

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

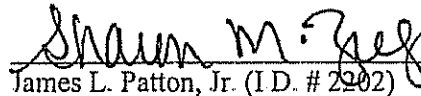
IN RE: : Chapter 11  
: :  
OWENS CORNING, *et al.* : Case Nos. 00-3837 (JKF)  
: (Jointly Administered)  
Debtors. :

**NOTICE OF FILING OF REBUTTAL REPORT OF DR. FRANCINE F.  
RABINOVITZ IN CONNECTION WITH ASBESTOS ESTIMATION**

PLEASE TAKE NOTICE that on December 6, 2004, the Legal Representative for Future Claimants filed the attached Rebuttal Report of Dr. Francine F Rabinovitz in Connection with Asbestos Estimation with the United States District court for the District of Delaware [Docket No. 15].

Dated: December 23, 2004

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP



James L. Patton, Jr. (I.D. # 2202)

Sharon M. Zieg (I.D. # 4196)

The Brandywine Building  
1000 West Street, 17th Floor  
P O. Box 391  
Wilmington, DE 19899-0391  
(302) 571-6600

KAYE SCHOLER LLP

Jane W. Parver

425 Park Avenue

New York, N.Y. 10022

(212) 836-8000

*Counsel for James J. McMonagle, Legal Representative for  
Future Claimants*

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DISTRICT OF DELAWARE

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

Owens Corning, *et al.* :  
 : Civil Action  
 :  
 v. :  
 : No. 04-905 JPF  
 :  
 Credit Suisse First Boston :

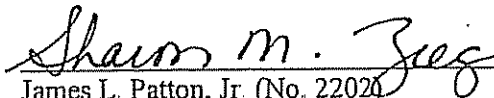
**JAMES J. MCMONAGLE, LEGAL REPRESENTATIVE  
FOR FUTURE ASBESTOS CLAIMANTS, NOTICE OF FILING  
OF REBUTTAL REPORT OF DR. FRANCINE F. RABINOVITZ  
IN CONNECTION WITH ASBESTOS ESTIMATION**

PLEASE TAKE NOTICE that pursuant to Fed. R. Civ. P. 26(a)(2), made applicable to these proceedings by Bankruptcy Rule 7026, James J. McMonagle, legal representative for future asbestos claimants, hereby files with the Court the attached Rebuttal Report of Dr. Francine F. Rabinovitz.

A courtesy copy of this report has also been delivered to the chambers of the Honorable John P. Fullam, Senior Judge.

Dated: December 6, 2004  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

  
James L. Patton, Jr. (No. 22020)  
Edwin J. Harron (No. 3396)  
Sharon M. Zieg (No. 4196)  
The Brandywine Building  
1000 West Street, 17th Floor  
P.O. Box 391  
Wilmington, DE 10900-0391  
Telephone: (302) 571-6600  
Facsimile: (302) 571-1253

- and -

KAYE SCHOLER LLP  
Michael J. Cames  
Jane W. Parver  
Edmund M. Emrich  
Andrew A. Kress  
425 Park Avenue  
New York, New York 10022  
Telephone: (212) 836-8518  
Facsimile: (212) 836-8689

Counsel for James J. McMonagle, Legal  
Representative for Future Claimants

REBUTTAL REPORT OF DR. FRANCINE F. RABINOVITZ

December 5, 2004

HAMILTON, RABINOVITZ & ALSCHULER, INC. (HR&A)  
Northern California \* Los Angeles \* Portland \* Washington, D.C. \* New York

## I. Introduction

I am the Executive Vice President of Hamilton, Rabinovitz & Alschuler, Inc. ("HR&A"). As reflected in my *curriculum vitae*, a copy of which is attached to Appendix 5 of my October 15, 2004 reports, I and my firm have had extensive experience in the field of estimating the number and value of present and future asbestos personal injury claims. Among my various assignments in this area, I was or am currently an expert for PPG Industries, a shareholder of Pittsburgh Corning in its chapter 11 proceeding, for the debtors in the Mid-Valley chapter 11 proceedings, and for the representatives of future claimants in the JT Thorpe, Quigley, AcandS, Celotex and Western MacArthur chapter 11 proceedings. I and my firm, HR&A, have also had significant roles in other mass tort liability cases including the chapter 11 cases of A.H. Robins and Dow Corning

Pursuant to the Stipulation and Order Respecting Expert Discovery dated October 12, 2004, Dr. Frederick C. Dunbar of NERA was required to produce all of the backup materials that he relied upon or considered in forming his opinions in his October 15, 2004 report. However, NERA did not produce portions of Dr. Dunbar's forecast models until the evening of November 19th, some 5 weeks after he was required to do so and after he had submitted a rebuttal report. As a result, in preparing my rebuttal report, HR&A has had less than three weeks to analyze the forecast models that Dr. Dunbar untimely produced. The opinions expressed herein and the results presented are necessarily based on HR&A's preliminary review of Dr. Dunbar's models and calculations. We are continuing to work on refining this analysis and reserve the right to supplement the opinions expressed herein.

