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

IN RE: GARLOCK SEALING TECHNOLOGIES LLC, et al., Debtors.[1]	Case No. 10-BK-31607 Chapter 11 Jointly Administered

DEBTORS' SUMMARY RESPONSE TO THE INFORMATION BRIEF OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS

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[1] The debtors in these jointly administered cases (these "Cases") are Garlock Sealing Technologies LLC; Garrison Litigation Management Group, Ltd.; and The Anchor Packing Company (the "Debtors" or "Garlock").

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The Official Committee of Asbestos Personal Injury Claimants (the "Committee") relies on its Information Brief (Docket No. 452) in partial support of its Motion for Entry of a Scheduling Order for Plan Formulation Purposes ("Scheduling Motion") (Docket No. 451). In further support of their Response to the Scheduling Motion (filed contemporaneously herewith), the Debtors submit this Summary Response to the Committee's Information Brief.

INTRODUCTION

In its 90-page Information Brief, the Committee primarily seeks to establish two points: Garlock had no defenses to asbestos claims in the tort system, and Garlock's settlement history between 2000 and 2010 is the only proxy for its current and future responsibility for Asbestos Claims.[2] On both points, the Committee is incorrect.

Unlike the top tier defendants[3] who filed for bankruptcy beginning in 2000, Garlock had excellent defenses to liability. Prior to the Bankruptcy Wave,[4] juries and courts almost always accepted those defenses, as reflected in Garlock's verdict history and the nominal settlement values Garlock paid to resolve asbestos claims. Even after the Bankruptcy Wave, Garlock won most cases that went to trial, despite the fraudulent and abusive practices of the plaintiffs' bar. Garlock had defenses to asbestos claims, and they were good ones.

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[2] Unless otherwise specified, capitalized terms have the meanings set forth in the Debtors' Motion for (A) Establishment of Asbestos Claims Bar Date, (B) Approval of Asbestos Proof of Claim Form, (C) Approval of Form and Manner of Notice, (D) Estimation of Asbestos Claims, and (E) Approval of Initial Case Management Schedule (Docket No. 461).

[3] The "top tier" defendants are nine large companies with historically very large asbestos liabilities each of which filed for bankruptcy protection between January 2000 and December 2001: Babcock & Wilcox (Feb. 2000); Pittsburgh Corning (April 2000); Owens Corning and Fibreboard (Oct. 2000); Armstrong World Industries (Dec. 2000); GAF (Jan. 2001); W.R. Grace (April 2001); USG (June 2001); Turner & Newall and other Federal Mogul companies (Oct. 2001). The top tier defendants were manufacturers of friable, amphibole asbestos-containing products and, prior to their bankruptcies, were the biggest sources for compensation of asbestos claims. Their bankruptcies precipitated dozens of other bankruptcies. *See* Garlock Info. Br. at 48 n.129 (Docket No. 24).

[4] The Bankruptcy Wave refers to top tier defendants' retreat from the tort system to chapter 11 from January 2000 to December 2001 that precipitated over thirty subsequent asbestos bankruptcy cases. *See* Garlock Info. Br. at 48, n. 129.

Ignoring what courts and juries thought of the relative merits of the plaintiff's case and Garlock's case, the Committee focuses on what Garlock *paid* to settle asbestos claims. More specifically, the Committee focuses on the narrow window of 2000-2010. After 1999, Garlock's average settlement values in mesothelioma cases increased eightfold. But because the increase happened due to factors that were either temporary or unlawful, those settlements are not an accurate guide to Garlock's responsibility for asbestos claims. The Committee devotes only eleven out of ninety pages at the end of its brief to addressing Garlock's points regarding the key issues in these Cases.

First, as the Committee's own claims expert has admitted in prior testimony, the top tier defendants funded most of plaintiffs' damages before 2000 and this responsibility shifted to solvent defendants when the top tier defendants left the tort system in the Bankruptcy Wave. When the top tier defendants established Trusts with tens of billions of dollars in assets for these plaintiffs, Garlock's responsibility should have diminished enormously.

Second, the increase in Garlock's payments occurred in significant part because plaintiffs concealed evidence of their exposure to products of the top tier defendants that had filed for bankruptcy, thereby making their cases against Garlock stronger. The Committee's Brief ignores that these practices are more than "hardball litigation," they amount to the fraudulent concealment of evidence.

Finally, the Committee's brief fails to engage how the Trust Distribution Procedures ("TDP") governing the Trust claiming process aided in denying Garlock relief from the tens of billions of dollars placed in Trusts for plaintiffs suing Garlock. These TDP allowed plaintiffs to delay and hide their Trust claims and the evidence supporting those claims, giving them free reign to "double dip" in the Trust and tort systems in the manner detailed in Garlock's

Information Brief. The Committee's only rejoinder is to propose a definition of "double dipping" that ignores the untoward aspects of claimants' actual practices. *See* ACC Info. Br. 83–84.

As explained more fully below and in Garlock's Information Brief, the settlement values that best reflect Garlock's responsibility for asbestos claims are those Garlock paid before 2000, when the top tier defendants funded most of the liability and plaintiffs did not withhold evidence of their exposures to those companies' products. The Committee obviously disputes this approach, making a contested estimation hearing necessary and requiring full discovery relative to the issues Garlock has raised.

This Summary Response does not respond to every misstatement in the Committee's Information Brief. Instead, it focuses on key issues relevant to the motions before the Court—namely, Garlock's defenses and the reasons its settlement payments increased between 2000 and 2010.

I. Garlock Had Excellent Defenses To Liability in the Tort System.

In its brief, the Committee tries to argue that Garlock's defenses "have been rejected by the scientific and medical community," (ACC Info. Br. at 3), and "have *no* scientific support, and have properly been rejected by judges and juries in the tort system in the last 30 years." (ACC Info. Br. at 42.) Through this and similar hyperbole, the Committee miscasts Garlock's Information Brief as a "disinformation" brief (ACC Info. Br. at 2) and accuses Garlock of a "*false* description of […] medical and exposure realities." (ACC Info. Br. at 44.) These charges do not survive minimal scrutiny.

