UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

OWENS CORNING, *et al.*,	:	
	:	**Civil Action**
v.	:	
	:	**No. 04-905**
CREDIT SUISSE FIRST BOSTON	:	

POST-HEARING REPLY BRIEF OF CSFB, AS AGENT, IN OPPOSITION TO PLAN PROPONENTS' MOTION FOR ESTIMATION OF OWENS CORNING'S PENDING AND FUTURE ASBESTOS LIABILITIES

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I. INTRODUCTION.

The Plan Proponents' Post-Trial Briefs fail to address most of the key elements of the Banks' case. That case was well known to the Plan Proponents. It was clearly presented in the Banks' Pre-Trial Brief, opening statement, and trial evidence, which was then summarized in the Banks' closing arguments. That case has two parts:

First, that in estimating liability for future claims against a company in bankruptcy, one can use pre-bankruptcy claims values as a starting point. However, as the Asbestos Claimants' expert, Dr. Peterson has written and testified, extrapolations from historical claims values are "problematic" if there have been or will be changes to the bases on which the pre-bankruptcy claims were settled. Accordingly, a forecaster must do a systematic study to determine if there have been changes between the pre-bankruptcy era and the real world and time in which the present and future claims will be resolved. Moreover, both Dr. Peterson and the Asbestos Claimants' counsel have confirmed that, with Owens Corning now in bankruptcy, the real world in which claims against Owens Corning would be resolved is the federal judicial system.

The second part of the Banks' case, well known to the Plan Proponents, was that the vast majority of the huge difference between the dollar amounts of the estimates of the Asbestos Claimants' experts, on the one hand, and of Dr. Dunbar and Dr. Vasquez on the other, was driven by seven major disputes, as to which the Asbestos Claimants' estimates were unsupported by any serious analysis and were indefensible.

As to the first branch of the Banks' case, there was extensive evidence at the trial confirming that there had been significant changes with respect to the bases on which claims were settled during the pre-bankruptcy era. Nevertheless, the Plan

Proponents' Post-Trial Briefs have completely ignored the fundamental principles espoused by Dr. Peterson – and concurred in by Dr. Vasquez – which established that the Asbestos Claimants' attempt to forecast the future liabilities by blindly extrapolating from the past is patently improper under these circumstances. Instead, they have continued to argue, as they did at the closing, that as a matter of law, in conducting its estimation of the post-bankruptcy claims this Court is "required" to "determine them the way they would be determined by state courts" – or more precisely, in the same way they would have been determined by state courts in the 1990s.

In response to the apparent skepticism expressed by the Court, the Asbestos Claimants' counsel promised that their Post-Trial Brief would to provide citations to legal authority supporting that remarkable proposition. They have not surprisingly failed to do so. Rather, as demonstrated in Point I below, the cases cited in the Plan Proponents' briefs stand only for the uncontroversial points noted in the Banks' prior briefs and arguments – namely, that although substantive state law governs the existence of a claim, federal procedural rules will be applied to the claims that are being estimated, and federal bankruptcy law governs issues with respect to the allowance of claims. Moreover, although the case law reflects the undisputed point that pre-bankruptcy claims values can be used as a starting point for estimating future liabilities, **no case has held that a court is required to rigidly extrapolate from the past in the face of evidence indicating that there have been changes, and that the pre-bankruptcy claims values no longer reflect how the claims would be resolved in the future.** Indeed, a review of the Plan Proponents' briefs confirms that even they do not believe or adhere to the legal argument upon which their case is predicated, as they have

openly shed their "past as prologue" mantra whenever doing so would enable them to increase their estimate – including in arguing that Owens Corning's own propensity experience should be disregarded in favor of Dr. Peterson's "increasing propensity" model, or that this Court should disregard the fact that unimpaired claims received little or nothing under the NSP.

Turning to the second prong of the Banks' case, and even more important than the debate over these principles of law and forecasting, the Plan Proponents have failed to make a serious effort to address the major disputed issues among the competing expert forecasts, or to refute the evidence which established that their experts' estimates are unsupported and indefensible. And significantly, the resolution of most of the seven disputed issues does not depend on the outcome of the above-referenced legal dispute. For example, the Asbestos Claimants' brief makes no attempt to defend their experts' position with respect to the key issues of whether the NSP filing rates should be excluded from the data base as an anomalous surge, or whether this Court should use the KPMG or Nicholson epidemiological model to forecast future propensity. The Plan Proponents have also made virtually no effort to defend Dr. Peterson's increasing propensity model – which all of the other experts, including Dr. Rabinovitz, reject. This issue, which added $2.7 billion to Dr. Peterson's estimate, also does not turn on any disputed legal issue. The same is true for the issue of whether the historical claims values must be adjusted for age, an adjustment which both Dr. Vasquez and Dr. Dunbar made, and which is worth in excess of $396 million. (CSFB Ex. 289.)

As to those issues which the Plan Proponents do address, they have consistently failed either to confront the Banks' real arguments and the trial evidence

supporting them, or they have relied largely on anecdotal testimony that was unsupported by any verifiable data or analysis – in situations where such evidence would have been readily available and it was incumbent upon the Plan Proponents and their experts to provide it. For example, with respect to the issue of whether an adjustment should be made to remove the impact of punitive damages from the data base before extrapolating from it, the Plan Proponents appear to recognize that if future claimants cannot recover punitive damages, one should not include value for them in estimating the future claims. Accordingly, the Asbestos Claimants have now argued at length that the Bankruptcy Code does not "categorically" bar recovery of punitive damages. As they are well aware, however, that is not the issue. Rather, the Banks have argued that punitive damages could not be awarded to future claimants ***in this case***, where the only effect of doing so would be to punish innocent creditors for conduct committed decades ago that has already been the subject of scores of punitive awards. The Plan Proponents have completely failed to address that point. Additionally, while the Debtors argue that it is not possible to make a reasonable calculation of the extent to which the specter of punitive damages impacted the pre-bankruptcy claims values, that is exactly what Dr. Vasquez did, at the direction and with the approval of Debtors' counsel in this case. Moreover, his calculation continues to be used for purposes of the Debtors' SEC filings.

After ignoring the issues that drive the majority of the dollar differences between the competing estimates, the Plan Proponents devote much of their effort to criticizing Dr. Dunbar's determination to accord no value to unimpaired claims, and to his adjustments relating to dismissal rates and to claims submitted by suspect doctors identified by the Debtors' medical expert, Dr. Friedman, which Owens Corning would

not pay in the future. Not only is Dr. Dunbar's treatment of the umimpaired claims consistent with their treatment under the NSP and in the federal judicial system, but even if one were to pay them $1,000 each, as Dr. Vasquez proposes, the difference would be just $68 million. As for the dismissal rate, the principal issue is whether the dismissal rate under the NSP period, which dropped suddenly from 40 %to 50% in 1996-97 to virtually 0% in 2000, should be excluded from the database as anomalous. As Dr. Dunbar concluded, and as even the evidence presented at trial by the Plan Proponents confirms, it clearly should.

The last dispute among the experts – concerning the appropriate discount and inflation rates – accounts for $2.23 billion of the difference and between Dr. Dunbar's and Dr. Peterson's estimate, and also does not turn on the disputed legal issue. Although the Plan Proponents contend that this Court should use a "risk free" rate, their briefs do not contest that the evidence at trial confirmed that the trust is not likely to invest solely in risk free instruments. There is thus no basis in economics or law for using a risk free rate.

When the Court considers the evidence relating to the seven major disputes that account for most of the difference in the amounts of the competing forecasts, it will be clear that the Asbestos Claimants have either failed to dispute or are clearly wrong with respect to virtually all of them. Thus, as the Banks have maintained from the outset, the significant issue in this case is whether Dr. Dunbar's estimate or Dr. Vasquez's Method I estimate is closer to the mark. Moreover, while the Debtors have made a desperate effort to re-write Dr. Vasquez's estimate – so as to create the appearance that his methodology differed radically from Dr. Dunbar's and to increase his

estimate by billions of dollars – their effort is futile. As the chart annexed as Appendix A to this Reply Brief immediately makes clear, on most of the seven disputed issues, Dr. Vasquez and Dr. Dunbar took a similar approach, which is why their estimates are in the same range – and a fraction of Dr. Peterson's. Appendix A demonstrates the methodological similarities between Drs. Vasquez and Dunbar on many critical issues. For methodologies not discussed in Appendix A, as the Banks demonstrate below, Dr. Dunbar's analysis is better reasoned (on issues including dismissal rates and elimination of claims supported by "bad doctors") or supported by the law (on the discount rate). The Debtors' after-the-fact attempt to increase Dr. Vasquez's estimate by billions of dollars is disingenuous. Indeed, if the contentions in their brief were correct, the Debtors SEC current disclosures are false and misleading.

Unable to defend their central legal position, or to refute the evidence at trial, the Plan Proponents make several remaining arguments. First, they claim that in doing its estimation, this Court must wear blinders, and may not consider how much money would need to be put in trust to cover the value of the legitimate present and future claims if the trust implements the kinds of modest proof requirements – such as the requirement for a medical examination by a real doctor – that other trusts and federal courts have employed. Thus, the Asbestos Claimants contend that this Court must give them $11 billion now, even if, once a reasonable TDP containing responsible proof requirements is approved by the Court and implemented, only a fraction of that amount will be necessary. Their position is groundless. As discussed in the Banks' Post-Trial Brief (Banks' Post-Trial Br. 12-15) and below (at 10-11) federal bankruptcy law governs

the allowability of claims, and this Court need not and should not allow or value illegitimate claims.

