(2) null and void for purposes of the individual claimant's State tort case. This it cannot do.

25. Nor did the parties on both sides jointly craft or ever jointly agree upon Paragraph XV(E)(2)(l). In this respect, this provision is procedurally and substantively anomalous. As further discussed below, this provision conspicuously imposes a prescription upon one side that has always been at odds with the cooperative nature, and otherwise mutually efficient approach, taken by the

ACMO.

B. THE CONTROLLING FEDERAL SCHEME PRECLUDES THE STATE COURT FROM ORDERING THIS DISCOVERY, AND FROM DECREEING TRUST SUBMISSION DEADLINES

1. The Basis and Nature of the Federal Interest

26. The threshold issue in this appeal, especially with regard to ACMO paragraph XV(E)(2)(l), is the safeguard presented by the Supremacy Clause to the United States Constitution (art. VI, cl. 2).[3] This Court is competent to decide issues arising under the Supremacy Clause, and concerning the prioritized effect of Federal administrative schemes. *E.g., Drake v. Lab. Corp. of Am. Holdings*, 323 F. Supp. 2d 449, 454 (E.D.N.Y. 2004) ("state courts are competent to decide" the effects upon state litigations of federal schemes).

27. The Recommendation conflicts with the express confidentiality and related protections prescribed in most of the federally issued TDPs governing proof of claim procedures. *E.g., In re Garlock Sealing Technologies, LLC*, № 10-31607 (Bankr. W.D.N.C. Mar. 4, 2011) [annexed hereto as **Exhibit "3"**] (denying bankruptcy trust recovery-related information on the grounds, *inter alia*, that such

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[3] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2.

information "is generally and traditionally held secret," "is settlement data," "is protected . . . and subject to confidentiality agreements," and "is not available to the debtors outside of bankruptcy [or] to the debtors in the tort system"); *Renfrew v. Hartford Accident & Indem. Co. (In re Western Asbestos Co.)*, № 02-46284 T *et al.*, 2008 Bankr. LEXIS 1308, at *22 (Bankr. N.D. Cal. Apr. 11, 2008) ("the Court also agrees with the Trust parties that much of the information contained in the claims forms is confidential").

28. Accordingly, going forward, any effort at obtaining proof of claim materials, including non-party trust-related submissions, must be viewed in the context of the federally-supervised proof of claims procedures. Toward this end, annexed hereto as **Exhibit "4"** is another representative TDP, the Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures ("OCF TDP").

29. A consistent feature of the so-ordered asbestos trust settlement mechanisms generally, the OCF TDP expressly prohibits "defendants in the tort system" from making any use of the information or documents plaintiffs/claimants may submit to the trust under the Federal apparatus. Accordingly, the OCF TDP prescribes that "[e]vidence submitted to establish proof of OC/Fibreboard exposure is for the sole benefit of the PI trust, not third parties or defendants in the tort system" [Exh. 4, at § 5.7(b)(3)].

30. The NYCAL defendants are, by definition, third parties vis-à-vis the bankruptcy reorganizations and trusts at issue, and hence "defendant[s] in the tort system." Therefore, TDPs such as the OCF TDP effectively preclude defendants from obtaining any "benefit" derived from the filing or intended filing of a claim, and expressly preclude the use of such filing to establish proof of exposure to any such bankrupt entity's asbestos products. A discovery order or requirement that intends to provide this tort defendant with the benefit of a claimant or non-party filing with the trust effectively conflicts with these Federal prescriptions and unequivocal safeguards.

31. Although discrete State law considerations will be addressed separately below, it is well to highlight here that, by definition, materials that cannot be used to benefit a party cannot be deemed "relevant" to that party's case. *People v. Gonzalez*, 55 N.Y.2d 720, 725-26 (1981). Such materials, *a fortiori*, cannot be deemed "material and necessary in the prosecution or defense of an action," and thus are not even discoverable under CPLR 3101(a)'s general disclosure provision.

32. But returning to the Federal scheme, even more telling than TDP § 5.7(b)(3) is section 6.5 – titled "Confidentiality of Claimants' Submissions," which prescribes, in relevant part:

> All submissions to the PI Trust by a holder of a PI Trust Claim or 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, with the permission of the holder, to another trust established for the benefit of asbestos personal injury claimants pursuant to section 524(g) and/or section 105 of the Bankruptcy Code or other applicable law . . . *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 privilege before the Bankruptcy Court* and before those courts having appellate jurisdiction related thereto.

[Exh. 3, at § 6.5 (emphasis added)].

33. By this provision, which is all but ubiquitous in the Federal asbestos trust system, disclosure of the proof of claim and non-party materials at issue here is precluded except "with the permission of the holder, to another trust established for the benefit of asbestos personal injury claimants," and the bankruptcy court retains jurisdiction to adjudicate discovery disputes that implicate the disclosure of materials submitted pursuant to TDP procedures.

34. In the instant Recommendation objected to, the Special Master states, "Weitz further argues that these affidavits are exempt from production because they are party of 'settlement negotiations.' I disagree. . . . Weitz cannot, on the one hand, use these documents as a 'sword' to obtain money from a bankrupt entity and then try to shield it from co-defendants who are required to put in proof at trial of said exposure to reduce their own liability" [Exh. 1].