We have been asked to examine and comment on the October 15, 2004 Expert Report of Dr. Frederick C. Dunbar (the "Dunbar Report") and his November 15, 2004 Rebuttal Report.

Dr. Dunbar's Report is based on the presumption that estimating the number and value of current and future asbestos claims against Owens Corning (OC) requires adjusting the historical claims experience of the company. Dr. Dunbar asserts that adjusting the historical experience of OC in the tort system is necessary because asbestos forecasts are based on the allegedly erroneous assumption that claims "arise solely from a scientific, epidemiological process"<sup>1</sup> and he believes that "OC has in the past paid claims lacking proof of either exposure or asbestos-related diseases."<sup>2</sup>

We do not agree with Dr. Dunbar's assertions. We demonstrate below why such assertions are erroneous and their effect on Dr. Dunbar's estimation of OC's future asbestos liabilities.<sup>3</sup>

## **II. Summary of Adjustments to Dr. Dunbar's Forecast**

HR&A has made adjustments to Dr. Dunbar's forecast of future claims that identify the effects of five assumptions made by Dr. Dunbar that are contrary to OC's asbestos claims history in the tort system and/or standard asbestos liability estimation techniques:

- 1) We adjusted the calibration period used to calculate future claim rates from 1996-1998 to 1998-2000.

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<sup>1</sup> Dunbar Report at pp. 5-6.

<sup>2</sup> Id. at 6.

<sup>3</sup> Because NERA did not produce Dr. Dunbar's backup materials in a timely manner, we did not adjust pending claims as estimated by Dr. Dunbar. We expect that such adjustments would further increase Dr. Dunbar's estimates.

- 2) We properly valued the effect of punitive damages on future claims resolved in non-trial settings
- 3) We accounted for classification and logical errors in the identification of OC products in the NERA deposition review.
- 4) We corrected the erroneous assumption that future non-malignant claims classified by Dr. Dunbar as “non-disabling” are not compensable.
- 5) We added back the inflation adjustment for future claims, which Dr. Dunbar never argues against, but simply fails to make.

Adjustments 1-4 cumulatively increase Dr. Dunbar’s lower-bound estimate of OC’s future liabilities from \$1.5 billion to \$5.0 billion, and Dr. Dunbar’s upper-bound estimate of OC’s future liabilities from \$1.7 billion to \$5.9 billion. By comparison, HR&A’s middle future forecast calibrated to 1999-2000 is \$8.7 billion, assuming a net discount rate of 0 percent, i.e., the future asbestos liabilities are not inflated, and are not discounted to present value. See Table 1 below.

TABLE 1: NERA’s Forecast - Calibration, Punitives, Product ID and Non-Disabled Forecast Adjusted

	1996-1998 NERA Forecast	1998-2000 NERA Adjusted Forecast
Manville Adjusted	\$1.709	\$5.581
Friedman Adjusted	\$1.580	\$5.862
Hopkins Adjusted	\$1.452	\$4.973

Assuming an inflation rate of 2.5%, as we have done in our reports, Adjustments 1-5 cumulatively increase Dr. Dunbar's lower-bound estimate of OC's future liabilities to \$6.7 billion and Dr. Dunbar's upper-bound estimate of OC's future liabilities to \$7.1 billion.<sup>4</sup> See Table 2 below

TABLE 2: NERA's Forecast - Calibration Period, Punitives, Product ID, Non-Malignant Values and Inflation Adjusted

	1996-1998 NERA Forecasts	1998-2000 NERA Forecast
Manville Adjustment	\$1.709	\$6.761
Friedman Adjustment	\$1.580	\$7.092
Hopkins Adjustment	\$1.452	\$6.668

**Adjusting the Calibration Period**

In his October 15, 2004 report, Dr. Dunbar concluded that the proper historical calibration period with which to forecast future claims was 1996-1998, excluding the last two years in which OC was actually in the tort system (1999-2000). According to Dr. Dunbar, 1999-2000 was excluded because the National Settlement Program (NSP) had the effect of accelerating the filing of claims in the sense that "a large percentage of the claims filed in the years 1999-2000 have a longer lag between diagnosis and filing relative to the claims which were filed during the period 1996-1998" (claim "dredging").<sup>5</sup> In my October 15, 2004 report, I demonstrated that any concerns with respect to acceleration or claim "dredging" were ameliorated by restating the filing year to the earliest of OC or Manville Personal Injury

<sup>4</sup> The issue of discounting is discussed in the Report of James Hass, October 15, 2004, and is not addressed here

<sup>5</sup> Dunbar Report at p. 22.



Settlement Trust filing dates. Dr. Dunbar, in his Rebuttal Report, now acknowledges that my methodology, i.e., restating the filing year, would eliminate the timing effect,<sup>6</sup> yet Dr. Dunbar nonetheless has chosen not to use the full OC claims history and, instead, has chosen to eliminate the most recent years (1999-2000) in which OC was in the tort system and operated under the NSP. Dr. Dunbar does not, in his Rebuttal Report, explain why he did not use the full OC claims history after making the adjustments as was done by HR&A.