In fact, the plaintiffs' bar has litigated the liability case against Garlock many times. Most of the time—and the vast majority of the time before 2000 (when all defendants and

evidence were before courts and juries)—Garlock won. Such results were not surprising given that independent and reliable industrial hygiene evidence demonstrates that Garlock's products released miniscule numbers of asbestos fibers, even during the occupational activities most likely to release fibers. Quite simply, plaintiffs who experienced exposure to fibers from Garlock products were not exposed to sufficient numbers of fibers to make a meaningful contribution to the fiber load that causes an increased risk of asbestos-related disease.[5] Accordingly, there was not a good case to be made against Garlock.

A. Garlock's Record of Successful Trial Defense Underscores Its Formidable Defenses to Asbestos Liability.

Presented with the opportunity to compare plaintiffs' evidence against Garlock's evidence at trial, judges and juries overwhelmingly have ruled in Garlock's favor on the question of its liability for asbestos-related injury. Prior to the Bankruptcy Wave, from 1975 to 1999, when Garlock and plaintiffs introduced their respective scientific and medical evidence in trials, Garlock was extraordinarily successful. In each case, Garlock was either completely exonerated or paid very little, even after verdicts were rendered. In fact, during the three calendar years prior to the Bankruptcy Wave, plaintiffs tried cases to verdict against Garlock 61 times. Of those cases, Garlock won defense verdicts or outright dismissals in 54 of them, an 89% success rate. Of the seven verdicts against it, Garlock won a reversal of one on appeal, settled another for a fraction of the verdict amount, and was found only 2% responsible for injury in another.

Garlock's trial strategy was to present evidence that its products were safe and that plaintiffs' injuries were caused by exposures to the highly friable, amphibole products of top-tier defendants that plaintiffs freely identified during discovery in years prior to the Bankruptcy

[5] Furthermore, most workers occupationally exposed to asbestos never engaged in activities capable of releasing fibers from gaskets or packing.

Wave. In weighing this evidence, juries consistently assigned liability to the insulation companies and other manufacturers of friable products, not Garlock.

The formidable nature of Garlock's defenses is reflected in the fact that before 2000, Garlock paid on average less than $10,000 to resolve mesothelioma claims (and less than $3,000 and $1,600, respectively, to resolve lung cancer and asbestosis claims). Even after the Bankruptcy Wave, juries still more often than not exonerated Garlock from claims that its products caused asbestos related injuries.

B. The Committee's Brief Misstates The Majority Approach to Legal Causation in Asbestos Cases.

To try to create the impression that Garlock lacks legal defenses to liability when, in fact, its defenses are strong, the Committee misstates the causation standard that applies in asbestos cases. For its position, the Committee puts forth text from an unpublished 1991 federal trial court decision the Committee says represents the "uniform" standard of causation in asbestos cases: that "every exposure contributes" to asbestos injury and warrants liability. ACC Info. Br. at 69 (citing *Blancha v. Keene Corp.*, 1991 WL 224573 (E.D. Pa. Oct. 24, 1991)). This position misstates the law.

Although a handful of cases have discussed a liberal, "every exposure contributes" standard, the application of such a tenuous basis for legal causation has been roundly beaten back by federal appellate court and state supreme court decisions. In fact, the departure of top tier defendants from the tort system in the Bankruptcy Wave of the early 2000s put this flimsy notion of liability to the test before appellate courts. As plaintiffs began pursuing less-plausible exposure theories against companies who made low dose, encapsulated asbestos products, appellate courts increasingly rejected the "every exposure" basis for liability that the Committee champions.

In fact, the *Blancha* decision itself, the case at the heart of the Committee's position, was expressly discarded by the Pennsylvania Supreme Court. In *Gregg v. V-J Auto Parts Co.*, the court explained:

> We recognize that it is common for plaintiffs to submit expert affidavits attesting that any exposure to asbestos, no matter how minimal, is a substantial contributing factor in asbestos disease. . . . Such generalized opinions do not suffice to create a jury question in a case where exposure to the defendant's product is *de minimis*, particularly in the absence of evidence excluding other possible sources of exposure (or in the face of evidence of substantial exposure from other sources).

596 Pa. 274, 291 (Pa. 2007). Even after its decision in *Gregg*, the Pennsylvania Supreme Court has continued to pile on in its attack on *Blancha* and the Committee's "every exposure" standard as an unacceptable "fiction." Earlier this year that court held in another case:

> In *Gregg v. V-J Auto Parts Co.*, 596 Pa. 274, 943 A.2d 216 (Pa. 2007), this Court recently rejected the viability of the "each and every exposure" or "any breath" theory. We stated: we do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation. . . The result, in our view, is to subject defendants to full joint-and-several liability for injuries and fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm. *Id.* at 226-27.

Summers v. Certainteed Corp., 997 A.2d 1152, 1162 (Pa. 2010).

The Committee also tries to put forward the 1973 decision under Texas law of *Borel v. Fibreboard Paper Products Corp*, 493 F.2d 1076 (5th Cir. 1973), as emblematic of the "each and every exposure" theory of liability. ACC Info. Br. at 28. That decision, however, predated *all* asbestos bankruptcies, and thus dealt with circumstances where defendants were companies who manufactured friable, high-exposure products that were capable of causing disease, and who were the principal litigants in asbestos personal injury cases. More importantly, however, *Borel*'s characterizations of the law have been superseded by decisions from the Texas Supreme

Court that compel a stricter standard of causation liability. Texas law now plainly requires evidence of proximity, frequency, and duration of asbestos exposure quantified by epidemiologic evidence that plaintiffs' exposures are equal to the dose shown to create a 2.0 relative risk of the asbestos disease in question. *See Borg-Warner Corp. v. Flores*, 232 S.W. 3d 765 (Tex. 2007); *Smith v. Kelly-Moore Paint Co.*, 307 S.W. 3d 829 (Tex. App.-Fort Worth, 2010, no pet.).