35. The sword and shield analysis simply does not pertain here. On the one hand, the federal mechanism governing proof of claim submissions *expressly makes them confidential settlement materials by definition.* Plaintiffs submit such claims pursuant to the federally-administered procedures, guidance and assurances embodied in the governing TDPs. Moroever, if the filing of a trust claim is a "sword" in relation to plaintiff/claimant's ability to obtain compensatory relief, it is equally a sword (not a shield) in relation to defendants' ability to reduce a post-verdict judgment pursuant to New York's General Obligation Law § 15-108. *See generally In re New York County Data Entry Worker Product Liability Litig.: Hulse v. A.B. Dick Co.*, 222 A.D.2d 381 (1st Dep't 1995) (pursuant to GOL § 15-108, the amount of a settlement "must be disclosed in the event of a verdict in [plaintiff's] favor"). Further, amendment of answers to interrogatories to reflect plaintiff-specific product identification, rather than production of documents submitted to the trusts, gives all parties an equal playing field.

36. By way of additional background, as the Court is aware, and underlying the *Burns & Roe* opinion discussed above, the Bankruptcy Code authorizes the creation in bankruptcy proceedings of trusts dedicated to compensating injured claimants "seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products." 11 U.S.C. §524(g) & (h).

37. Each trust issues distribution procedures that govern the submission of claims for compensation. The TDPs are formulated pursuant to the respective trust agreements and plans of reorganization developed under the bankruptcy courts' exclusive supervision, 11 U.S.C. §§ 101 *et seq*. There are several dozen asbestos-related personal injury trusts, each with its own TDP. *See* Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 NYU ANNUAL SURVEY OF AMERICAN LAW 163, 163-64 (2006). Plaintiffs have thus far discussed two representative TDPs, and will discuss (and annex) more below.

38. Like other federally-created schemes, the bankruptcy trust provisions may inform the way state courts oversee matters implicating those provisions. *See generally New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 356 (2006).

39. Provisions of the federally authorized TDPs should take precedence over any conflicting state laws, rules or procedures. *See generally City of Olathe v. KAR Dev. Assocs. (In re KAR Dev. Assocs., L.P.)*, 180 B.R. 629, 638 (D. Kan. 1995) ("the interest in fulfilling bankruptcy purposes and objectives, provides an adequate 'federal interest' to justify" privileging the Federal scheme); *cf. City of Hartford v. Chase*, 942 F.2d 130, 135 (2d Cir. 1991) ("a federal judge has the power to prevent access to settlement negotiations when necessary to encourage the

amicable resolution of disputes").

40. The purpose animating the Supremacy Clause is to avoid "obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campell*, 402 U.S. 637, 649, 91 S. Ct. 1704, 1711 (1971); *accord Rose v. Moody*, 83 N.Y.2d 65, 71-72, 607 N.Y.S.2d 906, 909 (1993). The Supremacy Clause is further construed under New York law to mean that State courts cannot affect "official acts performed under the enactments of Congress." 20 N.Y. Jur. 2d: Constitutional Law §101 (2008 ed.); *see Wasservogel v. Meyerowitz*, 300 N.Y. 125, 134, 89 N.E.2d 712, 717 (1949) (emphasizing that "not only have our courts . . . no power to revise or invalidate this Federal determination, but we are, by the supremacy clause . . . put under a positive duty to enforce it").

41. If the TDPs establish or reflect an overall mechanism or scheme for claims submissions premised upon the confidentiality of those submissions, and also upon the trusts' commitment to take any and all necessary steps to ensure such confidentiality, then the disclosure which the Recommendation orders, and in particular disclosure of non-party materials, "stands as an obstacle to the accomplishment and execution of the full purpose and objectives" of those federally administered TDPs.[4]

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[4] *Cf. Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (holding that party who submits an analogous bankruptcy court proof of claim "trigger[s] the process of 'allowance and disallowance of claims,' and thereby consents to bankruptcy court jurisdiction).

(continued...)

42. Indeed, with respect to the inclusion in most TDPs of provisions paralleling the OCF TDP section 6.5 discussed above ("Confidentiality of Claimants' Submissions"), annexed hereto as **Exhibit "5"** is the Stipulation By and Among Plan Proponents and Owens-Illinois, Inc., *In re Federal-Mogul Global, Inc.*, № 01-10578 (JKF) (Bankr., D. Del., Oct. 24, 2007), carefully deliberated upon by numerous parties, including the debtor Federal-Mogul Corporation, the co-defendant Owens-Illinois, Inc., the Official Committee of Asbestos Claimants, the Legal Representative for Future Asbestos Claimants, and others, before the Honorable Judith K. Fitzgerald. This Stipulation adopts the section 6.5 language and, importantly, makes clear – as noted by Judge Brown in the *Burns & Roe* decision, 2009 U.S. Dist. LEXIS 13574, at *47 – that "[t]he Bankruptcy Court shall retain jurisdiction to interpret and enforce this Stipulation" [Exh. 5]. *Cf. Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 781 (9th Cir. 2007) ("The debtor conceded jurisdiction was exclusively vested in the