Moreover, regardless of whether the Court does a "trust" analysis or a "tort system" analysis, the result is essentially the same. And that is because the courts in the federal tort system in which the post-bankruptcy claims would be resolved – and particularly Judge Weiner presiding over the MDL – have also implemented reasonable procedures to weed out illegitimate claims and eradicate the abusive tactics and rampant fraud that inflated the pre-bankruptcy claims values. Indeed, despite their constant references to the "tort system," the Plan Proponents have not even done a bona fide tort system analysis: they have failed to estimate Owens Corning's liability for the post bankruptcy claims in either the federal tort system, where the claims would be resolved, or even under the NSP, which represents the most recent pre-bankruptcy values for the claims brought in the state court system. In fact, that analysis is contained in Dr. Vasquez's Method I, which produced the $2 billion estimate for the future claims that the Plan Proponents now seek to discard even though it continues to be used in the Debtors' SEC filings. In any event, the notion that this Court must close its eyes to reality and ignore the various judicial and legislative reforms that have been implemented to avoid payment of baseless claims unsupported by legitimate medical evidence is groundless.

The Asbestos Claimants have advanced a related and equally meritless argument – first surfaced in their closing argument – that this Court should overestimate the value of their claims, by permitting them to use an inappropriate discount rate or by including value for unrecoverable punitive damages, because they will not receive 100 cents on the dollar and will therefore ultimately not be overpaid any way. As the Court

appeared to recognize instantly, no unsecured creditors will receive 100 cents on the dollar, and the claimants' attempt to gain preferential treatment over other creditors violates the most fundamental precept of bankruptcy law.

The Asbestos Claimants also complain that the Bank Group has not answered the Court's question, posed during the Opening, as to whether it is fair to value the claims of the asbestos claimants in a way that is different from other similarly situated creditors. In fact, the Asbestos Claimants are not being discriminated against in any way, shape, or form. The Banks' claims are liquidated, noncontingent, uncontested claims. If there was any dispute concerning the Banks' claims – and there is not – the validity of the claim would be resolved by applying substantive state contract law. The allowability of the Banks' claims, however, is a matter to be resolved under federal bankruptcy law. The same legal framework applies to the asbestos claims. While those claims are contingent and unliquidated, they, too, are analyzed under substantive state law to determine their validity, but are subject to federal procedural law and federal bankruptcy law to determine how much, if any, of the claims will be allowed. This is no different from how any other substantial contingent, unliquidated claim would be estimated under § 502(c). Thus, for example, if a billion dollar negligence or contract claim needed to be estimated, the federal court would look to state law as to whether there was a viable cause of action, but would then apply federal procedural law, and administer the litigation as it saw fit, in order to estimate the value of the claim. The notion that the federal court would have to set aside federal procedure and its own administrative practices and estimate the claims by conjuring up how a state court jury might have resolved those claims five to ten years earlier, assuming that the plaintiffs were permitted to engage in litigation tactics that

would not be countenanced by the federal court (and have even been banned in some of the states) is preposterous.

In sum, it is understandable that the Asbestos Claimants would like to put blinders on the Court and simply crunch numbers to extrapolate from the pre-bankruptcy claims values. But the litigation tactics that drove Owens Corning and seventy other companies into bankruptcy should not be projected into the future because the inflated values that resulted would never be realized today, in any relevant forum.

As demonstrated below, the Plan Proponents' briefs confirm that they have no response to the evidence and arguments demonstrating that their experts' estimates are unsupported and unreliable. Dr. Dunbar and Dr. Vasquez have each provided responsible estimates backed by time-consuming, systematic analyses. Moreover, in the few instances where Dr. Dunbar's methodology actually differs from Dr. Vasquez's (*e.g.*, dismissal rates and adjustments for bad doctors), it is usually because Dr. Dunbar did additional analyses in order to tailor the data base more closely to Owens Corning's experience. Although there are a number of adjustments to Dr. Dunbar's forecast of $2.046 billion that could reasonably made (*e.g.*, to provide some nominal value to unimpaired claimants), as explained during the Banks' closing the most reasonable estimate would be $2.347 billion. (1/20/2005 p.m. tr. 105 Argument of Miller.)

II. THE GOVERNING LEGAL STANDARD.

A. The Plan Proponents Have No Legal Authority Supporting Their Position.

While Dr. Peterson testified at trial, consistent with his report to Judge Weinstein, that the Court should not extrapolate from the past without doing analysis of

whether the factors that had shaped the historical record had or will change, (1/17/05 a.m. tr. 97), during closing argument counsel for the ACC returned to the theme that the law requires this Court to estimate the asbestos claims "under state law and to determine them the way they would be determined by state courts." (1/20/2005 p.m. tr. 107.) Counsel for the ACC promised to supply this Court with legal authority in their Post-Trial Brief to support the Plan Proponents' position. (*Id.*) As we predicted, neither the Asbestos Claimants nor the Debtors have provided any authority to support this remarkable contention. Rather, the cases cited by Plan Proponents simply reaffirm two undisputed points – that substantive state law governs the validity of claims, and that the pre-bankruptcy claims history is a permissible *starting point* for conducting an estimation.

In support of their legal position, the Plan Proponents first cite three Supreme Court cases *Raleigh v. Illinois Department of Revenue,* 530 U.S. 15 (2000), *Butner v. United States*, 440 U.S. 48 (1979), and *Grogan v. Garner,* 498 U.S. 279 (1991). As previously explained (*see* Banks' Post-Trial Br. 27 n. 10) these cases stand only for the unremarkable and undisputed proposition that applicable nonbankruptcy law (usually state law)[1] governs the *existence* of claims in bankruptcy. The Plan Proponents then attempt a sleight of hand, contending that these cases establish the principle that nonbankruptcy law (i.e., state law) is applied to *value* the claims. (Plan Proponents' Post-Trial Brief hereinafter "PP Post-Trial Br. 9-10.)[2] The cases establish no such thing.

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[1] Applicable nonbankruptcy law includes both state and federal law, where appropriate. *See, e.g., Patterson v. Shumate*, 504 U.S. 753, 758 (1992).

[2] The "PP Post-Trial Br." refers to the brief submitted jointly by the ACC and the Futures Representative.

Rather, it is indisputable that under section 502(c) of the Bankruptcy Code, the Court must apply federal bankruptcy law "for purposes of allowance." (*See* Banks Post-Trial Br. 12; *see also Avellino v. M. Frenville Co.* (*In re M. Frenville Co.*), 744 F.2d 332, 337 & n.8 (3d Cir. 1984) ("federal law controls which claims are cognizable under the Code ....").) To determine a claim for purposes of allowance the Court "shall determine the *amount* of such claim." 11 U.S.C. § 502(b). This means that after applying applicable nonbankruptcy law to determine whether a claim is valid, federal bankruptcy law determines how much, if any, of that claim will be allowed. *See Addison v. Langston (In re Brints Cotton Marketing, Inc.*), 737 F.2d 1338 (5th Cir. 1984). A fourth Supreme Court case cited by the Plan Proponents, *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156 (1946), makes this clear and flatly contradicts the Asbestos Claimants' position. *Id.* at 162-63 ("In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. . . . [B]ankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles.")

The Plan Proponents also cite *Bittner v. Borne Chem. Co.*, 691 F.2d 134 (3d Cir. 1982), for the proposition that the Court should apply state law to determine the *value* of the claim. What the Third Circuit actually said was that the Court "is bound by the legal rules which may govern the ultimate value of the claim." *Id.* at 135. In this case, those legal rules include, not only state substantive law, but federal procedural law and federal bankruptcy law, which is necessary to estimate the claim "for purposes of allowance," pursuant to section 502(c), which ultimately determines how much, if any, of

the claim will be paid pursuant to section 502(b). *Brints,* cited by the Plan Proponents for the same proposition, further refutes the Asbestos Claimants' position. *Brints* holds that:

> [w]hatever the merits under state law of [the creditors'] view *absent bankruptcy*, the creditors' contention overlooks that, while state law ordinarily determines what claims of creditors are valid and subsisting obligations, a bankruptcy court is entitled ... to determine how and what claims are allowable for bankruptcy purposes, in order to accomplish the statutory purpose of advancing a ratable distribution of assets among the creditors.

737 F.2d at 1341 (emphasis added). Thus, applying this general rule, the court in *Brints* recognized that while under state law the appellant's claim might be valued differently, state law was only to be applied to determine the merits and validity of the claim; federal bankruptcy law determined how and what claims were allowable. The court then noted as an example of the operation of this rule, "post-petition accumulation of interest (allowable under state law) on claims against a bankrupt's estate are suspended . . . on grounds of 'historical considerations of equity and administrative convenience . . ." *Id.* (quoting *Nicholas v. United States*, 384 U.S. 678, 682 (1966)). *Brints* demonstrates that while state law is applied to determine a claims' validity, federal bankruptcy law determines how much of a claim is allowable.

In re Farley, Inc., 146 B.R. 748 (Bankr. N.D. Ill. 1992) and *In re Federal Press Co.*, 116 B.R. 650 (Bankr. N.D. Ind. 1989) (PP Post-Trial Br. 9-10), are equally unhelpful to the Plan Proponents' position. Neither case involved an estimation for purposes of allowance. Rather, both cases involved estimations conducted only for

purposes of voting on the proposed plans.[3] Neither case involved future claims or more than a handful of present claims. In both *Farley* and *Federal Press*, the claims would be liquidated and paid after confirmation regardless of the amount estimated for voting purposes.

The Plan Proponents further argue that the Banks' position is that the Court should discard Owens Corning's pre-bankruptcy experience in the tort system. (PP Post-Trial Br. 11.) That argument is incorrect – as Dr. Dunbar's testimony and report confirm. *All* of the experts in this case started with Owens Corning's historical claims database. The issue is whether the Court is confined to Owens Corning's database – as the Plan Proponents argue – or whether the Court may look to the "real world," and make adjustments to the claims history to reflect the undisputed proposition that factors that shaped the history have changed. No case cited by the Plan Proponents holds that the Court is prohibited from looking at anything other than what is in Owens Corning's claims database.