Although the Committee has tried to portray significant precedent against its position as "outlier[s]," ACC Info. Br. at 69, it is the Committee's view of the law that rests on shaky ground. Indeed, just last year, the Sixth Circuit rejected the Committee's approach to causation as running headlong into the black letter tort law of the Restatement (Second) of Torts. In *Martin v. Cincinnati Gas & Elect. Co.*, 561 F.3d 439, 443 (6th Cir. 2009), the court held that if it were to accept the premise that every exposure amounts to a legal cause of injury, that "would render the substantial cause requirement [of the Restatement] meaningless." The court explained:

> Plaintiff also argues that, because mesothelioma is a progressive disease, any exposure is a substantial cause. This argument would make every incidental exposure to asbestos a substantial factor. Yet one measure of whether an action is a substantial factor is "the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it." RESTATEMENT (SECOND) OF TORTS § 433(a). The Sixth Circuit responded to a similar argument in a maritime action by stating that an expert's opinion that "every exposure to asbestos, however slight, was a substantial factor" was insufficient because it would render the substantial factor test "meaningless." *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 493 (6th Cir. 2005).

Martin, 561 F.3d at 443.

In short, contrary to the Committee's discussion in its Brief, courts have routinely rejected the "every exposure" theory of causation. The prevailing legal standard applicable to asbestos claims is one that depends on the quantification of the frequency, proximity, and duration of exposure. *Kummer v. Allied Signal, Inc.*, 2008 U.S. Dist. LEXIS 88240 (W.D. Pa.

Oct. 31, 2008) (holding that the "regularity, frequency, and proximity test" is the majority rule). This approach, not the Committee's, is the one that "has been adopted by a majority of federal jurisdictions and many state courts." *Id.*

It is worth noting that other cases the Committee cites likewise fail to support liability based on the notion of "any exposure," no matter how miniscule. For instance, the Committee cites *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1227 (Cal. 1997), as supporting its theory. *See* ACC Info. Br. at 60. But even that case explains that an evaluation of the nature and extent of exposure is necessary in each case and that claims cannot stand on evidence of miniscule exposure alone. In particular, the California Supreme Court held that the causation question should be framed as follows:

> Taking account the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, any other potential causes to which the disease could be attributed (e.g., other asbestos products, cigarette smoking), and perhaps other factors affecting the assessment of comparative risk, should inhalation of fibers from the particular product be deemed a "substantial factor" in causing the cancer?

Id. at 1214. Furthermore, the court explained, "a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." *Id.*[6]

The best evidence that the Committee misapprehends the prevailing legal standard is Garlock's successes in the courtroom. The idea that every exposure to asbestos, no matter how

[6] The Committee's brief presents in a footnote a string citation of nine cases it says supports its view. ACC Info. Br. at 61. Seven of those cases, however, were decided in the 1990s, before court decisions applied *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as a basis to reject the causation science that previously was admitted in asbestos injury cases. These seven cases also generally concerned liability based on friable asbestos products that released asbestos fibers in such substantial amounts that the court was not called to examine the legal causation standard with precision. The other two cases cited in the footnote come from intermediate appellate courts, not courts of last resort. Although those decisions apply a lower causation standard compared to other jurisdictions, in each case, the court required an evaluation of the nature and extent of asbestos exposure before liability could be established—a stricter approach than the Committee proposes in its Brief. *See John Crane v. Linkus*, 190 Md. App. 217, 233-34, 988 A.2d 511, 521 (2010) (Maryland applies form of frequency, proximity, and regularity test); *Jones v. John Crane, Inc*, 132 Cal. App. 4th 990, 35 Cal. Rptr. 3d 144, 150 (Ct. App. 2005) (packing manufacturer 1.95% liable for lung cancer, but acknowledged frequency, proximity, and regularity factors in applying standard).

minute, gives rise to liability, defies Garlock's track record of success in cases before juries, on summary judgment, and in obtaining dismissals on the pleadings as a matter of law. Garlock has formidable and demonstrable defenses to liability. The Committee's assertions to the contrary are misplaced.

C. Courts Have Rejected the "Junk Science" Upon Which the Committee Relies.

The Committee's Information Brief puts substantial stock in the purported industrial hygiene analyses of Dr. William Longo to try to assign substantial liability to Garlock. ACC Info. Br. at 48-49. Dr. Longo's scientific efforts, however, are woefully deficient. For instance, Dr. Longo was a materials scientist, not an industrial hygienist. Perhaps for that reason, his work was based on protocols developed without ever seeing asbestos gaskets or packing used in the workplace or ever collecting air samples in the workplace. Moreover, his work relied upon operational activities that did not reflect real world practices; for example, he would grind an entire gasket for removal instead of scraping the gasket material before grinding, the standard practice in the field.

Dr. Longo's studies suffered from substantial quality control problems, and he has been unable to replicate his results in subsequent experiments. In fact, each time he has tried to reproduce experiments in response to criticisms leveled at his work, his tests have yielded escalating amounts of fiber releases to levels that only cast further doubt on their validity.

Dr. Longo's studies have been excluded because they are "not scientifically reliable." Order Relating to Garlock, Inc. Motion to Suppress Testimony of Dr. William Longo and Mr. Richard Hatfield with Findings of Fact and Conclusions of Law ¶ 2, In re Lamar County Asbestos Litig. Cases Filed or to be Filed By Waters & Kraus in Lamar County, Texas (Dist. Ct. [6th Cir.] Tex. July 5, 2001) (attached here as Ex. 1). Indeed, after a thorough review, his work

and his approach in this field have been labeled as nothing more than "junk science," unworthy of any consideration. *Id.* ¶ 3. In sum, the exposure levels produced by Dr. Longo's experiments—those relied upon by the Committee—lie orders of magnitude away from reliable scientific results produced by independent scientists and researchers and do not sustain allegations that Garlock's products contributed to asbestos injuries as the Committee contends.