As set forth above, since a working version of NERA's SAS-based forecasting model was only produced on November 19, 2004, the adjustment from a 1996-1998 claim rate calibration period to a 1998-2000<sup>7</sup> calibration period was made using HR&A's estimation model.<sup>8</sup> The effect of recalibrating from 1996-1998 to 1998-2000 results in the following:

- 1) the mesothelioma claiming rate, i.e., the propensity to sue, increased from 37.4% to 42.4%;
- 2) the lung cancer claiming rate, i.e., the propensity to sue, increased from 35.2% to 38.2%;
- 3) the other cancer claiming rate, i.e., the propensity to sue, decreased from 21.8% to 20.5%;

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<sup>6</sup> Rebuttal Report at p. 2. NERA states: "The adjustment we make is very similar to one made in Dr. Rabinovitz's report: claims in the Owens Corning ("OC") database are matched to the Manville Trust database. . . . For those claims that matched . . . , the earliest year of filing was taken to be the file year for that claim."

<sup>7</sup> We retained the 3 year calibration period which Dr. Dunbar had preferred however.

<sup>8</sup> HR&A continues to review the NERA forecast model and, in light of its very recent production in a working version, HR&A reserves the right to revise and supplement the conclusions contained in this report.

- 4) the ratio of non-malignant claims to malignant claims increased from 10.5 to 1 to 11.2 to 1.

As shown in Table 3 below, the calibration period adjustment increased Dr. Dunbar's lower-bound estimate of OC's future asbestos liabilities from \$1.452 billion to \$1.534 billion, and Dr. Dunbar's upper-bound estimate of OC's future asbestos liabilities from \$1.7 billion to \$1.8 billion.

Table 3: NERA Forecasts Recalibrated to 1998-2000

	1996-1998 NERA Forecasts <sup>9</sup>	1998-2000 Adjusted NERA Forecasts
Manville Adjusted	\$1.709 billion	\$1.820 billion
Friedman Adjusted	\$1.580 billion	\$1.677 billion
Hopkins Adjusted	\$1.452 billion	\$1.534 billion

**Correcting Claim Values Adjusted for Punitive Damages**

Dr. Dunbar's analysis of punitive damages is based on the assertion that punitive damages "... may not be applied for claims against a firm under Chapter 11 protection"<sup>10</sup> Based on OC's verdict history from 1996 to 2000, Dr. Dunbar calculates that the percentage share of compensatory damages to total verdicts would range from a low of 75.8 percent for mesothelioma to a high of 90.1 percent for disabling non-malignancies. In other words, Dr. Dunbar adjusts the average value for all claims resolved between 1996-2000 by a factor of 10%

<sup>9</sup> Dunbar Report, Exhibit 6, "Owens Corning NERA Forecast, Claims Forecast Ends in 2050, Calibration period of 1996-1998."

<sup>10</sup> Dunbar Report at p. 23.

to 24%, i e , his punitive damages adjustment. As shown in Table 4 below, Dr. Dunbar then uses the compensatory share of claims that have gone to verdict to adjust the average values for all claims resolved between 1996 and 2000, regardless of how they were resolved.<sup>11</sup> For example, Dr. Dunbar's estimated average value for mesothelioma claims between 1996-2000 is \$171,824, which, after adjustment for punitive damages (75.77 percent), is \$130,195

Dr. Dunbar has, in applying his punitive damages adjustment, ignored the realities of the tort system in which OC operated prior to commencing its bankruptcy proceeding. In our prior bankruptcy estimations of the number and value of pending and future asbestos personal injury claims, we have always relied on historical values as they stood, including verdicts and punitive judgments where applicable. However, should the Court here disallow punitive damages for purposes of estimating OC's future asbestos liabilities, we believe that Dr. Dunbar has greatly overstated the impact of removing the effect of punitive damages. Dr. Dunbar's adjustment erroneously applies the punitive damages differential to the average claim values for all resolved claims, without accounting for the fact that the probability of going to trial is less than 0.015 (1.5%) except for mesothelioma claims, which have a 0.031 (3.1%) probability of going to trial. Put simply, a correct adjustment for the effect of punitive damages on all claims must account for the small chance that a claim will actually go to trial.