The Plan Proponents rely heavily on *In re Eagle-Picher Industries, Inc.*, 189 B.R. 681 (Bankr. S.D. Ohio 1995) – a decision of a bankruptcy court in another circuit. (*See* PP Post-Trial Br. *passim*) This decision does not hold or say that a bankruptcy court estimating future claims must rigidly extrapolate from pre-bankruptcy

[3] To facilitate voting on a chapter 11 plan, all unliquidated claims first must be liquidated or estimated. Importantly, estimation for voting purposes does not set a cap or otherwise influence the outcome of the later liquidation of a claim. As a result, the need for precision in estimating a claim for voting purposes only is dramatically reduced. This lack of precision is exemplified by *Federal Press,* where the court did not even consider the merits of the claimant's claim, and simply estimated it an amount the court thought would be appropriate if the claimant was later successful. 116 B.R. at 650. Indeed, the court performed no analysis to determine if such a result was even likely.

values even if the bases for settling claims have changed. That issue was not even raised, much less decided in the case, and the court simply stated that for estimation purposes the sound approach is to "*begin* with what is known" about prepetition history. 189 B.R. at 686 (emphasis added). This is a proposition the Banks and Dr. Dunbar have never disputed.

In an effort to support their position, the Plan Proponents take a number of statements from *Eagle-Picher* out of context and then fail to follow them through to their logical conclusion. For example, the Plan Proponents rely on the statement in *Eagle-Picher* that claims should be valued as of "the date of the filing of the petition." *Id.* at 682. The bankruptcy court made this statement – unsupported by citation to any authority – in the context of applying a discount rate as of the petition date, rather than the date a trust would actually be established, *id.*, an undisputed point here. Second, the court valued claims "as of the date of filing" because it determined in that case, again without citation to authority, that it would be appropriate to use settlement values "for claims close to the filing date of the bankruptcy case" to project future values. *Id.* at 691. The court's decision to use claim values as of the petition date in that case in no way precludes this Court from taking into account significant changes that have occurred since Owens Corning filed for bankruptcy in 2000 that would affect either the number of future claims likely to be asserted against Owens Corning, or the value of those claims. Thus, nothing in *Eagle-Picher* purports to hold that a court is required to estimate the number or value of future claims by blindly extrapolating from the past, particularly in the face of changes – such as the aging of the exposed population – which indicate that those past values no longer accurately reflect the value of present or future claims. As

the testimony of Dr. Peterson and Dr. Vasquez confirmed, any such rule would be contrary to fundamental principles of forecasting, as well as common sense. It would also contradict the binding Third Circuit precedent in *Bittner,* which empowers this Court to use whatever methods are best-suited to estimating Owens Corning's liability. 691 F.2d at 135.

Moreover, even if one were to mistakenly interpret the bankruptcy court in *Eagle-Picher* as having imposed a rule, binding on this Court, requiring that an estimation be based on settlement values "for claims close to the filing date of the bankruptcy case," the Court would then be required to use the NSP settlement values as a benchmark. And that is what Dr. Vasquez did in his Method I valuation, which estimated future claims at approximately $2 billion applying NSP settlement values between 1998 and 2000. Of course, when confronted with that reality the Plan Proponents attempt to discard the Vasquez Method I estimate – and their past as prologue mantra – because that would produce an estimate that is dramatically lower than they would like.[4] This is consistent with the Plan Proponents' view of history as a one-way ratchet – claims values and propensity to sue should be driven up by any historical anomalies that work in their favor, but they dismiss as anomalous all factors which could decrease the value of their estimate.

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[4] Dr. Peterson rejected the Vasquez Method I estimate on the putative basis that "future claimants are not a party to [NSP] agreements. Values of their claims cannot be determined by agreements to which they are not a party." (PP Ex. 65 at 59.) But Dr. Peterson himself estimates future claim values from the claims' database which consists primarily of past agreements to which future claimants are obviously not a party. Thus, his own methodology refutes his criticism of Dr. Vasquez and makes clear his real attack on Vasquez Method I is that that estimate demonstrates that his own is wildly inflated.

The Plan Proponents also rely on *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694, 702 (4th Cir. 1989) (PP Post-Trial Br. 11), which also undermines, rather than supports, their legal position. In *A.H. Robins*, the district court established a bar date by which all Dalkon Shield claimants had to submit a detailed questionnaire. 880 F.2d at 699. The various experts in that case, including Dr. Rabinovitz, then performed estimations relying on information contained in those questionnaires. While the Plan Proponents note the fact that in *A.H. Robins* the court found Dr. Rabinovitz's testimony to be a "good example of competent testimony" (*id.*), they draw the wrong conclusion from that citation, because in that case her methodology was exactly the opposite of what she did here. In this case, Dr. Rabinovitz relied solely on historical claim values.

In *A.H. Robins*, the Fourth Circuit noted that Dr. Rabinovitz looked at the returned questionnaires from pending claims and took them as:

> a representative sample and weeded out those, for example with no medical proof of use of the Dalkon Shield. As a further example, she classified the claims into those with and without complications and the nature of the injuries claimed. She then took a random sample of the claims as she had divided them up and got three Aetna claims adjusters who had been experienced in the actual adjustment of Dalkon Shield claims and instructed those to set a value on a sample of the claims she referred to them.

Id. Thus, it is apparent that the estimation methodology found to be most credible in *A. H. Robins* did not seek to replicate the tort system, but established basic medical standards designed to eliminate bogus medical claims.[5]

[5] Moreover, the Banks in this case also have urged the imposition of a bar date, which, as in *A.H. Robins*, would allow a more accurate, medically based estimate of the number

Finally, while the Plan Proponents seek support in the proposed findings of fact in *In re Armstrong World Industries, Inc.* (PP Ex. 186) and *Babcock and Wilcox* (PP Ex. 184), neither case supports their position.[6] In both cases, the court's findings expressly stated that, "*absent evidence to the contrary*," future claiming against the debtor would broadly follow its well-established historical patterns. (PP Ex. 186 at ¶ 24 (emphasis added); *see* PP Ex. 184 at 47.) In contrast to the largely uncontested nature of the *Armstrong* and *Babcock & Wilcox* estimations (*see* Banks' Post-Trial Br. 21-25), the hearing in this case established the record is replete with "evidence to the contrary," i.e., that future claiming against Owens Corning would not follow historic patterns, such as the unsustainable surge in claiming rates in 1999 and 2000 and unusually low dismissal rates during the same years.[7]

B. The Plan Proponents Fail To Address The Banks' Central Arguments Upon Which The Banks Have Relied Since Prior To Trial.

As demonstrated above, the cases cited by the Plan Proponents stand only for the basic proposition asserted in the Banks' pre-trial brief – i.e., a federal court will

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and value of future claims. The Plan Proponents have aggressively opposed imposition of a bar date.

[6] Both the Plan Proponents, PP Post-Trial Br. 64-66, and the Debtors, Debtors' Post-Trial Br. 31-32, argue that this Court should compare estimates from other bankruptcies in setting its estimate in this case. As we explained in our Post-Trial Brief, (Banks' Post-Trial Br. 22-27), those cases involved largely consensual plans in which no challenge to the Asbestos Claimants' estimates were presented. Moreover, consideration of those estimates would be improper, as explained at Banks' Post-Trial Br. 80.

[7] The Plan Proponents' also assert that the Court must estimate Owens Corning's asbestos liability at no less than $7.8 billion because otherwise the proposed Plan of Reorganization is unconfirmable. (PP Post-Trial Br. 7 & n.4.) This argument is a tautology. The fact that they and the Debtors concocted a Plan of Reorganization which can only be confirmed based on a wildly inflated estimate of asbestos liability has no bearing on a proper estimate of Owens Corning's future asbestos liability.

look to **substantive** state law, or more precisely, applicable nonbankruptcy law, in seeking to determine the *existence* of a claim *see, e.g., Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000); (Banks' Pre-Trial Br. 40). Moreover, beyond failing to provide any support for their central proposition in this case, the Plan Proponents have not contested any of the fundamental principles of law and forecasting which they know the Banks have relied upon extensively in their briefs, arguments, and witness examinations since before the trial and throughout it.[8]

First, nowhere in their briefs do the Plan Proponents contest that federal procedural law and federal bankruptcy law principles govern the claims *allowance* process. *See, e.g., Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332, 337 (3d Cir. 1984) ("federal law controls which claims are cognizable under the Code. . . .") (*see* Banks' Pre-Trial Br. 42-43; 1/20/2005 p.m. tr. 66, argument of Mr. Rothman.) Nor do they dispute that a federal court is entitled to administer proceedings before it – whether they be estimation proceedings or claims resolution proceedings governed by state substantive law – employing those procedures and administrative devices it believes are necessary and appropriate. This is exactly what Judge Weiner has done in the diversity cases encompassed within the MDL, imposing those rules and requirements, including dismissing claims, which the court believed were necessary to weed out illegitimate claims.

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[8] Contrary to the Plan Proponents' claim (PP Post-Trial Br. 5) the Banks' have answered the question posed to the Court as to whether the Banks advocate disparate treatment between their claims and the Asbestos Claimants' claims. As explained in detail in the Banks' Post-Trial Brief, we do not. (Banks' Post-Trial Br. 21 n.10.)

Second, while continuing to recite their past as prologue mantra, and alleging that this Court must estimate the value of the post-bankruptcy claims by mimicking the litigation tactics and procedures permitted in certain state courts in the 1990s, the Plan Proponents' briefs have ignored the writings and admissions of their own witnesses and counsel – and failed to address what they knew to be the Banks' case. Nowhere, for example, do the Asbestos Claimants address Dr. Peterson's critical admissions contained in his report to Judge Weinstein including that:

> [t]he extrapolations are problematic if the bases for settling claims have or will change. The extrapolations would then provide little information about what defendants will actually pay, but would at most indicate what defendants' expected payments would have been if past practices had continued into the future.

(CSFB Ex. 81 at 207.)

This fundamental principle – articulated by the Banks in our papers (*see* Banks' Pre-Trial Br. 5-6) and arguments (1/13/2005 a.m. tr. 55-56, argument of Mr. Rothman) – was reconfirmed by Dr. Peterson at trial (Peterson, 1/17/2005 a.m. tr. 97) and endorsed by Dr. Vasquez as well. (Vasquez, 1/20/2005 p.m. tr. 21.) It goes hand-in-hand with Dr. Peterson's assertion that to do a proper forecast, one cannot simply manipulate statistics and must instead do a "systematic study" of the prior litigation in order to determine if there have been changes with respect to the "bases for settling claims" between the pre-bankruptcy arena and the real world in which the present and future claims will be resolved. (Peterson, 1/17/2005 p.m. tr. 8.) This basic principal of forecasting was fatal to the Plan Proponents' position, because the trial confirmed that in

disregard of it, and as to every major contested issue raised by the competing forecasts, their experts failed to do the necessary analysis and blindly extrapolated from the past.