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[4](...continued)
Section 157(b)(2)(B) of the Bankruptcy Code provides that "core" bankruptcy proceedings include "allowance and disallowance of claims against the estate." 28 U.S.C. § 157(b)(2)(B); *see also Wood v. Wood*, 825 F.2d 90, 97 (5th Cir. 1987) ("[t]he filing of the proof invokes the special rules of bankruptcy concerning objections to the claim, estimation of the claim for allowance purposes, and the rights of the claimant to vote on the proposed distribution. Understood in this sense, a claim filed against the estate is a core proceeding because it could arise only in the context of bankruptcy"). This is not, of course, to say that litigation conducted amongst third parties are core proceedings, but rather that bankruptcy trust treatment of an integral matter – such as proofs of claim as formulated in TDPs – expresses a Federal interest, here the confidentiality and non-discoverability of those submissions, with which state courts cannot interfere.

district court for *trial*, but that did not mean the bankruptcy court could not retain jurisdiction *pre-trial*"); *Beck v. Fort James Corp. (In re Crown Vantage, Inc.)*, 421 F.3d 963, 969, 971 (9th Cir. 2005) (where "[t]he confirmed plan itself further provided that the 'Bankruptcy Court shall retain jurisdiction over this Agreement and the Liquidating Trust established hereby,'" emphasizing that "[t]he requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in bankruptcy court or with leave of the bankruptcy court"); *In re Adelphia Communications Corp.: Bank of Nova Scotia v. Adelphia Communications Corp.*, № 02-B-41729 (REG), 06 Civ. 4983 (JGK), 2007 U.S. Dist. LEXIS 95139 (S.D.N.Y. Dec. 26, 2007) ("a Bankruptcy Court retains exclusive jurisdiction to interpret the effect of a confirmed plan").

43. The trusts are created, and their TDPs adopted, pursuant to the bankruptcy court-implemented reorganization plans. *E.g.*, *Travelers Indem. v. Bailey*, 129 S. Ct. 2195, 2199 (2010) ("The ensuing reorganization plan created the Manville Personal Injury Settlement Trust . . . to pay all asbestos claims against Manville, which would be channeled to the Trust"); *see generally In re Johns-Manville Corp.: Hospital and University Property Damage Claimants v. Johns-Manville Corp.*, 7 F.3d 32, 34 (2d Cir. 1993) ("The bankruptcy court's post-confirmation jurisdiction therefore is defined by reference to the Plan").

44. Indeed, upon creation of these trusts pursuant to 11 U.S.C. § 524(g), the bankruptcy court originally presiding over the bankruptcies that occasioned the creation of the trusts retains exclusive jurisdiction to "[i]ssue injunctions, enforce the injunctions contained in the Plan and Confirmation Order, enter and implement other orders or take other actions as may be necessary or appropriate to restrain interference by any Entity with consummation, implementation, or enforcement of the Plan or Order,"[5] and to "[d]etermine any other matters that may arise in connection with or relate to the Plan, the Disclosure Statement, the Confirmation Order or any contract, instrument, release or other agreement or document entered into or delivered in connection with the Plan, the Disclosure Statement, or the Confirmation Order."[6]

45. Discovery disputes implicating TDP provisions and TDP assurances

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5 Joint Plan of Reorganization of USG Corp., at Art. X.A.9, *In re USG Corp.*, № 01-2094 (Bankr. D. Del., Mar. 27, 2006) [Dkt. № 10709].

6 Second Amended Joint Plan of Reorganization at Art. XIII.1 & XIII.n, *In re Kaiser Aluminum Corp.*, No. 02-10429 (Bankr. D. Del. Sept. 7, 2005) [Dkt. No. 7312]. *See also* Order Confirming ACandS's Second Plan of Reorganization, *In re ACandS, Inc.*, No. 02-12637 (Bankr. D. Del. May 8, 2008) [Dkt. No. 3309] and Second Plan of Reorganization of ACandS Inc. at 13.3(d) & 13.3(e), *In re ACandS, Inc.*, No. 02-12637 (Bankr. D. Del. Nov. 19, 2007) [Dkt. No. 3109]; Order Confirming the Sixth Amended Joint Plan of Reorganization at 57-58, *In re Owens Corning*, No. 00-03837 (Bankr. D. Del. Sept. 26, 2006) [Dkt. No. 19366] and Sixth Amended Joint Plan of Reorganization at 13.1(a) & (l), *In re Owens Corning*, No. 00-03837 (Bankr. D. Del. July 10, 2006) [Dkt. No. 18339, Appendix A]; Order Confirming the First Amended Joint Plan of Reorganization at 27-28, *In re USG Corp.*, No. 01-2094 (Bankr. D. Del. June 15, 2006) [Dkt. No. 11688] and First Amended Chapter 11 Plan of Reorganization of USG Corp. at Art. X.A.9, *In re USG Corp.*, No. 01-2094 (Bankr. D. Del. Mar. 27, 2006) [Dkt. No. 10810].

are the province of the appropriate bankruptcy court, and confidentiality provisions developed in the context of bankruptcy proceedings can only be modified or vacated by the bankruptcy court. *E.g., Amresco New England II L.P. v. Vescio (In re Vescio)*, 220 B.R. 195, 196 (Bankr. D. Vt. 1998) (addressing "motion to vacate . . . confidentiality provisions"); *cf. City of Hartford v. Chase, supra*, 942 F.2d 130, 135 (2d Cir. 1991) ("a federal judge has the power to prevent access to settlement negotiations when necessary to encourage the amicable resolution of disputes"); *Rahl v. Bande*, 316 B.R. 127, 133 (S.D.N.Y. 2004) ("A proceeding may have a "significant connection" with a Chapter 11 bankruptcy case subsequent to confirmation of a plan").