D. Garlock's Products Were Safe; the Committee Gets Its Facts Wrong In Claiming They Were Dangerous.

Without citation to evidence, the Committee starts its information brief with the false claim that Garlock knew its products were dangerous "since at least the 1950's."[7] The evidence is precisely to the contrary. Just like the most knowledgeable scientists of the time, Garlock reasonably believed its encapsulated products were safe. Even in 1978, after many friable insulation products had been banned, the nation's leading advocate for asbestos safety, Dr. Irving Selikoff, wrote that using gaskets and packing posed "no health hazard."[8]

The Committee erroneously claims in its Brief that Garlock has admitted that its products were dangerous since the 1950s. *See* ACC Info. Br. 45. But the Committee cites no supporting documents from that time. Rather, the Committee holds out a Material Safety Data Sheet ("MSDS") from 1991 as the document that supposedly proves that point.[9] As with many of the

[7] ACC Info. Br. at 1: "Despite knowing of the dangers posed by its asbestos-containing products since at least the 1950's, Garlock continued to produce and sell those products, without adequate warnings to end-users, until 2000." Garlock disputes both the knowledge claim and the lack of adequate warning claim. Although not required to do so, Garlock voluntarily placed the standard OSHA warning on its products by 1978.

[8] Irving Selikoff and Douglas Lee: Asbestos & Disease 466 (1978). In this influential book Dr. Selikoff presented a "comprehensive review" of the information then available. *Id.* at xv. Among other things, he presented conclusions drawn from one of the dustiest work environments ever studied, British naval shipyards. His statements about gaskets uses the British term "jointing." The text reads: "High Temperature jointing and packing materials with asbestos fiber: Compressed Asbestos Fiber—no substitute heat resistance material, no health hazard in forms used in shipyard application." This statement is highly relevant to cases brought against Garlock because many involve shipyard workers.

[9] ACC Info. Br. at 46 n.107. In most cases, the Garlock MSDS was published subsequent to the plaintiff's alleged exposure, and therefore inadmissible pursuant to Fed. R. Evid. 407.

Committee's statements, reliance on this document confuses the dangers of raw materials used to make a product with the separate question of whether the finished product is dangerous. Although the Garlock MSDS, of course, contains government-mandated warnings about asbestos ingredients in the product,[10] it states the position Garlock has always taken: "These products do not pose a health hazard under ordinary conditions of use."

The Committee can cite no real supporting evidence for its claim that Garlock "tried to conceal" known dangers of its product. ACC Info. Br. at 44-45. Indeed, there is "no evidence of surrounding circumstances that rises to the level that is required to show that Garlock made a conscious decision not to warn about the dangers of its products."[11] Instead of acts of concealment by Garlock, the Committee cites to a Garlock representative's attendance at a speech that recounted the widespread publicity about the dangers of an entirely different category of products—friable thermal insulation.[12] In doing so, the Committee gets its facts completely wrong. The speech it cites was not made by the executive secretary of a trade

[10] An MSDS is required under the Federal Hazard Communication Standards. 29 CFR § 1910.1200, App.B (2006). These public heath provisions err on the side of overprotection. *See IUD v. API*, 448 U.S. 607, 655 (1980) (affirming OSHA's right to err on the side of overprotection, and not base its decision on "anything approaching scientific certainty" in doing so). If a product contains a substance that is listed as a carcinogen by OSHA, the International Agency for Research on Cancer, or the National Toxicology Program, the MSDS must contain a cancer warning. Thus, an MSDS is not proof of causation. *Coastal Tankships U.S.A. Inc. v. Anderson*, 87 S.W.3d 591, 618 (Tex. App.–Houston [1st Dist.] 2002, pet. denied) (Brister, J., concurring) (MSDS "provides no information about relative risk, required exposure level, or time of onset. This is not enough to prove causation."). *See Davis. v. DuPont*, 729 F. Supp. 652 (E.D. Ark. 1989). To see why an MSDS is not proof, one need only examine the MSDS for play sand, which contains a cancer warnings because silica is a carcinogen at high doses—even though no one really thinks sand boxes pose a danger.

[11] *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 690 (Tex. App.—Texarkana 1991, writ denied). This case was decided when Texas utilized a far more lenient causation standard than it currently employs. *See* Section I.B *supra*. But even under more liberal standards then applicable, the appellate court found that the exemplary damage claim was insupportable.

[12] ACC Info. Br. at 45 n.105. The sole example supporting the claimed concealment is attendance at a meeting of the Asbestos Textile Institute ("ATI") on June 7, 1973.

organization of which Garlock was a member in 1973, but someone from a different group.[13] Moreover, the Committee is mistaken in its suggestion that Garlock "voted down" a study of lung cancer in asbestos workers.[14] Garlock did not participate in the vote the Committee discusses. In fact, it was not even a member of the subject organization at the time.[15]

Later in the Committee's Brief, it impliedly concedes that its knowing concealment charges lack merit, as it backpedals to a position that Garlock was "preferring to remain ignorant." ACC Info. Br. at 45. Tellingly, the Committee, in making its allegations about Garlock's knowledge of product dangers in the 1950s, fails to account for the fact that the levels of fiber release from gaskets and packing identified in reliable studies is so low that they would not have even registered under the testing procedures used in that decade. When more sophisticated tests were later developed, they confirmed what Dr. Selikoff had said: that ordinary use of asbestos gaskets and packing—such as that by most claimants—was safe. *See* Garlock Info. Br. at 32.