Third, the Plan Proponents have also adopted an ostrich-like approach to the admissions of both Dr. Peterson and counsel that the real world in which the post bankruptcy claims will be resolved will be the federal judicial system – not the state courts. Dr. Peterson testified that the asbestos claims will be resolved either in a trust established by this Court pursuant to section 524(g), or in federal court. (Peterson, 1/17/2005 p.m. tr. 16.) Counsel for the ACC agreed: "they [i.e., the asbestos claims] would be resolved either in this Court or the district court where the claims arose, in the discretion of this judge in this Court." (1/20/2005 p.m. tr. 24, argument of Mr. Inselbuch.) Now, however, the Plan Proponents have pointed in their Post-Trial Brief to a provision buried in the proposed TDP, that would purport to permit claimants to at some point litigate claims in state courts with which they have a real connection. That provision, not yet approved by the Court, is contrary to the above-quoted evidence at trial. In addition, the notion that the Trust would ever waive its right to have claims adjudicated in an efficient federal proceeding – so that they could be litigated in myriad state courts that were avoided by Owens Corning before bankruptcy whenever possible would be a gross waste of the assets of the Trust.

It is now apparent that the Asbestos Claimants have failed to address Dr. Peterson's key admissions – in either his testimony, their closing argument, or their briefs to date – because they have no credible response: Dr. Peterson's admissions are fatal to the Asbestos Claimants' position in this case because the evidence at trial showed that (1) on issue after issue, the Asbestos Claimants' experts simply crunched statistics and

blindly extrapolated from pre-bankruptcy claims values without doing any of the necessary "systematic studies" to determine if there had been changes to the bases on which Owens Corning settled claims prior to its bankruptcy; and (2) there have indeed been numerous material changes which render the Asbestos Claimants' experts' extrapolations "problematic," and their resulting estimates wildly inflated.

C. The Plan Proponents Argument That This Court Cannot Consider How The Imposition Of Reasonable Procedures Will Impact The Number and Value of Such Claims Is Groundless.

The Plan Proponents argument that this Court is required to put blinders on and cannot consider how much money would to required to pay allowable, legitimate claims under responsible trust rules is both wrong and irrelevant. Whether the Court's estimate is based on (1) the assumption that the Plan, subject to this Court's approval, will include the kinds of modest and reasonable requirements employed in other trusts and federal courts to weed out fraudulent claims; or (2) an appropriate tort system analysis, the result is largely the same. In fact, one of the points that became increasingly apparent as the trial went on is that while the Plan Proponents constantly refer to the tort system, they did not even do a bona fide "tort system analysis" of the value of the post bankruptcy claims.

As previously noted, the undisputed evidence at the hearing – including from the mouths of Dr. Peterson and the ACC's counsel – was that the asbestos claims subject to estimation in this proceeding will be resolved in the federal system, not in a state court. Accordingly, federal procedures, not state procedures, will apply to proceedings to resolve the asbestos claims. And, in the "real world," virtually all of the

claims will likely be resolved in a federal bankruptcy trust, under this Court's supervision. (1/13/2005 a.m. tr. 11, argument of Mr. Inselbuch.)

Moreover, the fact that the future claims should be evaluated in the context of the federal system is particularly appropriate because those claims never were filed in any state court – and, as Dr. Peterson and Asbestos Claimants' counsel confirmed, given that Owens Corning's has commenced a case under chapter 11, they never will be litigated there. Thus, it makes no sense to speak of estimating these future claims as if they were filed and litigated and resolved in the state courts years before they accrued, as the Plan Proponents assert – because these cases will only ever exist in a federal forum, most likely the trust created in this proceeding pursuant to section 524(g), or in the federal MDL before Judge Weiner.

1. *In doing its estimation, the Court can assume that the TDP under which the claims will be resolved will contain reasonable proof requirements that will reduce the number of illegitimate claims.*

The Plan Proponents argue (PP Post-Trial Br. 14) that the Court must ignore the fact that the asbestos trust that will result from this case can and should contain the kinds of modest proof requirements employed by other trusts (and by federal courts) – including the requirement that all claims be supported by a physical examination conducted by a real doctor. Even though it is undisputed that employing such requirements would significantly reduce the number of illegitimate claims,[9] and thus

[9] Dr. Peterson stated that one of his objectives when drafting the revised Manville TDPs was that "over the long term, Manville will receive fewer nonmalignant claims because of the changes in the TDP." (Peterson, 1/17/2005 p.m. tr. 72.) Additionally, Dr. Peterson confirmed that the more stringent TDPs were a factor lowering the filing rate for nonmalignant claims. (*See id.* at 68-71.)

slash the amount of money needed to pay legitimate claims, the Plan Proponents contend that this Court must proceed wearing blinders. More specifically, they contend that this Court is required to value the claims at $11 billion even though: (1) that number is the product of the abusive past tactics, including fraudulent mass screenings, that would now be eliminated by a responsible TDP (or the requirements imposed by federal courts); and (2) under a responsible TDP, only a fraction of the $11 billion would be needed to cover the value of the claims supported by legitimate proof. Stated simply, and as the Court recognized at trial, here and elsewhere the Plan Proponents tell this Court that it must give them $11 billion, even though the actual value of the claims in the real world will be far less because they will not actually receive 100 cents on the dollar and therefore will not wind up being overpaid. Their position is unsupported and groundless.

In support of their position that this Court cannot consider the effect of the TDP that will be subject to the Court's approval, the Asbestos Claimants again cite *Eagle-Picher*. But the statement from *Eagle-Picher* relied on by the Plan Proponents simply says that an estimation should not be based on the "value which claimants might take in satisfaction of their claims through some bankruptcy mechanism such as a trust of the sort provided for at § 524(g)." 189 B.R. at 683. The Banks' approach is entirely consistent with *Eagle-Picher*, because the Banks do not advocate *valuing* claims based on how much a trust will pay them. Dr. Dunbar did not multiply the number of projected claims by the estimated amount a trust would pay claimants. Rather, the relevant point is that an estimation should take into account that the post-estimation claims processing regime will implement and enforce reasonable criteria and screening mechanisms to prevent illegitimate claims. This is uncontroversial – even Dr. Peterson agreed that

modest medical standards will reduce the number of claims (Peterson, 1/17/2005 a.m. tr. 73), as it did when Manville Trust implemented such requirements in its 2002 TDPs.

Moreover, the measures that will accomplish this salutary goal have not been limited to consensual trust rules. They have been adopted by federal courts – including by Judge Weiner in the MDL and Judge Rubin (*see* Banks' Post-Trial Br. 37, 40-42) – as well as by the Manville Trust – with a resulting (and dramatic) drop in claims following these changes. (*Id.* 57-58.) Indeed, the evidence in the record is uncontroverted that employing modest measures to control and eliminate illegitimate claims will reduce the number of illegitimate claims filed. There is no basis, in law, equity, or common sense, why this Court cannot base its estimate on the assumption that these kinds of responsible measures will be incorporated into the TDP that is ultimately approved in this case – under which virtually all present and future claims will be resolved.[10] Rather, the Court is well within its authority to impose – and to now assume that there will be – reasonable, common-sense standards to ensure that only legitimate claims will be compensated. For example, in another asbestos bankruptcy pending in this

[10] The Plan Proponents cite *Travelers Int'l AG v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, 134 F.3d 188 (3d Cir. 1998) for the proposition that "it is inappropriate to value claims at an amount below the face amount to which such claims would be entitled to be paid under applicable non-bankruptcy law." (PP Post-Trial Br. 16.) Again, this case is contrary to the Plan Proponents' position. *Trans World Airlines* is not an estimation case at all, but a preference case under 11 U.S.C. § 547. A necessary aspect of a preference claim is that the debtor was insolvent at the time of the alleged transfer. As part of the solvency analysis, it was claimed that the value of TWA's bond liabilities should be the market value of its debt and not its face value. However, because TWA was a going concern at the time, the Third Circuit concluded that the face value of the debt was the appropriate standard for valuation. *Id.* at 196-97. This is consistent with the basic bankruptcy principle that valuations must not occur in a vacuum and must reflect the underlying purpose for the valuation, a principle which the Plan Proponents have sought to escape from throughout their entire brief.

district, the bankruptcy court recently stated: "In an asbestos bankruptcy, the Court will, within the constraints of the law, reject unsubstantiated claims, bogus medical evidence and fanciful theories of causation. The Court will protect those who have truly been harmed." *In re USG Corp.*, 290 B.R. 223, 225 (Bankr. D. Del. 2003). Significantly, this admonition resembles this Court's statement in its November 22, 2004 Order, that the goal is to "structure a system, that to the extent possible, recognizes only legitimate claims, and accords the appropriate priority to the claims of all creditors." *Medical Records Order* at 2.

2. *Under an appropriate "Tort System" analysis, the estimate will be essentially the same as under a "Trust" analysis.*

Although the Plan Proponents contend that this Court must conduct a "tort system" valuation of the post-bankruptcy claims, in fact their experts have not attempted to estimate what Owens Corning's liability would be in the tort system in which the present and future claims will actually be resolved. (Peterson, 1/17/2005 p.m. tr. 20, Rabinovitz, 1/18/2005 a.m. tr. 91.) Moreover, the Asbestos Claimants have not even done a genuine "state court tort system" estimation using the settlement values "for claims close to the filing date of the bankruptcy case," as they claim the *Eagle-Picher* case mandates. To the contrary, that is exactly what Dr. Vasquez did in arriving at his Method I $2 billion estimate of the future claims which the Debtors oppose, ironically based on arguments that Owens Corning's past experience settling claims under the NSP supposedly would *not* be prologue to the future.