For example, accepting, for the sake of discussion, Dr. Dunbar's assumption that compensatory damages account for 75.77 percent of total damages for mesothelioma claims, some account must still be taken of the fact that mesothelioma claims have a trial probability of 3.1%. We make the adjustment by calculating the probability that a mesothelioma claim will not

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<sup>11</sup> NERA spreadsheet, "Pricing NERA Forecast 2.xls; tab "Forecast pricing"

go to trial ( $1 - 0.031$ ) or 0.969. The probability that a set of claims by disease will or will not go to trial is calculated by identifying the number of claims that went to trial in 1996-2000 and dividing it by the total number of claims resolved in the period. We then apply that probability to Dr. Dunbar's punitive damages discount ( $100.00 - 75.77\%$ ) or 24.23 percent. Multiplying these quantities yields Dr. Dunbar's overestimate of the effect of punitive damages ( $0.969 \times 24.23\%$ ) of 23.48%. Adding the overestimate to the compensatory percent yields the corrected compensatory percent of 99.24% ( $23.48\% + 75.77\% = 99.24\%$ ). The corrected average claim value for mesothelioma claims, with a corrected adjustment for punitive damages, is then \$170,517 ( $\$171,824 \times 99.24\% = \$171,517$ ).

We therefore corrected Dr. Dunbar's punitive damage claim values to reflect the likelihood that an asbestos claim against OC would actually be tried in court. These adjustments increased the average value of:

- 1) mesothelioma claims from \$130,195 to \$170,517;
- 2) lung cancer claims from \$30,787 to \$40,249;
- 3) other cancer claims from \$14,937 to \$17,294; and
- 4) disabled non-malignant claims from \$10,158 to \$11,265.

**Table 4: HR&A Analysis of NERA's Adjustments for Punitive Damages  
(Table Headings are from NERA Table)**

	96-00 average settlements (1)	Asbestosis adjusted by LC/NM ratio (2)	Compensatory Percent (3)	Adjusted for Punitives (4)	Probability of Trial 1996-2000 (5)	Compensatory Percent Adjusted for Probability of Trial (6)	Claim Values Adjusted for Punitives & Probability of Trial (7)
DISABLED	\$9,748	\$11,270	90.14%	\$10,158	0.005	99.95%	\$11,265
LUNG CANCER	\$40,366	\$40,366	76.27%	\$30,787	0.012	99.71%	\$40,249
MESOTHELIOMA	\$171,824	\$171,824	75.77%	\$130,195	0.031	99.24%	\$170,517
OTHER CANCER	\$17,327	\$17,327	86.21%	\$14,937	0.014	99.81%	\$17,294
UNDISABLED		\$0	84.13%	\$0			\$0
UNKNOWN	\$6,635	\$7,672	80.10%	\$6,145	0.005	99.90%	\$7,664

ratio of NM/LC	0.2792
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Source: NERA spreadsheet, "Pricing NERA Forecast 2.xls; tab "Forecast pricing", as adjusted by HR&A

As shown in Table 5 below, the calibration period adjustment discussed above combined with the punitive damages adjustment cumulatively increased Dr. Dunbar's lower-bound estimate of OC's future asbestos liabilities from \$1.5 billion to \$2.0 billion, and Dr. Dunbar's upper-bound estimate of OC's future asbestos liabilities from \$1.7 billion to \$2.3 billion.

**Table 5: NERA Forecasts Recalibrated and Adjusted for Punitive Damages**

	1996-1998 NERA Forecast	1998-2000 and Punitive Adjusted NERA Forecast
Manville Adjusted	\$1.709	\$2.294
Friedman Adjusted	\$1.580	\$2.134
Hopkins Adjusted	\$1.452	\$1.976

**Correcting Product Identification Deduction – Errors in Classification and Logic**

The Dunbar Report states that NERA obtained 15,395 deposition transcripts of depositions taken in 1998 or later in cases filed in eight states, electronically searched the

deposition transcripts for OC's name or its products, and manually reviewed every mention of OC or its products in 1,410 depositions that matched to OC's database.<sup>12</sup> On the basis of these 1,410 depositions, Dr. Dunbar concluded that 48.6 percent of all claims made against OC contained evidence that the claimant had been exposed to or could identify OC asbestos products.<sup>13</sup> In other words, Dr. Dunbar assumed that 51.4% of all OC claimants in the OC historic database had no evidence of exposure to OC products and eliminated them as a basis for forecasting future claims.

NERA's methodology was flawed because, among other things NERA did not read the depositions in their entirety, or ascertain if the deponent had previously testified, *i.e.*, whether the deposition obtained was a continuation of a prior deposition, or check to see whether an OC lawyer was present at the deposition, whether the deponent was the claimant or a co-worker, whether the deponent was asked at the deposition to identify specific asbestos containing products, whether the deponent testified at what sites he or she had worked, or whether the deponent had already settled his claim against OC under a NSP agreement.

Further, the logic Dr. Dunbar uses to conclude that claims without OC identification in the depositions NERA examined is flawed, even assuming that all depositions had been properly reviewed and classified. Dr. Dunbar ignores the fact that evidence of OC product use/exposure could be established by plaintiffs using a variety of different types of evidence produced outside of depositions. These include identification in written declarations made by the claimant, co-

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<sup>12</sup> Dunbar Report at pp. 14-17. Dr. Dunbar did not produce any written protocol for this deposition review and NERA advises that none exists.

<sup>13</sup> Dunbar Report at p. 14.

workers and family members, not to mention evidence of exposure at one or more sites that were commonly known to contain OC asbestos products.