II. Garlock's Post-2000 Resolution Values Are Not An Accurate Guide To Its Current and Future Responsibility for Asbestos Claims.

Rather than confront Garlock's extraordinary trial success, the Committee argues that the Court, in its estimation of Garlock's responsibility for asbestos claims, must myopically focus on the settlements Garlock paid to resolve cases in the tort system to the exclusion of other, real

[13] Actually, the speaker, Mathew Swetonic, held no office in the ATI. He was a former Johns-Manville employee who was executive secretary of the Asbestos Information Association ("AIA").

[14] *See* ACC Info. Br. n.106, implying that that Garlock "voted down" a proposal to study lung cancer in 1957, because it "would stir up a hornet's nest."

[15] The vote was taken by representatives of companies like Johns-Manville and Raybestos-Manhattan. Accordingly, efforts by plaintiffs to use the "hornet's nest" document in evidence are routinely rejected by trial courts that have tried cases against Garlock, consistent with the prohibition on tarring one company with the conduct of others. *See e.g., O'Flynn v. Owens-Corning Fiberglas*, 759 So.2d 526 (Miss. App., 2000); *Fibreboard*, 813 S.W.2d at 559.

world evidence of Garlock's responsibility or the absence thereof. ACC Info. Br. 15, 44. In particular, the Committee proposes that the estimation be based entirely on a blind extrapolation from Garlock's past settlements.

As an initial matter, the Committee's approach would make estimation in these Cases where liability is disputed hang solely on out of court compromises that are not even admissible on the issue of liability. *See* Fed. R. Evid. 408(a) ("Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount . . . [F]urnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim."). Rule 408 recognizes that defendants settle cases for reasons that stand apart from actual liability, among them, the high costs of mounting legal defenses, even to meritless claims, and the inherent risks of trial outcomes in our jury system. The benefits of no admission compromises would be lost if settlement amounts were used to prove liability. *See* Weinstein's Federal Evidence § 408.02[1]–[2] (2d ed. 2009) (explaining how Rule 408 promotes compromise and settlement and protects the freedom of communications between the parties).

In any event, resting an entire estimation trial solely on settlement history would be especially perilous in the asbestos litigation context, as Garlock's own settlement history shows. For example, Garlock paid settlements in non-malignant cases not to avoid trial risk, but to avoid defense costs. *See* Garlock Info. Br. at 44–46 (Docket No. 24).

Then, between 2000 and 2010, Garlock's settlements in mesothelioma cases increased eightfold due to factors entirely unrelated to its actual responsibility. The increased trial risk caused by the exit of top tier defendants from the tort system and the plaintiffs' practice of

withholding exposure evidence resulted in Garlock's average mesothelioma settlement value increasing from $9,000 to more than $70,000 (excluding claims where Garlock did not make payment to a claimant, such as dismissed claims). The point is that settlement values react to temporary stimuli (e.g., the absence of payments from top tier defendants who should now pay out the more than $30 billion in the Trust compensation system), and if settlement amounts based on temporary trends are extrapolated into the future they will wildly overstate responsibility.

A. Garlock's Mesothelioma Settlements Were Temporarily Inflated by the Bankruptcies of the Top Tier Defendants.

The Committee cannot seriously dispute that the disappearance of the top tier defendants from the tort system was a major factor that increased Garlock's trial risk and its per-case settlement average. In the *W.R. Grace* case, the Committee's claims expert Dr. Mark Peterson—the same expert the Committee retained in these Cases (Docket No. 305)—testified that asbestos cases in the tort system are resolved primarily through settlement in what he referred to as a "marketplace of settlement." Transcript of Hearing at 159, *In re W.R. Grace & Co.*, No. 01-01139 (Bankr. D. Del. Sept. 15, 2009) (testimony of Dr. Peterson) (attached as Ex. 2). Each defendant in this marketplace had its trial risk mitigated by the possibility of obtaining contribution from other tortfeasors in the event of an adverse judgment. As a result, according to Dr. Peterson, defendants almost always succeeded in settling for only their several shares. Transcript of Hearing at 239-240, *In re W.R. Grace & Co.*, No. 01-01139 (Bankr. D. Del. Sept. 15, 2009) (testimony of Dr. Peterson) (Ex. 2).

Dr. Peterson went on to testify that, prior to the Bankruptcy Wave, eight "top-tier" asbestos defendants were the "biggest sources of compensation for asbestos claims." *See* Peterson, W.R. Grace Projected Liabilities for Asbestos Personal Injury Claims As of April 2001

at 25 (attached as Ex. 3).[16] When these big payers went into bankruptcy, and their ability to pay their several shares temporarily disappeared, plaintiffs were able to demand and receive more from surviving defendants. *Id.* Dr. Peterson opined that, if W.R. Grace had remained in the tort system during the 2000s, its trial risk would have increased and its average settlement values for mesothelioma claims would have multiplied, from less than $50,000 before the Bankruptcy Wave to $225,000 thereafter. *See id.* at 29, 36; Transcript of Hearing at 201, *In re W.R. Grace & Co.*, No. 01-01139 (Bankr. D. Del. Sept. 15, 2009) (testimony of Dr. Peterson) (Ex. 2). The Committee thus cannot deny that a significant cause for the increase in Garlock's settlement values was the temporary absence of the top tier defendants from the tort system.