3. *A proper "tort system" analysis must assume that Owens Corning's liability for the post-bankruptcy claims will be determined in the federal judicial system, in which the claims would be encompassed within the MDL.*

As the Plan Proponents have conceded, to the extent the post-bankruptcy claims will be resolved in the "tort system," that means the federal tort system. We know much about how the claims would be resolved in the federal system, because of the long history of the MDL, under which all asbestos cases are transferred for all pre-trial proceedings to Judge Weiner.[11] Moreover, even before claims against a bankrupt debtor are transferred, the federal MDL panel has explicitly urged bankruptcy courts to consult and coordinate with Judge Weiner on issues such as "quantification of claims in the bankruptcy proceedings [and] determination of the availability of funds to compensate claimants with *valid* claims against debtor companies." *In re Asbestos Bankruptcy Litig.*, No. 950, 1992 WL 423943 (Jud. Pan. Mult. Lit. 1992) (emphasis added).

The Plan Proponents seek to dismiss the steps Judge Weiner has taken as merely "administrative measures" and charge that the Banks are attempting to use these "administrative measures" to impermissibly displace state substantive law and refuse to pay ostensibly valid claims. (PP Post-Trial Br. 12-13.) They are wrong, as a matter of fact and law. As the Plan Proponents do not deny Judge Weiner actually dismissed all nonmalignant claims premised on evidence generated from mass screenings. *In re Asbestos Prods. Liab. Litig. (No. VI)*, Civil Action No. MDL 875 at 1-2 (E.D. Pa. Jan. 8,

[11] Many of the MDL claims are diversity cases, to which state substantive law and federal procedural law apply. (Banks' Post-Trial Br. 20-21.) Accordingly, the treatment of claims in the MDL is subject to a similar legal framework as the asbestos claims in this bankruptcy proceeding.

2002) (Admin. Order No. 8) (the "MDL Order 8"). The overwhelming majority of the nonmalignant claims – Professor Brickman's uncontested testimony was 90% – are the product of the illicit mass screenings. These mass-screened cases will not merely be deferred temporarily (as the Plan Proponents claim at page 12 of their brief). They have been dismissed and can only be reinstated if and when a claimant shows impairment and provides evidence from treating physicians who work outside of the mass-screening operations that defined asbestos litigation in the 1990s.

Judge Weiner has taken other measures to ensure that only claims supported by bona fide medical evidence are permitted to proceed, and has either dismissed claims where adequate proof has not been provided or effectively placed unimpaired claims on a pleural registry. (Banks' Post-Trial Br. 40-42.) And, while the Asbestos Claimants contend that these measures do not constitute rulings extinguishing the affected claims on the merits, they plainly constitute permissible determinations by the federal court as to the evidentiary prerequisites for assertion of a claim. Indeed, Judge Weiner's procedures do not abrogate any claimant's rights under state substantive law, but rather are procedural devices (akin to *Daubert*) establishing the type of evidence a claimant must adduce to bring a successful claim in the federal system. The measures also reflect the court's eminently reasonable determination that the value of the unimpaired claims is far less than the value of a claim by a person who has experienced real impairment. Thus, whether one places that value at zero, or at some nominal amount, there is no question that in the real world of the federal tort system in which the

post-bankruptcy claims will be resolved, the mass-screened cases have no value and the unimpaired claims have little if any value.[12]

Indeed, contrary to the Plan Proponents' assertions, claimants have explicitly recognized, and complained, that Judge Weiner's procedures have decreased the values of claims from what plaintiffs might have received in state court. In *In re Patenaude*, 210 F.3d 135, 140 (3d Cir. 2000), petitioners sought a writ of mandamus ordering Judge Weiner to transfer diversity cases back to their originating jurisdictions for trial in part because under MDL settlement protocols the petitioners asserted "in many instances [d]efendants have failed to generate any monetary offer to settle plaintiffs' cases; and in the remaining cases, the *[d]efendants have failed to offer settlement values that approach historical settlement values for similar claims.*" (*Id.* at 139) (emphasis added).[13] The Third Circuit denied the writ, affirming Judge Weiner's latitude to process

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[12] Purportedly relying on *Eagle-Picher*, the Plan Proponents state that the Court is required to "convert claims into dollar amounts as of the petition date," and therefore, reliance on the MDL deferral docket approach would conflict with the "very purpose" of claims estimation. (Plan Proponents Br. 12 *citing In re Eagle-Picher Indus.*, 189 Br. 681, 682 (Bankr. S.D. Ohio 1995).) Even assuming it was proper to value claims as of the petition date, it would defy reality to value unimpaired claims filed in federal court and transferred to the MDL at the same amount as claims pending at the same time in the state system. No reasonable defendant would pay substantial sums of money to resolve MDL claims. As Clyde Leff testified, because of procedures applicable in the MDL, defendants did not have to resolve nonmalignant claims in the MDL. (Leff, 1/13/2005 p.m. tr. 11.)

[13] Moreover, in *In re Collins*, 233 F.3d 809 (3d Cir. 2000), the Third Circuit upheld Judge Weiner's practice of severing punitive damage claims from compensatory claims. *Id.* at 812 (citing *Dunn v. Hovic*, 1 F.3d 1371, 1400 n.13 (3d Cir. 1993) (en banc) (Weis, J. dissenting)) (noting that "in many instances the delay will result in payment of no punitive damages"). And, in fact, this has proved true. As Mr. Leff testified, he was not aware of a "revived attempt to get punitive damages" once Judge Weiner severed that component of a case. (Leff, 1/13/2005 p.m. tr. 111.)

cases in the MDL, which represents the real "tort system" that must be considered if one were to do an appropriate tort system estimation.

Finally, assuming that a "state tort" system analysis extrapolating directly from Owens Corning's database must be done (and the Court cannot look at the relevant changes in the "real world"), the Court need only look to the Vasquez Method I estimate. By relying on NSP settlement values – which comprised the vast majority of settlements in the two years prior to Owens Corning's bankruptcy – the Vasquez Method I most closely resembles a straightforward extrapolation of what Owens Corning's future would have looked like absent a bankruptcy. That estimate most closely resembles the kind of estimation used by the court in *Eagle-Picher* (which extrapolated from settlement values "for claims close to the filing date of the bankruptcy case,") the case the Plan Proponents' rely upon most heavily. Knowing that a low and reasonable estimate such as Vasquez Method I would doom their case, the Plan Proponents spend pages trying to explain why the NSP was an anomaly, and why claim values should be based on their highly selective view of Owens Corning's history. In doing so, however, they betray the fundamental premise of their case that the Court cannot critically evaluate the database and determine what factors are relevant for estimating future liabilities.

4. *The Plan Proponents have also failed to refute the evidence which established that the pre-bankruptcy values of the nonmalignant claims were inflated by litigation procedural tactics that would no longer apply, and by other factors that have also changed.*

The Banks have demonstrated that the evidence at trial – much of it from the mouths of the Debtors' own lawyer witnesses – confirmed that the pre-bankruptcy claims values in the 1990s state court litigations were the product of a collection of

procedural and tactical practices, which fed on each other, including: plaintiffs routine practice bundling of serious cancer claims with unimpaired claims; the filing of cases in hand-picked states and counties with which neither the plaintiffs nor the defendants had any contact; the proliferation of unimpaired claims through mass screenings; and, the use of inflammatory documents which, particularly in the context of the bundling and jurisdictional grabs noted above, made it impossible for Owens Corning to defend and therefore inflated the settlement value of unimpaired claims – that would now either be dismissed or otherwise accorded no value in the federal judicial system as well as in some of the very states that were once the hotbed of asbestos litigation. (Banks' Post-Trial Br. 29-42.)

Once again, nothing in the Banks' Post-Trial Brief could have come as a surprise to the Plan Proponents. These points have been at the heart of the Banks' case since prior to the trial, and were a focus of our Pre-Trial Brief and Opening Statement. (Banks' Pre-Trial Br. 11-26). Nevertheless, here again, the Plan Proponents have failed to address the real arguments made by the Banks. Instead, they have argued at length that this Court should rigidly extrapolate from the pre-bankruptcy claims database because the state court tort system was not broken. As demonstrated below, however, the Plan Proponents spirited defense of the asbestos state court litigation "system" of the 1990s (for example, they argue that the "nationwide tort system . . . is not broken and did not distort the Owens Corning liabilities," which has undergone significant change even in some of the key states[14]) is both an irrelevant straw man, and wrong. It is irrelevant

[14] As the Banks demonstrated through evidence at trial that stands completely unrebutted in the record due to changes in state procedural law (reducing forum shopping and the

because the issue in this case is ***not*** whether state court judges acted improperly or unreasonably, but whether the nonmalignant claims values were inflated by factors which are no longer applicable (*e.g.*, the specter of punitive damages), or have changed (*e.g.*, the aging of the population that was exposed to Owens Corning's products).

Finally, the Plan Proponents' contention that there was nothing wrong with the process by which state court asbestos cases were litigated in the 1990s is plainly wrong. That is confirmed by the various major reforms that have since been instituted by federal courts and trusts, state courts, and state legislatures, not to mention the chorus of alarm and criticism by such respected commentators as Judge Griffin Bell. (Banks' Pre-Trial Br. 28-40.)

a. The Plan Proponents ignored and/or failed to refute the evidence that the value of the pre-bankruptcy nonmalignant claims was inflated by procedural tactics.

The Asbestos Claimants do not address the evidence which confirmed that (1) plaintiffs' attorneys virtually always bundled nonmalignant cases with malignant cases, and (2) this practice inflated the value of the nonmalignant claims. While the Debtors claim, not surprisingly, that they preferred facing a nonmalignant claim bundled with a malignant claim to trying two malignant claims together (Debtors' Post-Trial Br. 9-10), their argument proves nothing: of course they would rather have faced one serious claim tied to a groundless claim, than two serious cancer claims! Trying mesothelioma cases together may have been worse in the sense that it cost more total dollars for Owens

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ability to bundle malignant and nonmalignant cases), state substantive law (reducing the availability of punitive damages), and heightened scrutiny of medical evidence (such as in Ohio), the system the Plan Proponents seek to replicate no longer exists. (Banks' Post-Trial Br. 33, 37.)