Dr. Dunbar then assumes that the presence or absence of product identification/exposure in the depositions, as defined above, functions as a simple binary switch that either deems a claim “allowed” or “not-allowed.” In fact, the resolution of tort claims is a far more complex process that accounts for evidentiary issues such as product identification in a continuous set of judgments that is most often reflected in the indemnity value of a claim.

We therefore concluded that Dr. Dunbar’s concept of excluding forecast claims on the basis of the absence of OC identification in some depositions was not credible, nor was it consistent with OC’s historical experience in the asbestos claim resolution system. Thus, Dr. Dunbar’s models were adjusted assuming that the actual claim values paid by OC in the tort system fully reflected the strength or weakness of the product identification information available to value such claims.<sup>14</sup>

As shown in Table 6 below, the calibration period adjustment, the punitive damages adjustment and the product identification adjustment cumulatively increased Dr. Dunbar’s lower-bound estimate of OC’s future asbestos liabilities from \$1.5 billion to \$4.1 billion, and Dr. Dunbar’s upper-bound estimate of OC’s future asbestos liabilities from \$1.7 billion to \$4.7 billion.

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<sup>14</sup> I have been advised that counsel for the Banks has served upon OC a document request with respect to the product identification information OC relied upon when it settled the claims of individuals who were listed in the Banks’ document request. We will review the information which OC will provide pursuant to the document request and may supplement this rebuttal report accordingly.

Table 6: NERA’s Forecast - Recalibrated, Punitive Adjusted, Adjusted for Product Identification

	1996-1998 NERA Forecasts	1998-2000 NERA Adjusted Forecast
Manville Adjusted	\$1.709	\$4.721
Friedman Adjusted	\$1.580	\$4.393
Hopkins Adjusted	\$1.452	\$4.068

**Correcting the Value of “Non-Disabled” Claims**

Dr Dunbar also sets the value of so-called “non-disabled” non-malignant claims at zero (\$0) based on his assertion that (1) he has developed an epidemiologically based prevalence model for non-malignant asbestos related injuries, and (2) various studies demonstrate that many claimants who filed against OC and were paid had no disabling asbestos-related disease.<sup>15</sup> Thus, he concludes that the number of claimants estimated to have non-malignant asbestos-related injuries by the prevalence model must be adjusted downward.

We do not comment in detail on various studies discussed by Dr. Dunbar, but obviously none of them was designed to be representative of the OC claimant population and therefore, not surprisingly, none of them is. We have also not adjusted the 11.3% deduction that Dr Dunbar makes to Lung Cancer and Other Cancer claims, which he reclassified to “no disease” on the basis of work by Drs. Goldstein and Mendelsohn.<sup>16</sup> Although the Dunbar Report discusses Dr. Goldstein’s report, Dr Dunbar did not produce the report and I am advised that NERA now says that Dr Dunbar does not have the Goldstein report and did not rely upon it. Without

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<sup>15</sup> Dunbar Report at pp. 7-14

<sup>16</sup> Dunbar Report at p. 13.



Dr. Goldstein's report, we have no way of knowing whether what NERA says is a "sample" is properly drawn, and what relationship it bears to OC's claimant population. While Dr. Dunbar did produce a report by Dr. Mendelsohn, that report is completely uninformative about what files she looked at and how she selected her sample. She says only: "I have reviewed several trust claims files . . ." <sup>17</sup> She does not tell us how she selected them, how many there were in all, or anything else about the rationale for selection which would allow us to judge their status as a sample, or even a representative group of OC claims. We have not adjusted these deductions because we have no way to know whether they have any basis, but this is an extremely conservative approach. Clearly removing the deduction would raise our adjusted NERA forecasts even more.

Dr. Dunbar states that he developed prevalence models of "disabling" and "non-disabling" non-malignant disease to make his future forecast of non-malignant disease. Yet, as he himself noted in his report, ". . . no published, accepted dose/response function governing the occurrence of non-malignant changes currently exists . . ." <sup>18</sup> Drs. Selikoff and Nicholson, who since 1962 had worked with two local unions of insulation workers in the New York-New Jersey metropolitan areas and published numerous studies about disease rates among these union members, never themselves used their data to develop a dose/response model for non-malignant diseases as Dr. Dunbar, an economist, now reports he has. Indeed, Dr. Nicholson, who provided the data, continued to believe it could not be done. We are therefore skeptical that an economics

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<sup>17</sup> Expert Witness Report, Sara Mendelsohn, p. 3.

<sup>18</sup> Dunbar Report, Appendix 3 at p. 3.

consulting firm is qualified to develop a medical model of disease to be used in an adversarial proceeding, when heretofore, “ . . . no published, accepted dose/response function . . . ” existed.