The corollary to Dr. Peterson's testimony, however, is that when the top tier defendants resumed paying damages through Trusts holding *tens of billions of dollars* for damages owed to the same mesothelioma plaintiffs suing Garlock, Garlock's responsibility had to decrease. This is the natural consequence of two facts: plaintiffs can only recover their damages once and, under state law, defendants are entitled to credit for amounts that other tort feasors can pay (either through setoff or contribution). Garlock's expert witness believes that enough money has

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[16] Dr. Peterson explained:

> "Between January 2000 and December 2001, eight so-called "top-tier" asbestos defendants with historically very large asbestos liabilities each filed for bankruptcy protection: Babcock & Wilcox (February 2000), Pittsburgh Corning (April 2000), Owens Corning and Fibreboard (October 2000), Armstrong World Industries (December 2000), GAF (January 2001), USG (June 2001) Turner & Newall and the other Federal Mogul companies (October 2001). If Grace had continued in tort litigation (which is assumed in determining its asbestos liabilities within its bankruptcy), it would have paid more in the future simply because all the other big payers had gone into bankruptcy. After these bankruptcies had removed the biggest sources for compensation of asbestos claims, plaintiffs and their lawyers demanded and received greater settlement payments from those defendants who remained in litigation. Asbestos plaintiffs and their counsel successfully demanded that the remaining solvent defendants still in the tort system "pick up the share" of the defendants who sought bankruptcy protection. Because of these bankruptcies both claims against Grace and the amounts that it would have had to pay to resolve asbestos claims would have increased greatly."

Id. at 25-26.

already been placed in Trusts for current and future mesothelioma plaintiffs to fully fund the entire current and future responsibility of all defendants for asbestos claims. The availability of Trust payments at the very least should return Garlock's current and future responsibility to the very low levels that existed prior to the Bankruptcy Wave.[17]

The Committee tries to escape this conclusion by arguing that Trust payments to mesothelioma plaintiffs are insignificant, because they are "only a fraction of the settlement value." ACC Info. Br. at 84. That is simply not true. Several top tier defendants pay *much more* money per claim through Trusts than they were paying in the tort system before bankruptcy. Moreover, the Trusts have more assets available to pay mesothelioma claimants than predicted because substantial sums were set aside for non-malignant claimants, and non-malignant claims have sharply declined since 2005.

For this fundamental reason, the settlement payments Garlock made between 2000-2010 badly overstate its responsibility. Those payments reflected shares of liability that the Trusts will be paying in the future, and that Garlock would not be responsible for paying.

B. Garlock's Mesothelioma Settlement Payments Increased Because of Plaintiffs' Concealment of Evidence.

Garlock's settlement values in 2000-2010 exaggerated its actual responsibility for another fundamental reason—the concealment by plaintiffs and their counsel of evidence that exculpates Garlock.

It was natural that W.R. Grace's settlement payments would have spiked had it remained in the tort system, as a result of fellow top tier defendants leaving the tort system for bankruptcy. W.R. Grace was a manufacturer of friable products, which had relatively weak defenses to

[17] *See* Charles Bates & Charles Mullin, Having Your Tort and Eating It Too?, Mealey's Asbestos Bankruptcy Report (November 2006) (attached as Ex. 4).

liability and a poor trial record, and routinely paid large settlements even before the Bankruptcy Wave.

Garlock was no W.R. Grace. Before the Bankruptcy Wave, Garlock was a peripheral defendant with enormous trial success. In a system where plaintiffs and their lawyers disclosed evidence of exposures to friable asbestos products, there would be no reason to expect that the bankruptcies of top tier defendants would automatically cause Garlock to bear the substantial liability assigned to top tier defendants.

Nonetheless, because plaintiffs and their lawyers concealed exposure evidence, that is what happened. As Garlock explained in its Information Brief, the exposure story it faced in tort system discovery abruptly changed when top tier defendants filed bankruptcy. Garlock Info. Br. at 49–52. For no plausible reason, plaintiffs began claiming their use of Garlock products was the major source of their asbestos exposure and plaintiffs minimized or denied exposure to friable products known to cause disease.

This practice substantially impacted Garlock's liability defenses, which depended on comparing the miniscule numbers of fibers released by Garlock products to the substantial numbers of fibers released by the products of bankrupt companies. Without this evidence, Garlock's trial success dropped from 90% before the Bankruptcy Wave to 67% thereafter.

Although still routinely successful at trial, Garlock's settlement values were under pressure, and for reasons that were more complex than those predicted by Dr. Peterson for W.R. Grace. Not only did Garlock risk greater damages awards in cases that went to trial because culpable defendants were in bankruptcy, Garlock was hamstrung because plaintiffs withheld evidence that exonerated Garlock in court. Garlock was soon sued in more cases, faced

bigger damages if it lost, and had a higher trial risk. These factors were what led to massively inflated settlement values.

C. The Committee's Excuses for Plaintiffs' Misconduct Should Be Rejected.

The Committee tries to justify the practice of withholding exposure evidence described in Garlock's Information Brief by asserting that Garlock could have obtained the alternative exposure evidence through sources other than the plaintiff. ACC Info. Br. at 80. Put another way, the Committee takes the implausible position that the misconduct in which plaintiffs engaged should be excused because Garlock did not do enough to find evidence from third parties to prevent it.

Keeping plaintiffs honest by way of third party discovery is a nearly impossible task. Evidence of occupational exposure to asbestos that has allegedly occurred over a substantial period of time is, by nature, evidence within the exclusive control of the plaintiff. Garlock lacks first-hand knowledge of activities at sites where its gaskets and packing were used. Third-party evidence cannot test every piece of testimony from plaintiffs, particularly evidence of occupational practices spanning many years. Moreover, third party discovery is especially ineffective against the cooperative concealment of evidence by plaintiffs and lawyers.