Corning, but only because those claimants were entitled on the individual merits of their case to greater recovery. The Debtors never demonstrated that trying malignant cases increased the value of an individual mesothelioma case. In contrast, the problem with the routine bundling of cancer claims with nonmalignant claims was that, as the Debtors' witnesses conceded, doing so *did* inflate the value of the nonmalignant claims. (Banks' Post-Trial Br. 30-32.)

The Plan Proponents spend much of their time arguing that mass consolidations did not increase the settlement value of nonmalignant claims, and that, to the contrary, they supposedly got good deals. On this issue, as on so many others, the Plan Proponents rely entirely on anecdotal evidence. They never tasked their experts with systematically analyzing data to prove their bald contentions – or even quantifying the percentage of claims that were settled in mass-settlements, as opposed to the routine bundling which they concede inflated the value of the nonmalignant claims. Moreover, here, as elsewhere, their unverifiable anecdotal testimony of their lawyer witnesses is contradicted by the concrete evidence in the record.

For example, a November 2000 presentation by Owens Corning stated that one of the reasons Owens Corning went into bankruptcy was: "*Courts consolidating groups of cases with few malignancies,* ***increasing aggregate settlement costs for unimpaired cases.***" (PP Ex. 54 at 054011 (emphasis added).) Similarly, Maura Smith, Owens Corning's then-General Counsel, testified at her deposition that an express purpose of the NSP was to "de-link cases and pay fair value for unimpaired non-

malignant cases and pay more for those with malignancies and not let the two kind of blend together and just pay larger sums for all." (Smith Dep. at 98-99.)[15]

The Plan Proponents also argue that consolidated trials resulted in lower per-claim values. (PP Post-Trial Br. 28-29).[16] Here again, however, they produced no verifiable, statistical data or expert analysis to support this contention, which is belied by the evidence noted in the preceding paragraph and in the Banks' Post-Trial Brief. (Banks' Post-Trial Br. 30-32.) Moreover Ms. Smith testified that Owens Corning "really didn't want to have to face a consolidated set of cases" (Smith Dep. at 227), and that Owens Corning "evaluated a jurisdiction-by-jurisdiction trend in consolidation, [in] West Virginia and other locations, where we were concerned about judges who would consolidate cases and force us to pay large sums of money for the groups. Consolidation was a concern." (*Id.* at 98; 28-29 (explaining that the company could not withstand consolidations because "if you had 2,000 or 4,000 or any number of thousands of cases,

[15] The Debtors citation to the *Cosey* settlement for the contention that unimpaired claims had value under the tort system is misguided. (Debtors' Post-Trial Br. 13.) What the *Cosey* settlement really shows is the impact of consolidating unimpaired nonmalignant cases with serious diseases. Mr. Leff stated that "two or three lung cancers" were consolidated for trial with unimpaired nonmalignant cases (Leff, 1/13/2005 p.m. tr. 8.) These cases are a classic example of the phenomena that Dr. Peterson described whereby less serious cases "can borrow value" from serious cases. (*See* CSFB Ex. 84 (article by Dr. Peterson noting that consolidations can "expand the litigation to include claimants with questionable losses or grounds for liability" because when juries believe that unimpaired plaintiffs face a "future of cancer or debilitating lung impairment . . . less serious cases borrow value from serious cases.")

[16] While the Plan Proponents allege that they got "good deals" in the mass consolidation cases, the evidence at trial established that the vast majority of those claims were the product of the illicit mass screenings and lacked any bona fide support. Most of those claims should not have been brought in the first place, or should have been paid nothing.

and they were continued to put up on a very fast-paced docket, when you took verdicts . . . you would have hundreds of millions of dollars in verdicts in no time.").)

The only empirical data in the record regarding the effect of consolidations on the value of nonmalignant claims came from Dr. Dunbar. Consistent with the testimony of Owens Corning's General Counsel noted above, Dr. Dunbar demonstrated in his Supplemental Report that Owens Corning paid a very high percentage of the claims filed against it as part of consolidations (i.e., very few of these claims were dismissed), while it defeated (and had dismissed) a very high percentage of nonmalignant claims that were tried individually. (CSFB Ex. 159 at 6.)[17] Under those circumstances, the incentive for bundling together more and more claims based on mass-screened evidence is manifestly clear.

The Plan Proponents also fail to refute the evidence which established that the value of nonmalignant claims in the pre-bankruptcy era was also impacted by both the failure to enforce fundamental jurisdiction rules, and the inflammatory bad documents and accompanying specter of punitive damages. As to the former, the Plan Proponents have no rejoinder – nor can they contest that the practice of bringing hundreds of mass-screened cases in handpicked state courts with which the plaintiffs had no nexus has since been barred in key states, including Mississippi and Texas. In fact, the Plan Proponents completely ignore the state law reforms discussed at length in the Banks' papers. (*See*

[17] Exhibit II-3 to Dr. Dunbar's Supplemental Report shows that only 11% of claims filed in groups of twenty of more were dismissed while 42% of all claims were dismissed. (CSFB Ex. 159.)

Banks' Pre-Trial Br. 35-37; Banks' Post-Trial Br. 32-33.[18]) As to the impact of punitive damages, here again, the Asbestos Claimants rely entirely on unverifiable anecdotal testimony for the proposition that the specter of punitive damages did not significantly impact settlement values. And as demonstrated below, here again, their arguments and anecdotal testimony is contradicted by the record. (*See* below at 50.)

In sum, the Plan Proponents have ignored several of the major factors almost entirely. Moreover, as to the few which they have attempted to address, such as the impact of punitive damages or mass consolidations on settlement values, the Plan Proponents have relied entirely on anecdotal evidence from their lawyer witnesses, and have consistently failed, as they did at trial, to provide any verifiable empirical data and analysis of the database to support the lawyers' testimony – under circumstances where such empirical data would have been readily available and could easily have been supplied by the Plan Proponents' experts had their position been sustainable. Indeed, this is precisely the kind of "systematic study" of the pre-bankruptcy claims history that Dr. Peterson knew was necessary, which Drs. Dunbar and Vasquez did, and which both Drs. Peterson and Rabinovitz consistently failed to do. And indeed, as discussed below, it is now clear that the anecdotal testimony upon which the Asbestos Claimants rely was wrong in significant respects.

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[18] Only last month a Mississippi trial court dismissed the claims of thousands of Alabama residents who failed to allege exposure to asbestos products in Mississippi. *Noble v. E.H. O'Neil Co.*, Civ. Action No. 98-0024 (Miss. Cir. Ct. Jan. 24, 2005). This is significant because, as the Debtors' former general counsel testified, after tort reform in Alabama, cases migrated to Mississippi because it was a more permissive jurisdiction. (Smith Dep. at 105.)

b. The Plan Proponents' argument that the state court system was not broken also is wrong.

In addition to being an irrelevant straw man, the Plan Proponents' contention that this Court should blindly mimic and replicate the pre-bankruptcy state court system because it is was not broken, is incorrect. The fact that there were massive problems with the ways in which asbestos litigations were administered in certain state courts is widely known and has been chronicled by a broad range of respected commentators, including state court judges who presided over these cases,[19] Judge Carl Rubin, Former Attorney General and Judge Griffin Bell,[20] Professor Lawrence Tribe,[21] plaintiffs' lawyer Steven Kazan (who represents mesothelioma claimants),[22] the ABA, and others (including Professor Brickman), who have explained and documented the distortions and in some cases perversions of justice, that defined the asbestos system as it existed.[23]

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[19] As Judge Andrew McQueen in West Virginia, who presided over consolidated cases, noted: "We thought that an [early mass] trial was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases." Victor W. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick,* 31 Pepp. L. Rev. 271, 284-85.

[20] (*See* Banks' Pre-Trial Br. 21.)

[21] (*See* Banks' Pre-Trial Br. 12.)

[22] (*See* Banks' Pre-Trial Br. 23.)

[23] The Debtors argue that the federal system was just as bad as the state system. (Debtors' Post-Trial Br. 7-9.) This flies in the face of the testimony of their own witnesses, who testified that Owens Corning "did prefer . . . certainly on balance to be in federal court," because of the "higher standard of rules and procedures applied, just from discovery through trial," (Leff, 1/13/2005 p.m. tr. 89-90; Tucker, 1/14/2005 p.m. tr. 47.)

More importantly, however, the best evidence that there were serious problems with state court asbestos litigation in the 1990s consists of the major reforms that have been implemented by federal and state courts, trusts, and legislatures to eradicate the abuses that drove Owens Corning and seventy other companies into bankruptcy. Those reforms – some of which have occurred in the key states where Owens Corning was habitually sued in the 1990s –conclusively demonstrate that the state court system was clearly broken. They also confirm that the notion that this Court should now replicate that system – rather than applying the same procedural requirements as other federal courts and trusts – is untenable and inconsistent with this Court's duty to estimate the value of only legitimate, allowable claims.

Finally, while there has been much discussion concerning the state tort system, it is important to understand that most of the adjustments at issue with respect to the estimates are not dependant on this. Indeed, the issues concerning the NSP surge, propensity to sue, dismissal rates, age adjustments for claim values and propensity to sue,

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In any event, the anecdotal support the Debtors rely on in their papers misses the mark. For example, the Debtors point to consolidated federal cases such as *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985), *Cimino v. Raymark Indus., Inc.* 751 F. Supp. 649 (E.D. Tex. 1990); *In re E. and S. Dist. Asbestos Litig.*, 772 F. Supp. 1380 (E. & S.D.N.Y. 1991), but fail to point out that all of these commenced prior to the creation of the federal MDL in 1991, and before the recent disclosures of systemic abuses of medical evidence to generate masses of cases. The only case the Plan Proponents cite to support their contention that punitive damages were problematic in federal courts is *Dunn v. Hovic*, 1 F.3d 1371 (3d Cir. 1993) (en banc). While in *Dunn* the jury awarded $25 million in punitive damages, the district court cut punitive damages to $2 million, and on appeal the Third Circuit reduced punitive damages further to $1 million – in total a 96% reduction. *Id.* at 1391. In any event, punitive damages are not available in the federal system pursuant to the MDL, nor are they be available in any distributions to asbestos claimants in this proceeding, *see* section III, (c) below, and the TDPs proposed by the Plan Proponents in this case expressly preclude the payment of punitive damages to the Asbestos Claimants.

and the appropriate dissent rate are independent of any issues concerning whether the claims are to be resolved in the pre-2000 tort system versus the federal tort system bankruptcy trust.