46. In this general regard, the decision of the United States Court of Appeals for the Fourth Circuit in *In re A.H. Robins Co.*, 86 F.3d 364 (4th Cir. 1996), is instructive. The issue in *Robins* arose from a dispute over attorneys fees earned while representing claimants seeking recovery from the Dalkon Shield Claimants Trust that had been created, like the instant trusts, in the context of the debtor's bankruptcy reorganization plan. 86 F.3d at 367. Rejecting the appellant attorneys' claim that the bankruptcy court lacked jurisdiction to have decided the issue, the Fourth Circuit explained that "'related to' jurisdiction is to be 'broadly interpreted,'" and the bankruptcy court had jurisdiction because the trust-related dispute "would have no practical existence but for the bankruptcy. . . . The

bankruptcy case remains open until all claims have been paid and the Trust dissolved under its terms." 86 F.3d at 372; *accord In re Casual Male Corp.: Longacre Master Fund, Ltd. v. Telecheck Servs., Inc.*, 317 B.R. 472, 476 (Bankr. S.D.N.Y. 2004) ("("it is plain that Longacre's suit 'arises in' a bankruptcy case because this claims trading dispute 'would have no practical existence but for the bankruptcy'").

47. Hence the scope of the confidentiality and non-disclosure protections afforded plaintiffs by the TDPs should be decided by the Federal bankruptcy court presiding over the respective trusts, and not by the courts of the fifty states as they may, in their individualized discretion, determine. There is a strong Federal interest in construing like TDP provisions alike, which would be jeopardized were state-by-state interpretations approbated. *Cf. In re G-I Holdings, Inc.*, № 09-CV-05031 (GEB), 2010-1 U.S. Tax Cas. (CCH) P50,148, 2009 U.S. Dist. LEXIS 108339, at *148-49 (D.N.J. Nov. 12, 2009) ("If the holders of asbestos-related Demands are able to pursue such Demands outside of the Asbestos Trust and the Asbestos Trust Distribution Procedures, then the holders of such Demands would likely have to pursue their claims in the tort system on an individual basis, which, because of the vagaries inherent in litigation, could produce inconsistent results").

48. As stated, as a logically related point, plaintiffs respectfully submit that the ACMO prescription at paragraph XV(E)(2)(l) similarly impinges upon the

Federal administration of, and sole authority over, the bankruptcy-related trusts.

2. TDPs Preclude State Court-Ordered Discovery of Claimants' Submission Materials Under the TDPs

49. In fact, however, as suggested by the Federal-Mogul trust-related Stipulation [Exh. 5], the OCF TDP provisions referenced above are typical, and indicative of the intended Federal scheme governing asbestos trust claim submissions. For the Court's convenience, numerous additional TDPs are next discussed and annexed hereto.

50. The National Gypsum Company TDP states the prohibition more directly:

> Submissions with respect to Asbestos Claims asserted in the NGC Bodily Injury Trust shall be deemed to be part of a settlement discussion and be kept confidential and shall not be admissible or discoverable in any court proceeding not directly related to Claims submitted under these Claims Resolution Procedures.

Sixth Amended Claims Resolutions Procedures – NGC Bodily Injury Trust (Sept. 4, 2008), at § 3.13 [annexed as **Exhibit "6"**].

51. A further exemplary TDP is that governing proof of claim submissions to the trust covering claims against the Celotex Corporation and Carey Canada, Inc. [annexed hereto as **Exhibit "7"**at § VI] ("[a]ll materials, records and information submitted by claimants . . . are confidential, submitted solely for settlement purposes").

52. Scores of TDPs contain the "sole benefit" language discussed above with regard to the OCF TDP, similar to the following: "Evidence submitted to establish proof of exposure to [the bankrupt's] products is for the sole benefit of the trust, not third parties or defendants in the tort system."

53. For example, the Babcock & Wilcox TDP [annexed hereto as **Exhibit "8"**] provides this express restriction on defendants' use of proofs of claim [Exh. 8, at § 5.7(b)(3)], and also goes to great lengths to preserve the confidentiality of any such submissions, and to make a federally-backed commitment to "take all necessary and appropriate steps [to] preserve" such confidentiality [*id.*, at § 6.5]; *see also* U.S. Gypsum TDP [annexed as **Exhibit "9"**, at § 5.7(b)(3) ("sole benefit"); § 6.5 (confidentiality provision); AC & S TDP [Exh. 2] ("sole benefit"); Owens-Illinois Stipulation[Exh. 5]; Federal-Mogul TDP [annexed as **Exhibit "10"** ("sole benefit"); Keene TDP [annexed as **Exhibit "11"** (same)]; Kaiser Aluminum TDP [annexed as **Exhibit "12"** (same)]; Armstrong World Industries TDP [annexed as **Exhibit "13"**]; Porter Hayden Company Asbestos Trust Distribution Procedures ("PH TDP") [annexed as **Exhibit "14",** at § 5.7(b)(3) ("[e]vidence submitted to establish proof of exposure to Porter Hayden Asbestos is for the sole benefit of the Trust, not third parties or defendants in the tort system"; at § 6.5 ("The Trust will preserve the confidentiality of such claimant submissions"); DII Industries, LLC Asbestos PI Trust Sixth Amended Trust

Distribution Procedures (Sept. 2, 2010) [annexed as **Exhibit "15"**, at § 5.7(c) ("sole benefit"); § 8.4 (prescribing "confidentiality of claimant submissions," and guaranteeing that the Trust will "preserve the confidentiality of claimant submissions and communications," and shall "take all necessary and appropriate steps to preserve any privileges"); C.E. Thurston & Sons Asbestos Trust TDP [annexed as **Exhibit "16"**, at ¶ 8.1 ("[t]he Trust will preserve the confidentiality of the claimant submissions").