A New Jersey trial court recently issued an opinion where a plaintiff's untruths had been exposed, explaining that a plaintiff's work history is the key evidence in every case, how this evidence lies exclusively within a plaintiff's control, and why it is difficult for defendants to contest:

> In asbestos litigation, an accurate statement of work history is critical. It is only by investigation of a Plaintiff's work history the Defendants can learn about all of Plaintiff's asbestos exposures, an issue that is central to all asbestos cases. As a result, Plaintiff's lies about his work history have had a substantial detrimental impact on Defendants' ability to conduct discovery and ultimately prepare expert reports which are dependent upon asbestos exposure history. Plaintiff's lies

> regarding his work history and therefore his potential asbestos exposures, go to the very heart of his asbestos case, and clearly directly relate to the matter in controversy.
>
> . . .
>
> With the facts being in the control of Plaintiff and the relevant time period extending back 15 to 18 years, continued discovery to ferret out the truth may very well be futile.
>
> . . .
>
> In this Court's view, even more prejudicial is the question whether the true facts ever will be discovered. Knowledge of Plaintiff's work and asbestos exposure history is in Plaintiff's hands. Only what he chooses to reveal can be investigated. Thus far, Plaintiff has chosen to reveal only that which he believes does not adversely affect his case against the Defendants.

Gaskill v. Abex Corp., No. L-1772-08, 2010 WL 1484813 (N.J. Super. Apr. 1, 2010) (attached as Ex. 5).

D. The Committee Has Failed to Explain the Wrongdoing Garlock Has Already Exposed.

As discussed in Garlock's Information Brief (*see* Garlock Info. Br. at 53–56), before these Cases, Garlock obtained ballots voted by asbestos claimants in the Pittsburgh Corning bankruptcy to examine what Garlock had long suspected: that plaintiffs who denied exposure to top tier products, like Pittsburgh Corning products, in litigation against Garlock nonetheless made claims against top tier defendants who had entered bankruptcy. Garlock examined a random sample that included 255 plaintiffs from 19 different asbestos plaintiff firms. Its study revealed that in 236 of these cases, i.e., 92.5% of the time, the plaintiff denied knowledge of exposure to Pittsburgh Corning products in his suit against Garlock, but his attorney certified under penalty of perjury that the plaintiff suffered exposure to Pittsburgh Corning products that entitled him to a recovery in that case. *Id.*

The Committee's Information Brief has no good answer to this evidence. First, it derides these results as based on a sample that was not sufficiently random, by conflating what Garlock examined in this sample with criticisms of evidence Garlock presented in the *Pittsburgh Corning* confirmation hearing. *See* ACC Info. Br. at 86. Second, to the extent the Committee's complaint is that Garlock did not introduce more evidence in *Pittsburgh Corning*, it is important to recognize that Garlock could not adduce further evidence because discovery concluded before Garlock obtained the confidential Pittsburgh Corning ballots (a restriction Caplin & Drysdale vigorously enforced at the confirmation hearing).

In any event, the sample that Garlock described in its Information Brief was, in fact, random and representative of asbestos plaintiffs against it. Garlock's sample came from written discovery responses provided by law firms who voted master ballots in the *Pittsburgh Corning* case. In more than 90% of the cases plaintiffs' denied knowledge of Pittsburgh Corning exposure to Garlock, but nevertheless voted Pittsburgh Corning claims.

The Committee also attempts to minimize these results by claiming that neither these findings nor any other evidence Garlock has indicates "deliberate[] concealment" of exposure evidence by asbestos claimants or law firms. ACC Info. Br. at 86. But with this sample alone, Garlock has identified rampant and repeated practices of plaintiffs denying exposure to Pittsburgh Corning products in tort system discovery at nearly *the same time* or *after* the plaintiff or his lawyer certified under penalty of perjury he suffered exposure to Pittsburgh Corning products that entitled him to recover. These actions could hardly be better evidence of *deliberate* misconduct by litigants in the tort system. Moreover, this misconduct is not the first example of these kinds of problems arising in asbestos litigation. *See* Garlock Info. Br. at 41-42 (discussing Baron & Budd practices of concealing exposure evidence); *Gaskill*, 2010 WL 1484813.

Finally, the Committee makes a half-hearted effort to explain plaintiffs' omission to identify evidence that is "central to all asbestos cases," *Gaskill*, 2010 WL 1484813, as probably withheld based on discovery objections or because plaintiffs' memories temporarily must have lapsed. ACC Info. Br. at 87. These excuses for withholding material evidence in cases can be rejected by this Court out of hand.

It is important to emphasize that the practice of withholding exposure evidence to leverage settlements has consequences beyond the typical sanctions under civil court rules. At minimum, this practice warrants the prompt dismissal of asbestos personal injury claims. *See, e.g.*, *Gaskill*, 2010 WL 1484813 (dismissing claim with prejudice). Furthermore, parties and lawyers who conceal evidence to obtain favorable settlements face liability under state fraud-based claims and civil and criminal liability under the Racketeer Influenced & Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-1968. *See Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353 (9th Cir. 2005); *Napoli v. United States*, 32 F.3d 31 (2d Cir. 1994) (upholding criminal RICO convictions for fraudulent conduct by attorneys in fewer than 18 civil suits); *Tribune Co. v. Purcigliotti*, 869 F. Supp. 1076 (S.D.N.Y. 1994).

E. Trust Distribution Procedures Enable the Untoward Practices of the Plaintiffs' Bar and Continue to Inflate Settlement Values Through "Double Dipping."

Garlock has already described the practice of "double dipping" in its Information Brief. *See* Garlock Info. Br. at 53–56, 67. Double dipping occurs when asbestos plaintiffs injured by Trust products (i) sue tort system defendants; (ii) deny the Trust products caused injury; (iii) settle with the tort system defendants on that basis; and (iv) then make claims against the Trusts on the ground that the Trust products did cause the injury. As explained above, by withholding evidence of exposure to Trust products, plaintiffs leverage a higher settlement. The TDP of

asbestos trusts enable this conduct to continue, notwithstanding that they have emerged from bankruptcy and have begun to pay claims.