* * *

The bottom line with respect to the governing law is simple: The Court can not extrapolate from the pre-bankruptcy settlement history without taking into account any changes to the factors that impacted either the claims filing rates and/or the value of claims between the pre-bankruptcy era and the real world of 2005 and beyond in which the claims will now be resolved. Indeed, we submit that this threshold point, fatal to the Plan Proponents' position in this case is obvious, and their contention that this Court is required to simply replicate what would have happened if the future claims had been filed in state court litigations in the 1990s is specious. It is contradicted not only by Dr. Peterson's writings and testimony (*see* Banks' Post-Trial Br. 17-18), but also by Dr. Rabinovitz' work in *A.H. Robins, see* 880 F.2d at 702, Dr. Vasquez's report and testimony in this case, and even by the arguments asserted by the Plan Proponents themselves when they seek to exclude from their forecasts those chapters of Owens Corning's historical claims experience which they don't like.

It is, of course, understandable that the Asbestos Claimants would want to put blinders on the Court, bar it from considering or applying the reforms that other federal courts and trusts have implemented, and forecast the future by blindly extrapolating from the 1990s state court litigation claims values. That system was extraordinarily profitable for them – as the Plan Proponents' briefs confirm. It was also one of the greatest debacles in the history of our legal system, featuring relaxation, if not

abandonment, of fundamental jurisdictional principles, the use of improper mass screenings to generate bogus evidence and claims, and the other practices we have detailed that courts and legislatives have since made great strides to eradicate, restoring basic legal rules of procedures and evidence in the process. In any event, the notion that this Court is required, as a matter of law, to disregard the measures that the federal courts and trusts have taken, and to instead mimic the 1990s state court system is clearly wrong from every perspective.

III. THE COMPETING ESTIMATES.

As we discussed above, there are seven factors that account for most of the difference between the estimates of the Asbestos Claimants experts, on the one hand, and those of Drs. Dunbar and Vasquez, on the other. We discuss these issues below.

A. Propensity To Sue.

1. *The NSP surge.*

The evidence at trial showed that propensity to sue spiked dramatically in 1999 and 2000 on account of the NSP, and that the level of claiming observed during this time period was "unsustainable." (Vasquez, 1/20/05 a.m. tr. 25-26.) Although this was a prominent issue at trial – and one that accounts for $904 million of the difference between the Peterson and Dunbar forecasts (CSFB Ex. 289) – the Asbestos Claimants barely mention it in their brief. Not only does this conspicuous omission confirm that that the Asbestos Claimants' position on the NSP surge is indefensible, but also as previously demonstrated (Banks' Post-Trial Br. 46), Dr. Peterson's remarkable testimony that the NSP surge issue was not even worth studying underscores that both his forecast and testimony are not credible and should be rejected.

The Debtors do not dispute the existence of the surge, or its cause. Indeed, they could not, for the forecast of their own expert prominently takes it into account. Specifically, Dr. Vasquez used 1996-1998 as the calibration period for propensity to sue, disregarding the two years (1999-2000) when the NSP was in effect. (Vasquez, 1/20/05 a.m. tr. 29-30.) Dr. Dunbar accounted for the surge by matching filing dates in the Owens Corning database with filing dates against the Manville Trust and reclassifying the claims from the NSP era to the years when they were first asserted against Manville (*see* Appendix A). In an effort to improve precision still further, he also matched filing dates with claims in the database for the Center for Claims Resolution, creating an even more accurate picture of historic claiming activity.[24]

The Asbestos Claimants attempt to justify their failure to adjust for the NSP surge by pointing to Dr. Dunbar's report, which shows increasing numbers of claims against Owens Corning during the period 1990-97, and supposedly reflects that there was a trend of increasing claiming rates even before the NSP. (PP Post-Trial Br. 50-51.) As they are well aware, however, increasing *numbers* of claims are not the same thing as increasing claiming *rates*. There is no dispute that the raw number of claims against Owens Corning had increased in the past. But it is the historical propensity to sue, projected out into the future by multiplying it against the projected incidence of disease, on which the forecasts are based. And no matter how hard they try, the Asbestos Claimants cannot demonstrate a trend of increasing propensity to sue between 1990 and

[24] Dr. Rabinovitz failed to fully account for the NSP surge, although she recognized that some adjustments were necessary. (Rabinovitz, 1/18/2005 a.m. tr. 24-25.) However, she did not rely on all available data in performing her adjustments (*id.* at 83-84), and therefore, her analysis is incomplete and inferior to that of Drs. Dunbar and Vasquez.

1997 because their own data and exhibits – once the 1990 line in Table 11 (PP Ex. 65 at 21) that was removed by Dr. Peterson is restored to the chart – show that propensity to sue was essentially flat over this period, ending up in 1997 at levels just below where it started in 1990. (PP Ex. 65 at 21, table 11.) Reference to Dr. Peterson's physically-altered chart is conspicuously absent from the Plan Proponents' Brief. (*See* Banks' Post-Trial Br. 47-49.)

The Asbestos Claimants significantly distort the testimony of Dr. Vasquez in their quest to show that the spike in claims during the NSP was actually part of an increasing trend in propensity to sue throughout the 1990s. They contend Dr. Vasquez's report and testimony demonstrate that propensity to sue increased 30% when one compares the years 1990-93 against the years 1996-98. In fact, however, Dr. Vasquez testified that he believed there was no significant increasing trend prior to the NSP period that would justify treating 1999 and 2000 as anything other than an unsustainable surge. (Vazquez, 1/20/2005 a.m. tr. 27 (characterizing propensity to sue as "relatively stable" from the period 1993 up to the NSP in the end of 1998).) His actual testimony thus rebuts the very proposition for which it is cited by the Asbestos Claimants:

> Q: In general terms, was Owens Corning experiencing an upward trend in the propensity to sue for mesothelioma and lung cancer claims over the entire period 1980 through 2000?
>
> A: Yeah. I'm not sure I would depict it that way. I mean, clearly the increase was really occurring from the pre-1989 till you hit the – around 1993 *and then in my view, leveled off thereafter.*

(Vasquez, 1/20/05 a.m. tr. 90 (emphasis added).) All the evidence in this case showed that the claiming rates observed in 1999 and 2000 were anomalous and no credible

forecast can start out, as the Asbestos Claimants urge, at a level that is "roughly consistent" with what Owens Corning experienced just prior to bankruptcy. (PP Post-Trial Br. 49.)

2. *Dr. Peterson's increasing propensity model is not credible.*

As demonstrated in the Banks' Post-Trial Brief, Dr. Peterson's "Increasing Propensity" model, which he points to as an illustration of his "conservatism" (Peterson, 1/17/2005 a.m. tr. 65), should be rejected out of hand and underscores his lack of credibility. (Banks' Post-Trial Br. 46-50.) Tellingly, almost all the discussion in the Asbestos Claimants' brief on claiming rates is an attempt to justify Dr. Peterson's "no-increase" forecast, reflecting that they themselves realize that his preferred "increasing" model is indefensible. (PP Post-Trial Br. 48-50.) No other expert in this case – even Dr. Rabinovitz – forecasted an increase in propensity to sue *above* the historical rates (*see* Appendix A).[25] The Asbestos Claimants' implicit adoption of the no-increase model shaves $2.7 billion off Dr. Peterson's $11.1 billion estimate. (PP Ex. 65 at 29 table 16.)

The negligible effort the Asbestos Claimants do make to justify the increasing propensity to sue model shows how lacking in evidentiary support it is. Thus, the only support that the Asbestos Claimants offer for Peterson's increasing model is

[25] The Asbestos Claimants' assertion of a propensity to sue higher than that actually observed in the past shows that the Asbestos Claimants themselves do not practice what they preach. They contend that future claiming rates must be based on the "claiming history against Owens Corning" and that departure from that history is justified only if there is "compelling evidence" of "drastic change." (PP Post-Trial Br. 45, 48.) Yet they base their preferred forecast on Dr. Peterson's increasing propensity model, which departs from the claims history based on no evidence at all of any "drastic change" upward in propensity to sue. Indeed, the only credible evidence in this case shows that historic propensity to sue was overstated on account of the NSP surge.

conclusory and unsupported anecdotal testimony to the effect that the number of claims against other defendants increased during the period 2000-2003. (PP Post-Trial Br. 51-52.) The Asbestos Claimants offer no verifiable, statistical or empirical proof of this, no quantification of it, no evidence showing that the circumstances of these other defendants was comparable to that of Owens Corning, and no evidence that the anecdotal testimony about increasing claims is representative of any widespread or sustainable trend. Indeed, in his testimony on this topic Dr. Peterson did not even identify the "other companies" that the Asbestos Claimants contend experienced increased claims during 2000-2003 period. (Peterson, 1/17/2005 a.m. tr. 24-25.) And, just as with the NSP surge issue, the Asbestos Claimants' again mis-cite Dr. Vasquez's testimony to support their proposition. In fact, however, Dr. Vasquez did not say there was any general trend of increased claims against other companies. To the contrary, he testified that the experience of other companies was "mixed," and he expressly testified that he thought the use of an increasing propensity to sue model was "inappropriate" in this case. (Vasquez, 1/20/05 a.m. tr. 28, 34.)