Moreover, the OC bankruptcy proceedings do not offer the possibility of careful, exhaustive and time-consuming peer review by medical experts and government agencies that ultimately led to the specification and adoption of the exposed population and dose response models for cancers that are used by Dr. Dunbar and by HR&A in the asbestos disease forecasts for malignancies. Indeed, since Dr. Dunbar developed his non-malignancy model from data provided to him in 2000 in the context of the Falise litigation,<sup>19</sup> it is puzzling, to say the least, why Dr. Dunbar has not published or otherwise subjected his model to peer review in the last four years. At a minimum, Dr. Dunbar’s non-malignant prevalence model requires extensive scrutiny.

In addition, there are also a number of technical issues that are not adequately addressed by NERA in the description, estimation and application of the model.<sup>20</sup> These issues are particularly important in the development of a new model that has not been peer reviewed and accepted by the relevant professional community:

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<sup>19</sup> Falise et al. v. American Tobacco Co. et al., US District Court, Eastern District of New York, 99 CV 7392 (JBW)

<sup>20</sup> We only recently received a working version of Dr. Dunbar’s future forecast model that directly employs the parameters of the non-malignant prevalence model. We continue to review both the non-malignant disease prevalence model and the future forecast model, and reserve the right to comment further on both models.

- 1) Dr. Dunbar's model is based on a sample of 2,907 asbestos-exposed insulation workers.<sup>21</sup> It is not clear what the applicability of dose response functions estimated from the Selikoff insulator data is to estimate the health consequences of persons exposed to OC's major product, Kaylo. The insulators Dr. Selikoff examined (and workers in primary asbestos manufacturing) typically received the largest doses of asbestos relative to other members of the asbestos exposed workforce. But Dr. Dunbar does not consider, for example, whether the dose response mechanism for workers with less intense asbestos exposures differ from that of the insulators in the database. Since Dr. Dunbar's model is neither published nor accepted, the applicability of the Selikoff insulator data for predicting non-malignant diseases in workers exposed to OC products should be carefully scrutinized.
  
- 2) The effects of alternative definitions of "disabled" and "non-disabled" non-malignant disease are not considered by Dr. Dunbar. Despite considerable disagreement in the medical community over what constitutes "disabling" non-malignant asbestos disease, Dr. Dunbar defined and adopted a single measure of

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<sup>21</sup> Dr. Dunbar does not tell us much about where this database came from. HR&A, however, was an expert for the Manville Trust in the *Falise* litigation in which the data was produced under seal. HR&A facilitated the provision of the database and is independently aware of its background. The 2,907 people in the database are insulation workers. In 1981, as part of his continuing study of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, CIC ("IAHFIAW") members, Dr. Selikoff sent letters to four thousand insulation workers inviting them to a follow up examination in one of 19 sites throughout the U.S. Of these, 2,243 appeared for examination during December 1981 and continued to return for examination through December 1983, along with an additional 664 men who had not been invited

disability without regard for how alternative definitions would affect the magnitude of the non-malignant claim forecasts

With respect to Dr. Dunbar's definition of "non-disabled non-malignant" claims, not only does the definition appear to have been developed and implemented without review or guidance from any qualified medical advisors, it also appears not to have included consideration of the 2004 standards (the "ATS Standards") developed by the American Thoracic Society ("ATS").<sup>22</sup>

Dr. Dunbar's analysis is exactly the opposite of what the ATS says. He says that demonstration of functional impairment through ILO readings and PFT tests is absolutely required for the diagnosis of a nonmalignant asbestos-related disease. The ATS Standards provide specifically that "Demonstration of functional impairment is not required for the diagnosis of a nonmalignant asbestos-related disease, but where present should be documented as part of the complete evaluation."<sup>23</sup>

Moreover, the implementation of Dr. Dunbar's definition of "non-disabled non-malignant" claim is limited, as noted in his report, by the quality of the available diagnostic measures as well as the absence of data on equally important variables. The Selikoff database reports ILO classification, lung function test results, smoking history and the years in which individuals began and ceased

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<sup>22</sup> American Thoracic Society, "Diagnosis and Initial Management of Nonmalignant Disease Related to Asbestos," Official Statement of the American Thoracic Society adopted by the ATS Board of Directors on December 12, 2002, *American Journal of Respiratory Critical Care Medicine*, Vol. 179, pp 691-715

<sup>23</sup> *Ibid*, p. 691

exposure to asbestos insulation. Dr. Dunbar therefore had to himself estimate the dose of asbestos to which each individual was exposed, for each year the person was exposed. He did this by assuming that the persons exposed were working in places that exactly conformed to the OSHA rules of that era for permitted intensities of asbestos exposure levels. Dr. Dunbar did not provide any backup data or literature to support this assumption.

Dr. Dunbar also made the decision to use two of the many diagnostic measures available to him in defining "allowed" non-malignant claims. "An unimpaired non-malignant status is assigned to patients with ILO scores of 1/0 or more or pleural changes, but with FVC greater than or equal to 80% of the expected level."<sup>24</sup> In contrast, the ATS says that the evaluation of nonmalignant asbestos-related disease "should consider subjective symptoms as well as objective findings on physical examination, pulmonary function tests, and chest radiographic studies."<sup>25</sup> The symptoms the ATS says should be considered, along with a history of exposure to asbestos and a documented latency period sufficient to place the individual at risk, include the onset of dyspnea, a nonproductive cough, reduction in ventilatory capacity through chronic bronchitis, progression of respiratory symptoms, excess decline in FVC associated with newly developed wheezing, and chest pain.