3. **The Nonpublic Nature of the Submissions**

54. There is one further point to be made in this regard. Unlike the trust submissions, bankruptcy-related submissions are generally publically available. *See Geltzer v. Andersen Worldwide, S.C.*, № 05 Civ. 3339 (GEL), 2007 U.S. Dist. LEXIS 6794, at *11 (S.D.N.Y. Jan. 30, 2007) (all documents in a bankruptcy case available to the public); *see* 11 U.S.C. § 107 ("Except as provided in subsection (b) of this section, a paper filed in a case under this title [11 U.S.C. § 101, *et seq.*] and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge"); *French v. Marion Gen. Hosp. (In re Patterson)*, № 08-3025, 2008 Bankr. LEXIS 1778, at *2, 59 Collier Bankr. Cas. 2d (MB) 1706 (Bankr. N.D. Ohio June 3, 2008) ("Documents filed with the bankruptcy court are 'public records and open to examination by an entity at

reasonable times without charge.' 11 U.S.C. § 107(a). The itemized billing statement attached to the Defendant's proof of claim is thus in the public domain"); *Heritage Org., L.L.C. v. Canada (In re Heritage Org., L.L.C.)*, 322 B.R. 285, 297 (2005) (bankruptcy-related proofs of claim – in contrast to trust-related proofs of claim – are documents intended to be public record).

55. Accordingly, if the Federal bankruptcy trusts and the Federal trust-related submissions scheme intended the proof of claim materials or other trust-related submissions or documents to be publically available, or available to third parties in the tort system, as are those filed in bankruptcy proceedings, then these would be available to the defendants without any hardship. Because such materials are not publically available, then this further demonstrates the respective trusts' intention to protect such materials from disclosure. Plaintiffs and the non-parties do not waive their Federal trust confidentiality protections with regard either to their own, or to non-party, materials.

C. NEW YORK LAW ALSO REQUIRES VACATUR OF THAT PORTION OF THE RECOMMENDATION THAT SPECIFICALLY REQUIRES DISCLOSURE OF NON-PARTY MATERIALS

56. Apart from the Federal interests and Supremacy Clause issues, it is particularly evident that the portion of the Special Master's Recommendation that requires disclosure of non-party materials submitted to the bankruptcy trusts

contravenes State work product protections.

57. "[T]he phrase 'work product' embraces such items as 'interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs' conducted, prepared or held by the attorney." *Kenford Co. v. County of Erie*, 55 A.D.2d 466, 470 (4th Dep't 1977). "An attorney's work product encompasses 'materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy." *Acwoo Int'l Steel Corp. v. Frenkel & Co.*, 165 A.D.2d 752 (1st Dep't 1990).

58. Importantly, "[t]he work-product doctrine covers documents or the compilation of materials prepared by agents of the attorney in preparation for litigation." *United States v. Nobles*, 422 U.S. 225, 238 (1975). The investigation and compilation of non-party materials, and the assessment that these may pertain to a given plaintiff's case, reflect counsel's mental impressions and theory of the case, and constitute protected and privileged attorney work product. "Moreover, because attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial, the work product rule extends to material prepared by agents for the attorney as well as those prepared by the attorney for himself." *Complex Sys. v. ABN AMRO Bank N.V.*, № 08 Civ. 7497 (LBS) (FM), 2011 U.S. Dist. LEXIS 126029, at *11 (S.D.N.Y. Oct.

26, 2011) (omitting internal citations).

59. The doctrine reaches settlement-related materials. *See Veras Investment Partners, LLC v. Akin Gump Strauss Hauer & Feld, LLP*, 52 A.D.3d 370, 374 (1st Dep't 2008) ("That a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit . . . The JHO's order also directs the disclosure of nonparty counsels' 'analyses and evaluations of plaintiffs' jeopardy' with respect to plaintiffs' rationale for entering into the settlement agreement with the regulators. Such materials would constitute attorneys' work product, immune from disclosure under CPLR 3101(c)"); *Deutsche Bank Trust Co. v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 66 (1st Dep't 2007) ("Bankers Trust's commencement of this indemnity action does not, in itself, imply an 'at issue' waiver of the protection of the attorney-client privilege or the work-product doctrine for documents or witness testimony concerning the defense and settlement of the WMI action").

60. Nor, under New York law, can the filing of any such materials in the asbestos trust proof of claim context, be deemed a third party publication sufficient to extinguish the work product privilege. For it is well settled that "[t]he work product privilege is waived upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary, under conditions that

are inconsistent with a desire to maintain confidentiality." *Bluebird Partners, L.P. v. First Fid. Bank,* N.A., 248 A.D.2d 219, 225, 671 N.Y.S.2d 7, 12 (1st Dep't 1998).