First, TDP do not hold claimants to a timeline to present their Trust claims, which allows plaintiffs to prosecute their tort system claims before they submit Trust claims and have to provide evidence of exposure to Trust products. In particular, TDP impose only a "nominal" three-year statute of limitations. To the extent any limitations period applies, the standard TDP allow claimants to withdraw their claims "at any time" and to re-file the claims at any point in the future "without affecting the status of the claim for statute of limitations purposes." *See, e.g.*, United States Gypsum Asbestos Personal Injury Settlement Trust Distribution Procedures Revised March 29, 2010 ("USG TDP") (attached as Ex. 6) § 6.3. As a result, plaintiffs may wait as long as they want before they submit evidence of Trust product exposure that tort system defendants seek in defending tort system cases. According to Caplin & Drysdale's Elihu Inselbuch, provisions like these allow a plaintiff to delay "ten or 20 years" before submitting discoverable evidence to a Trust, without any adverse consequence at all. Transcript of Hearing at 85-87, 91-92, *In re W.R. Grace & Co.*, No. 01-01139 (Bankr. D. Del. Sept. 8, 2009) (testimony of Mr. Inselbuch) (attached as Ex. 7).

Then, the standard TDP include confidentiality restrictions that keep plaintiffs' evidentiary submissions—and even the fact that a claim has been filed--secret. *See* USG TDP § 6.5. A tort system defendant must cause a subpoena to be issued to get the information, *id.*, but after a settlement inflated by the concealment of evidence, has no way to do so.

The combination of the delay and confidentiality provisions casts a veil of secrecy over the Trust claiming process. It gives plaintiffs free reign to deny exposure to Trust products in tort system litigation to win settlements, then make Trust claims that include Trust product

exposure evidence that can no longer help tort system defendants. Some TDP, including the USG TDP, even admit that their purpose is to deny evidence to tort system defendants: "Evidence submitted to establish proof of USG/A.P. Green Exposure is for the sole benefit of the PI Trust, not third parties *or defendants in the tort system*. . . . [F]ailure to identify USG or A.P. Green products in the claimant's underlying tort action, or to other bankruptcy trusts, does not preclude the claimant from recovering from the PI Trust." USG TDP § 5.7(b)(3).

These procedures enable the misconduct of plaintiffs and deny tort system defendants relief that would follow from access to Trust submissions during active tort cases. Because of the TDP, settlement values remain inflated for many of the same reasons they became inflated by the Bankruptcy Wave in the first place—liabilities of top tier defendants and evidence related to those liabilities are out of the reach of defendants defending tort system cases.

The Committee does not deny that plaintiffs engage in the practices described above. Its only attempt to address these issues is its recharacterization of the Debtors' complaints about "double dipping" as nothing more than complaints about plaintiffs collecting damages from multiple parties, co-defendants and section 524(g) Trusts alike. ACC Info. Br. at 83. But double dipping is much more than that. The features of "double dipping" that raise the concern of the Debtors are the very ones the Committee ignores—the unlawful practice of withholding evidence, and the use of TDP provisions in aid of that practice.[18]

[18] The problem of double dipping in the tort and Trust systems has become a prominent one in asbestos litigation in recent years. *See generally* William P. Shelley, Jacob C. Cohn & Joseph A. Arnold, The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 17 Norton J. Bankr. L. & Prac. 257 (2008) (attached as Ex. 8). One blatant case of double dipping led to revocation of a plaintiff's firm's pro hac vice privileges in the State of Ohio. *See* Ruling on Motion to Revoke Pro Hac Vice Privileges, *Kananian v. Lorillard Tobacco Co.*, No. 442750 (Ct. of Common Pleas, Cuyahoga Cty., Ohio, Jan. 19, 2007) (attached as Ex. 9); *see also* Trusts Busted, Wall Street Journal (December 5, 2006) (attached as Ex. 10). State courts have begun to enter case management orders designed to prevent the practice of double dipping and restore integrity between the tort and Trust systems. *See, e.g.*, Case Management Order, In re Asbestos Personal Injury Litig., No. 03-O-9600 (Circuit Ct. of Kanawha Cty., West Va. March 3, 2010) (attached as Ex. 11) (including section that requires counsel to disclose whether claims to trusts have been submitted to a trust but deferred or delayed).

CONCLUSION

As set forth in Garlock's Information Brief and as recounted above, Garlock has strong defenses to asbestos liability. The Court should not accept the Committee's misplaced view of that liability or its attempts to exaggerate it. Likewise, the Committee's proposed approach to estimation is uninformed and incorrect. Garlock's true responsibility is impacted by numerous and material factors, including the departure of top-tier defendants from the tort system in the Bankruptcy Wave, plaintiffs' practices of withholding evidence of exposure to top tier defendants' products, and TDP that have allowed these practices to continue.

Garlock is capable of funding a Trust that can pay every current and future expected mesothelioma claimant on the basis of Garlock's true liability consistent with payments made before the Bankruptcy Wave. But unless the Committee is willing to consent to a Plan that provides such relief, Garlock must undertake litigation and discovery to prepare for an estimation trial where Garlock will demonstrate that its approach to estimating asbestos liability against it is the correct one.

And on April 29, 2010, Congressman Lamar Smith (ranking minority member of the House Judiciary Committee) sent a letter to the Government Accountability Office (GAO) (attached as Ex. 12) raising concerns about the transparency of Trusts and Trust claiming practices, and asking the GAO to study the administration of Trusts, including "whether greater cooperation and transparency between 524(g) asbestos trusts and the tort system could reduce the possibility of duplicate payments made by trusts or by tort defendants." Congressman Smith stated, "[I]t appears that many 524(g) trusts are specifically structured and operated to thwart attempts to obtain information regarding trust claimants who are also making claims of other 524(g) trusts or who are suing solvent defendants in the tort system. This lack of transparency appears to foster dishonest claims practices and encourage claimants and their attorneys to seek duplicative payments by concealing trust recoveries." *Id.*

This 24th day of September, 2010.

Respectfully submitted,

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