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<sup>24</sup> Dunbar Report, Appendix III at p. 5.

<sup>25</sup> See p 16, n 22, supra, at p 695

- 3) Dr. Dunbar's non-malignant model is not tested to ensure that a better functional form or estimation method exists. Typically, when a new statistical model is presented in the epidemiological or econometric literature, the mathematical relationships between the dependent variable (e.g., likelihood of non-malignant disease) and independent variables (e.g., asbestos dose, duration of exposure, years since first exposure) are tested in different configurations to ensure that the model that best fits the data is selected. There is no evidence that Dr. Dunbar tested the effect of alternative specifications or estimation methods on the fit of the model to the insulator data. Had Dr. Dunbar produced his back-up materials timely, we believe that alternative models which fit the data equally well could have been developed, which would likely change the non-malignant forecast
- 4) Dr. Dunbar failed to assess the predictive power of the non-malignant dose response model used in the future forecast of non-malignant disease. It is a standard diagnostic practice to compare the predictive accuracy of the model by comparing actual outcomes to those predicted by the model, as is done in this litigation for example by examining the Nicholson-KPMG models and the SEER data

Dr. Dunbar's assumption that "non-disabled" claims are not compensable is an erroneous and gross oversimplification of how the tort system actually works. The tort system sorts the complexities of measuring the extent of harm in the form of an indemnity value. Thus, claims with better evidence of harm tend to be paid more than claims with less compelling evidence of harm

We demonstrate this by adjusting Dr. Dunbar's model with respect to the value of "non-disabled non-malignant" claims as follows:

- 1) As set forth in HR&A's original report, the average claim value for all OC non-malignant claims was \$5,880
- 2) Disabled non-malignant claims are assumed to equal 15% of total non-malignant claims, and "non-disabled non-malignant" claims are assumed to account for 85% of the total non-malignant claims. We evaluated the distribution of payments made by OC to non-malignant claimants in the three years preceding and the three years following the adoption of the NSP. This evaluation shows the distribution between "low value" and "high value" claims. We plotted the distribution of indemnity values, excluding verdicts, for non-malignant claims showing the fraction of claims with a particular indemnity value. For claims resolved after the adoption of the NSP, slightly more than 10 per cent of all claims were resolved for \$0. Approximately 5 per cent were paid between \$100 and \$1,000. About another 10 per cent were paid \$1,000. About 60 per cent fell into the payment range from \$1,000 to slightly less than \$10,000. The remaining 15 per cent were paid from \$10,000 to as much as \$475,000. This 85/15 division is also supported by the deposition testimony of OC's defense lawyers.
- 3) The HR&A analysis reflects the value of non-malignant claims at their actual average historical values, *i.e.*, \$5,880 per claim. According to the Dunbar Report disabled non-malignant claims are paid \$11,265 per claim. Thus, "non-disabled non-malignant" claims are paid \$4,930. In other words, if the 15% of

Dr. Dunbar's assumed disabled non-malignant claims are paid about \$11,000 per claim, the "non-disabled non-malignant" claims must be paid about \$5,000, such that the average value for all non-malignant claims is equal to \$5,880<sup>26</sup>

As was shown in Table 1, supra, the cumulative calibration period adjustment, punitive damages adjustment, product identification classification adjustment and the adjustment of "non-disabled non-malignant" claim distribution and values, increased Dr. Dunbar's lower-bound estimate of OC's future asbestos liabilities from \$1.5 billion to \$5.0 billion, and Dr. Dunbar's upper-bound estimate of OC's future asbestos liabilities from \$1.7 billion to \$5.9 billion.

#### **Inflation Adjustment**

Dr. Dunbar devotes most of his rebuttal report to a discussion of what discount rates should be applied to a net present value calculation of OC's nominal future asbestos obligations. However, Dr. Dunbar has neither inflated nor discounted his forecast. In other words, future claimants, out to year 2049, are assumed to be paid the exact amounts that current asbestos claimants were paid in 2000, without any adjustment for inflation into the future. As shown in Table 2, supra, adding the 2.5% inflation rate used in the HR&A report to the cumulative prior adjustments increases Dr. Dunbar's lower bound estimate of OC's future asbestos liabilities from \$1.5 billion to \$6.7 billion and Dr. Dunbar's upper-bound estimate of OC's future asbestos liabilities from \$1.7 billion to \$7.1 billion.