61. As already shown, however, typically the TDPs expressly assure claimants that materials submitted in conjunction with proofs of claim will not be revealed to an adversary or any other third party, and that their confidentiality will be maintained.

62. With specific regard to the non-party affidavits that may have been submitted to the trusts , as referenced at page 2 of the Special Master's Recommendation [Exh. 1], the work product doctrine is especially applicable. For in no sense can the non-party, or co-worker, affidavits obtained by plaintiff's counsel be deemed more akin to a "complaint" than to a settlement document. *See Volkswagen of America, Inc. v. Superior Court*, 139 Cal. App. 4th 1481, 1494, 43 Cal. Rptr. 3d 723, 730-31 (1st Dist. 2006).[7]

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[7] On some occasions, tort defendants seeking discovery of a plaintiff's proof of claim bankruptcy trust filings have argued that a proof of claim submission is more in the nature of a "complaint" – whereby its pleadings might be taken to be admissions – than of a settlement-related communication to be protected from discovery. The *Volkswagen* Court distinguished circumstances in which the "statement by a claimant concerning the extent of his injuries or disease, or concerning the amount of damages he or she claims to have suffered, if not connected with an offer of compromise, may well constitute an admissible admission," from those in which "the bankruptcy trust had previously issued a formula or 'matrix' indicating the amount it would pay a claimant under certain conditions and the amount stated in the claim form was intended to indicate a willingness to accept that amount," in which case the trust submission would be
(continued...)

63. Moroever, although the Recommendation adopts the position that "work product is only a qualified privilege" [Exh. 1], this position is controversial. *See Siemens Solar Indus. V. Atlantic Richfield Co.*, 246 A.D.2d 476, 667 N.Y.S.2d 248 (1st Dep't 1998) ("Notes and memoranda made in connection with a lawyer's interview of a witness procured in the course of litigation constitute attorney's work product, which is absolutely exempt from discovery") (internal citations omitted);

64. In all events, whether the work product or other privilege pertains can only be assessed on an individual basis. *E.g., Viacom, Inc. v. Sumitomo Corp. (In re Copper Mkt. Antitrust Litig.)*, 200 F.R.D. 213, 225 (S.D.N.Y. 2001) ("[t]he Privilege Log, together with RLM's supporting affidavits, identifies these documents sufficiently to identify the basis of RLM's privilege and/or work-product claims"); *In re Langswager*, 392 F. Supp. 783, 788 (N.D. Ill. 1975) ("communications made seeking information from the witness may involve both the attorney-client and work product privileges and can only be reviewed by the court on an individual basis").

65. Clearly, the TDPs invite a breadth of supporting submissions which may well encompass such privileged materials [*e.g.*, OCF TDP, Exh. 4, at §§ 6.1,

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[7](...continued)
deemed settlement-related and thereby afforded enhanced protections. *Volkswagen, supra.*

6.2, 6.5], and which, in the case of the non-party submissions, clearly do so.

66. Additionally, apart from the work product doctrine, the non-party materials may well be deemed to constitute materials prepared in anticipation of litigation. *Cf. Brown v. Adams (In re Fort Worth Osteopathic Hosp., Inc.)*, № 05-41513-DML-7, 2008 Bankr. LEXIS 3156, at *44 (N.D. Tex. Nov. 14, 2008) (agreeing "that bankruptcy itself constitutes 'litigation' for purposes of delineating privilege"); *cf. In re 222 Liberty Assoc.*, 99 B.R. 639, 644 n.5 ("[e]ven though the Plaintiffs have not filed a formal proof of claim in the Debtor's bankruptcy case . . ., the prior litigation of this proceeding in the bankruptcy court would certainly appear to constitute an informal proof of claim").

67. As recited above, the trusts are created under the authority of Section 524(g) of the Bankruptcy Code, and by virtue of a "channeling injunction" that directs to the trust all asbestos-related personal injury and wrongful death claims that may have originally existed as against the debtor. 11 U.S.C. § 524(g)(1)(B), (g)(2)(A)-(B). The statute does not end asbestos-related litigation in toto involving claims against the debtor, but rather channels to the trusts "such legal actions as are expressly allowed by the injunction." 11 U.S.C. § 524(g)(1)(B); *see Garner v. DII Indus., LLC*, № 08-CV-6191-CJS, 2010 U.S. Dist. LEXIS 9583, at *10 (W.D.N.Y. Feb. 4, 2010) ("Pursuant to a channeling injunction, all mass tort litigation and claims are 'channeled' to a trust specifically established to resolve

and pay these claims – a so-called mass tort bankruptcy trust"); *see generally Nye v. Bayer Cropscience, Inc.*, № E2008-01596-SC-R11-CV, 2011 WL 2184317 at *8 (Tenn. June 7, 2011) ("This channeling injunction provided that present and future asbestos claimants were prohibited from suing Johns Manville and could only proceed against the asbestos claims trust"); *In re W.R. Grace & Co.*, 446 B.R. 96, 120 (Bankr. D. Del. 2011) (railway, asserting indemnity, contribution or subrogation claims, "may assert its claim against the Trust there as it could against Grace as if the channeling injunction had not been issued").

68. Falling under the anticipation-of-litigation rubric, any such non-party trust submission materials "may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials without other means." CPLR 3101(d)(2).