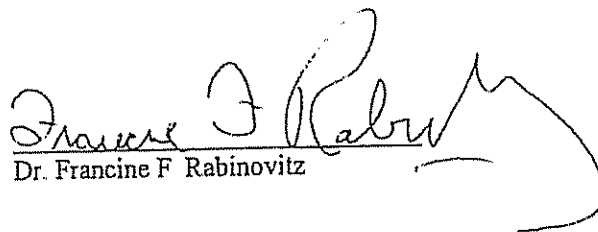
We reserve the right to modify this rebuttal report as new information becomes available the date of this rebuttal report and the time of trial

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<sup>26</sup>  $\$11,265 * 0.15 + \$4,930 * 0.85 = \$5,880.$



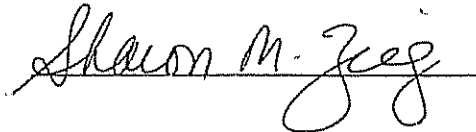
Pursuant to the "so-ordered" October 12, 2004 stipulation and protective order respecting expert discovery, all documents relied upon or considered by me in forming my opinions are being produced forthwith.

  
Dr. Francine F Rabinovitz

CERTIFICATE OF SERVICE

I, Sharon M. Zieg, Esquire, hereby certify that on December 6, 2004, I caused copies of the **JAMES J. MCMONAGLE, LEGAL REPRESENTATIVE FOR FUTURE ASBESTOS CLAIMANTS, NOTICE OF FILING OF REBUTTAL REPORT OF DR. FRANCINE F. RABINOVITZ IN CONNECTION WITH ASBESTOS ESTIMATION** to be served upon the parties listed on the attached service list via Hand Delivery to Local Parties and First Class Mail to all other parties.

SHARON M. ZIEG

A handwritten signature in cursive script that reads "Sharon M. Zieg". The signature is written in black ink and is positioned below the printed name. A horizontal line is drawn across the signature, likely to indicate the line for a signature.

DISTRIBUTION LIST

Bank Group

Ralph Miller, Esq  
Weil, Gotshal & Manges LLP  
200 Crescent Court  
Suite 300  
Dallas, TX 75201  
ralph.miller@weil.com

David Hickerson, Esq.  
Peter M. Friedman, Esq  
Weil, Gotshal & Manges LLP  
1501 K Street, NW  
Suite 100  
Washington, D C. 20005  
david.hickerson@weil.com  
peter.m.friedman@weil.com

Debtor

Roger E. Podesta, Esq  
Mary Beth Hogan, Esq  
Debevoise & Plimpton  
919 Third Avenue  
New York, NY 10022  
repodesta@debevoise.com  
mbhogan@debevoise.com

Debtor

Charles O. Monk, Esq.  
Saul Ewing LLC  
100 South Charles Street  
Baltimore, MD 21201-2773  
cmonk@saul.com

Bondholders

J. Andrew Rahl, Esq.  
Judith A. Yavitz, Esq.  
Anderson Kill & Olick, PC  
1251 Avenue of the Americas  
New York, NY 10020-1182  
arahl@andersonkill.com

David R. Hurst  
Skadden, Arps, Slate, Meagher &  
Flom  
One Rodney Square  
P.O. Box 636  
Wilmington, DE 19899

Kerri King Mumford  
Klett, Rooney, Lieber & Schorling  
1000 West Street, Suite 1410  
P.O. Box 1397  
Wilmington, DE 19899-1397

Barbara H. Stratton  
Knepper & Stratton  
P.O. Box 1795  
Wilmington, DE 19899

Christopher M. Winter  
Duane Morris LLP  
1100 North Market Street  
Suite 1200  
Wilmington, DE 19801

Noel C. Burnham  
Montgomery, McCracken, Walker & Rhoads  
300 Delaware Avenue  
Suite 750  
Wilmington, DE 19801

Francis A. Monaco, Jr.  
Monzack & Monaco, P.A.  
1201 North Orange Street, Suite 400  
P.O. Box 2031  
Wilmington, DE 19899

Richard S. Cobb  
Landis Rath & Cobb LLP  
919 Market Street, Suite 600  
P.O. Box 2087  
Wilmington, DE 19899

Frank J. Perch, III  
Office of the U.S. Trustee  
844 King Street  
Suite 2313  
Wilmington, DE 19801

Ad Hoc Bondholders Committee

Kenneth Pasquale, Esq  
Stroock Stroock & Lavan  
180 Maiden Lane  
New York, NY 10038  
kpasquale@stroock.com

Committee of Asbestos Claimants

Nathan D. Finch, Esq.  
Caplin & Drysdale  
One Thomas Circle, NW  
Washington, D.C. 20005-5802  
ndf@capdale.com

Century Indemnity

Gerald Stein, Esq.  
O'Melveny & Meyers  
Times Square Tower  
7 Times Square  
New York, NY 10036  
gstein@omm.com

Marla Rosoff Eskin  
Campbell & Levine  
800 North King Street  
Suite 300  
Wilmington, DE 19801

Linda M. Carmichael  
White & Williams  
824 Market Street, Suite 902  
P.O. Box 709  
Wilmington, DE 19899-0709