69. No defendant has made any such showing with respect either to the first-party or non-party trust submissions. *See DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 195 (1992) (agreeing that the party seeking discovery of material prepared in anticipation of litigation "has the burden of proving substantial need and hardship"); *Beller v. William Penn Life Ins. Co. of N.Y.*, 15 Misc. 3d 350, 356, 828 N.Y.S.2d 869 (Sup. Ct., Nassau County, 2007) (holding that, once a party shows that its materials "would fall under the umbrella of CPLR 3101(d)(2) as

'material prepared in anticipation of litigation,' . . . [t]he burden then shifts to [movant] to convince the court that there is a 'substantial need of the materials in the preparation of the case and [he] is unable without undue hardship to obtain the substantial equivalent of the materials by other means'").

70. Defendants not only bear this discovery-related burden pursuant to Article 31, they also bear the burden imposed upon them by Article 16, and this burden, too, weighs heavily against their ability to discover materials submitted in confidence to the bankruptcy trusts, as a means of proving that other tortfeasors may bear an equitable share of the total liability.

71. In this respect, it is well established in New York that *defendants* have the burden of proving the share of relative culpability of other joint tortfeasors, including bankrupt companies, for a plaintiff's harms. *See* CPLR 1603 ("[a] party asserting limited liability pursuant to this article shall have the burden of proving by a preponderance of the evidence its equitable share of the total liability"); *see also* CPLR 1412 ("[c]ulpable conduct claimed in diminution of damages . . . shall be an affirmative defense to be pleaded and proved by the party asserting the defense").

72. The obvious benefit to defendants of requiring plaintiffs to disclose trust-related submissions is that they will presumably seek to have such information admitted as evidence of a plaintiff's exposures to the bankrupt entities'

asbestos products, to have them placed on the jury verdict sheet, and to argue to the jury that a large portion of liability be allocated to those entities, in accordance with CPLR 1601(1).[8]

73. Also with regard to defendants' Article 16 burden, it should be noted that defendants are as capable of, and as free to, investigate, collect and gather site-specific, and certainly non-party, information as plaintiffs. The defendant can examine the plaintiff, cull through prior co-worker deposition transcripts, and engage in site-specific discovery. It is not the plaintiff's burden to undertake this work on defendants' behalf, or to provide a defendant in one case with materials that may be available to the particular plaintiff's attorney simply by virtue of having represented other individuals in unrelated cases.

74. Moreover, although inadmissibility is a separate matter from the

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[8] The admissibility of any such evidence is a separate matter. The federal asbestos personal injury trust system intends to avoid this. A claim and supporting material submitted to a bankruptcy trust is ordinarily *just* a claim, and may or may not be approved or supported by evidence deemed by the trust to be sufficient. Indeed, the trusts decline to accept a significant percentage of the claims. The contingent nature of proof of claim filings is also evidenced by the provisions in many TDPs that protect claims and related materials as confidential "settlement documents," as shown. Moreover, the many TDP provisions precluding use of the proof of claim-related submissions by defendants in the tort system further attests to the federal intent not to permit the use of such materials as "admissions" that might benefit such defendants. *Cf. People v. Vincente*, 4 A.D.3d 217, 218 (1st Dep't 2004) ("[t]he statement did not exculpate defendant, given the circumstances of the crime as well as the statement' ambiguity, and it was not admissible as an admission or declaration against penal interest"); *see also* CPLR 4547 (expressly prescribing that evidence concerning any settlement negotiations or offers, or of "any conduct or statement made during compromise negotiations," is inadmissible "as proof of liability for or invalidity of the claim or the amount of damage").

discovery issue here, *see* fn. 8, the inadmissibility of the non-party – as well as overall proof of claim – submissions, by virtue of their being settlement documents, also weighs heavily against their discoverability.

75. Section 4547 of the CPLR expressly prescribes that evidence concerning any settlement negotiations or offers, or of "any conduct or statement made during compromise negotiations," is inadmissible "as proof of liability for or invalidity of the claim or the amount of damages." CPLR 4547. Therefore, in the first instance, if the trust submissions are accurately deemed settlement materials, then under New York law they are inadmissible in these NYCAL cases.

76. The principal claim defendants have repeatedly made in seeking disclosure is that the materials they seek are somehow not "settlement offers" and CPLR 4547 does not protect them from disclosure. By the same token, being inadmissible settlement documents, their discovery cannot be deemed reasonably calculated to lead to the discovery of otherwise admissible materials. *See Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 179-80 (1989) (Scalia, J., dissenting on other grounds); *Niagara Falls Urban Renewal Agency v. Clifton Holding, Inc.*, 43 A.D.2d 900, 900 (4th Dep't 1974) (discussing holding that "appraisals used for purposes of establishing recommended prices for settlements or purchase are inadmissible to show market value, hence not discoverable," and stating that, in the case at bar, because appraisals at issue were *not* settlement documents, they

were discoverable).

77. Nor would the Court's denial of discovery of non-party trust-related submissions (as well as the striking of ACMO Paragraph XV(E)(2)(l)) deprive any defendant of any relevant and necessary information. NYCAL defendants have no need to discover confidential and protected non-party trust claims materials.

78. With particular regard to the non-party materials, any individual plaintiff is not, of course, required to seek out and disclose whatever information may be available to his or her attorney, as may be derived from other, unrelated cases. But the plaintiff has a continuing obligation to disclose the fact of his or her own filings. *E.g.*, CPLR 3101(h) ("[a] party shall amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete").

79. In this vein, plaintiffs certainly do disclose the fact of their filings, providing defendants, as a matter of course, with information concerning the filing of any trust claims, the identities of the trusts involved, the time at which any such claims have been filed, and the fact of whether the trust has made payment on the claim. Plaintiffs respectfully submit that this disclosure appropriately reconciles the Federal, State litigation, and privilege and confidentiality interests in play.

80. In sum, there is a strong and compelling Federal interest in the confidentiality and non-discoverability of party and non-party documents and materials submitted in support of a plaintiff/claimant's asbestos-related bankruptcy trust claims, and these materials are deemed to be strictly confidential and provided in the context of settlement negotiations. They are protected from disclosure and, by virtue of overriding Federal provisions, not to be used for the benefit "of any third parties or defendants in the tort system" [Exh. 4, at § 5.7(b)(3)].

81. Nevertheless, a NYCAL defendant may obtain a statement of any bankruptcy trust filing on the particular plaintiff's part. The Recommendation is incorrect in concluding that "any privilege that might have attached to the[] non-party affidavits at the time they were prepared was vitiated once they were sent on, with the POCs, to the bankruptcy trust." *See United States v. Deloitte LLP*, 610 F.3d 129, 142 (D.C. Cir. 2010) ("the question is whether a confidentiality agreement or similar assurance gave Dow a reasonable expectation that Deloitte would keep its work product confidential. . . . We conclude that Dow had a reasonable expectation of confidentiality because Deloitte, as an independent auditor, has an obligation to refrain from disclosing confidential client information"); *Vanguard Sav. & Loan Ass'n v. Banks*, № 93-CV-4627, 1995 U.S. Dist. LEXIS 13712, at *16-17 (E.D. Pa. Sept. 18, 1995) ("A disclosure made

'concurrently with a guarantee of confidentiality,' does not necessarily constitute a waiver of the work product privilege. . . . Therefore, I find that plaintiffs did not act with conscious disregard of the possibility that an adversary might obtain the protected materials. . . . It was reasonable for Vanguard's attorneys to expect that this disclosure would not permit future use of this material").

D. ACMO ¶ XV(E)(2)(l) CONFLICTS WITH TRUST PROCEDURES

82. For all of the reasons stated, plaintiffs have further established that ACMO¶ XV(E)(2)(l) is constitutionally, and otherwise, infirm, and they respectfully submit that this provision should be stricken from the ACMO.

83. The federally-administered trust mechanisms, defining limitations periods and filing deadlines, directly conflict with ACMO Paragraph ¶ XV(E)(2)(l), which presently imposes upon NYCAL plaintiffs who "intend to file a proof of claim form with any bankrupt entity or trust" strict time limits within which to do so, time limits that are inconsistent and incompatible with the trusts' prescriptions.

84. With further regard to Paragraph XV(E)(2)(l), it is well to note that in nearly all respects the original NYCAL Case Management Order and subsequent amended case management orders were crafted and acquiesced in "by representatives of both the plaintiffs' and defendants' NYCAL personal injury bar."

In re New York City Asbestos Litig., Index № 40000/88 (Sup. Ct., NY County Dec. 12, 2011) (Hon. Sherry K. Heitler); *see generally In re Liquidation of Midland Ins. Co.*, 16 N.Y.3d 536, 542 (2011) (concerning insurance litigation, "the parties negotiated and agreed upon a proposed case management order. Supreme Court so-ordered the document, entitled 'Stipulation and Case Management Order' (CMO)").

85. When it comes to Paragraph XV(E)(2)(l), however, the plaintiffs did not "negotiate[] and agree[] upon" this provision, nor can they now agree to its continued application.

86. Indeed, as a matter of the Federal policy inhering in the litigation trust scheme, the trusts typically apply the state law limitations period for the filing of proofs of claim. The ACMO impinges upon that scheme, and upon the Federal interest in dictating the timing of trust-related filings, by requiring action in relation to the trusts that may effectively and substantially curtail a plaintiffs rights, options or deadlines under the Federal scheme.

87. Plaintiffs therefore respectfully request that the Court revisit this provision, and vacate, rescind or strike it from the ACMO.

E. CONCLUSION

88. This objection has demonstrated that first party and non-party

materials assembled and submitted on behalf of a bankruptcy trust claimant are neither discoverable by defendants in the tort system, nor admissible in the tort action. These materials are safeguarded both by (1) the plaintiffs' federally and locally protected confidentiality and settlement-related privacy and work product interests, and (2) the strong Federal interest in a workable, efficient, confidential and Bankruptcy court-supervised trust claims mechanism.

89. Plaintiffs have further established that ACMO¶ XV(E)(2)(l) is constitutionally, and otherwise, infirm, and they respectfully submit that this provision should be stricken from the ACMO.

WHEREFORE, plaintiffs respectfully request that this Court grant plaintiffs' appeal and application in its entirety, and issue an Order protecting from disclosure any and all (1) proof of claim and (2) non-party documents and/or materials constituting supporting submissions to any bankrupt entity's trust, and striking (3) paragraph XV(E)(2)(l) from the ACMO, and grant such other and further relief that the Court deems just and proper.

Dated: New York, New York
December 21, 2011

Respectfully submitted,

WEITZ & LUXENBERG, P.C.

By: Alani Golanski, Esq.