The only evidence in the record here regarding the experience of other defendants post-2000 is that of the Manville Trust, and indeed, Dr. Peterson based his Increasing Propensity model not on the experience of Owens Corning, but on that of Manville and one other trust from the 1990s. (Banks' Post-Trial Br. 50.) In fact, however, the claiming rates against the Manville Trust actually dropped significantly in

2004 – a fact that Dr. Peterson knew but neglected to disclose to the Court either in his Expert Report or his Supplemental Report. (Peterson, 1/17/2005 p.m. tr. 64-65, 72-73.)[26]

In sum, the Plan Proponents' Post-Trial Briefs have confirmed that Dr. Peterson's Increasing Propensity model, which accounts for $2.7 billion dollars of his $11.1 billion estimate, should be rejected.

3. *The use of KPMG vs. Nicholson projections.*

Similarly absent from the Plan Proponents' Post-Trial Brief is any justification for Dr. Peterson's continued reliance on the unadjusted Nicholson epidemiological projections. Here, again, Dr. Peterson was alone, as Dr. Vasquez and even Dr. Rabinovitz used the updated KPMG model which, as the evidence demonstrated, is more accurate than the 1982 Nicholson model. The Banks addressed this issue (Banks' Post-Trial Br. 50-52) and the Asbestos Claimants offer nothing new in their brief. This factor alone adds 7.8%, or another $700 million at present value, to the Peterson forecast of future claims. (PP Ex. 65 at 66.)[27]

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[26] As the Manville Trustees have asserted, this decrease was due, in part, to the imposition of the modest but more stringent revised trust distribution procedures. (CSFB Ex. 83 at 1.) The Asbestos Claimants make a futile attempt to brush away this fact, asserting that the causes of the decline in filings against Manville are not pertinent to Owens Corning and are transitory. (PP Post-Trial Br. 51-52.) However, the Asbestos Claimants have asserted that the Manville TDP and the proposed Owens Corning TDPs are "virtually identical." (Peterson, 1/17/05 a.m. tr. 83.) Moreover, Dr. Peterson has admitted that the revised Manville proof requirements, which he supported and helped design, were intended to weed out claims that did not meet reasonable medical criteria and reduce the number of nonmalignant claims. (Peterson, 1/17/2005 p.m. tr. 65, 72.) Finally, while Dr. Peterson gave inconsistent testimony regarding the reasons for and permanence of the drop in claims at the trial, he has testified that here, as elsewhere, he has done no study or analysis to determine the actual reasons. (*Id.* at 76.)

[27] The Asbestos Claimants' contention that Dr. Dunbar ignored incidence of mesothelioma in females in assessing whether the Nicholson projections more closely

The only remaining issue regarding the use of epidemiological models relates to the projection of future nonmalignant claims. The Asbestos Claimants criticize Dr. Dunbar's use of a prevalence model to predict the number of nonmalignant claims. These criticisms are unfounded. Dr. Dunbar estimated the prevalence of nonmalignant disease utilizing a dose-response model based on the data from the insulator studies conducted by Dr. Selikoff and his colleagues at Mt. Sinai. (Dunbar, 1/19/2005 a.m. tr. 58.) The insulator studies are the very same ones that form the basis of the Nicholson cancer incidence projections used by every one of the experts in this case. As Dr. Dunbar explained, he found that sufficient low-dose exposure data were present in the Selikoff sample to allow development of a statistically valid model. (Dunbar, 1/19/05 a.m. tr. 60).

That no other expert in this case has devoted the time and effort to developing a scientific model to project the number of nonmalignant claims hardly is reason to reject Dr. Dunbar's estimate. Rather, it illustrates the superiority of the Dunbar estimate and demonstrates that he did far more analysis and study than any expert in this case. While the Plan Proponents devote significant portions of their briefs to this issue in an effort to disparage Dr. Dunbar, the reality is that it is only a marginal issue in the case. As Dr. Dunbar explained, substituting Dr. Peterson's method of forecasting the number

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tracked the actual SEER data is meritless. (PP Post-Trial Br. 46 & n.27.) While there is no doubt that a small number of Owens Corning claimants are women, that fact has no relevance to the task of measuring the accuracy of the Nicholson projections, which were based on assumptions regarding only the *male* population. This is confirmed by the Nicholson study itself, which expressly noted that "[c]alculations were made using US white male rates." (PP Ex. 179 at 296.) Dr. Dunbar thus properly compared the Nicholson projections of excess male deaths to the SEER male data, and concluded, as did Drs. Vasquez and Rabinovitz, that it was not the most reliable among the competing epidemiological forecasts.

of future nonmalignant claims for his own would have added only 1% to his estimate. (Dunbar, 1/19/05 a.m. tr. 52; CSFB Ex. 289 (reconciliation of Dunbar to Peterson).)

4. *Age adjustments to propensity to sue.*

The Asbestos Claimants also failed to adjust their propensity to sue calculation for the effect of age, despite substantial evidence at trial showing that older people tend to sue less frequently than younger ones. Both Dr. Dunbar and Dr. Vasquez made adjustments for this effect (*see* Appendix A). For reasons stated at page 45 & n.20 of the Banks' Post-Trial Brief, this adjustment is appropriate and demonstrates the methodological superiority of the Dunbar and Vasquez estimates.

B. Unimpaired Claim Values.

The uncontested evidence proves that most claimants suffer from no objectively measurable impairment in lung function, even if they have a valid X-ray indicating the presence of nonmalignant asbestos related disease. Dr. Friedman's study, conducted by the Debtors for the express purpose of determining how many claimants could demonstrate impairment, showed that 87% of claimants did not have functional impairment under NSP standards.[28] (CSFB Ex. 6 at 4.) The Asbestos Claimants offered no evidence to quantify the number of functionally impaired claimants, or to rebut Dr. Friedman's findings, and even opposed the Banks' efforts to collect a sample of medical records so that an additional study could be performed.

Nevertheless, Dr. Peterson's preferred estimate forecasts over 860,000 nonmalignant claims, and pays every one of them more than $7,000 (*see* PP Ex. 65 at 12,

[28] In fact, Dr. Friedman testified that two-thirds of the nonmalignant claims filed against Owens Corning did not demonstrate any compensable disease under the NSP, impaired or unimpaired, at all. (Friedman Dep. at 215-216.)

27, B-3), an absurdity given the evidence showing that most of these claimants will have no measurable functional impairment and the substantial proof demonstrating that all parties valued unimpaired claims at far less than $7,000. (Banks' Post-Trial Br. 52-55.) Comparing Dr. Dunbar's estimate to Dr. Peterson's, this issue accounted for $1.86 billion of the difference at present value. (CSFB Ex. 289, Step 6.4.)

The Asbestos Claimants try to justify this enormous payment to unimpaired claimants by asserting that measurable functional impairment is unimportant. (PP Post-Trial Br. 23-25.) However, demonstrable impairment played a significant role in Owens Corning's determinations of claim values. (*See* Banks' Post-Trial Br. 54.) Owens Corning's General Counsel testified (by deposition designation) that a specific purpose of the NSP was to de-link valuable claims (i.e., impaired claims) from *de minimis* claims (i.e., unimpaired claims) and specifically to pay "fair value" for unimpaired nonmalignant claims. (Smith Dep. at 98.) The "fair value" for such claims is reflected in the NSP agreements, which distinguished the amounts to be paid for impaired and unimpaired claims. Many present unimpaired claimants were paid $1,000, while none of the NSP agreements provided any compensation for future unimpaired claimants.[29] (Leff, 1/13/2005 p.m. tr. 61-62.) Thus, both the plaintiffs' bar and Owens Corning assigned little or no value to unimpaired claims – which is also consistent with contemporary treatment of unimpaired claims in the federal judicial system.

[29] The Plan Proponents argue that an asbestos-related disease can be diagnosed even in the absence of impairment, and thus, there is no basis for drawing a distinction between impaired and unimpaired claimants. (PP Post-Trial Br. 24.) This argument proves nothing – under the NSP people diagnosed with a non-impairing asbestos-related disease received little or no compensation.

As noted above at pages 13-15 while the Plan Proponents purport to base their case on the language of the bankruptcy court decision in *Eagle-Picher* to the effect that "valuation of claims should be based on settlement values close to the date of filing of the bankruptcy case," 189 B.R. at 691, an estimate truly consistent with *Eagle-Picher* would use the NSP's differentiated claim values for unimpaired and impaired claimants because that reflects Owens Corning's most recent pre-bankruptcy settlement history. Indeed, of all the estimates presented to this Court, Vasquez Method I reflects this aspect of *Eagle-Picher* most faithfully (Dr. Dunbar's analysis is very similar on this point; *see* Appendix A).[30] Significantly, the Plan Proponents attempt to explain away this critical facet of Owens Corning's history – casting aside their past-as-prologue rule in the process.

The Asbestos Claimants also argue that unimpaired claimants have value because "doctors recommend that persons with [unimpaired conditions] should have annual medical exams, X-rays and pulmonary function tests," and that these tests cost $1,000 per year. (PP Post-Trial Br. 24.) The Plan Proponents have presented no evidence showing that claimants actually get these tests, or that they pay any costs out-of-pocket. Indeed, the only evidence in the record was to the contrary – indicating that most unimpaired claimants do not see a doctor either before or after the mass screenings that

[30] The Plan Proponents' arguments with respect to the difference in the number of claims between Dr. Dunbar and Dr. Vasquez is accounted for, in part, by the number of unimpaired claims, which Dr. Dunbar does not include in his count of allowable claims because he values them at zero. If Dr. Dunbar attributed any value to unimpaired nonmalignant claims – such Dr. Vasquez's valuing them at $1,000 in his Method I – then Dr. Dunbar's claim count would be increased by the number of unimpaired nonmalignant claims.

generate their claims. (Welch, 1/14/2005 p.m. tr. 66-68.) Given the Plan Proponents' attacks on the utility of PFTs this is highly ironic. In any event, the Banks recognize that it would not be unreasonable to allocate some nominal value to unimpaired claims which is reflected in the "upwards adjustments" to Dr. Dunbar's estimate. (*See* Banks' Pre-Trial Br. 91.)

The Asbestos Claimants further argue that unimpaired claims have value, because individuals with asbestosis have a higher risk of developing lung cancer. (PP Post-Trial Br. 24.) This argument is immaterial for purposes of this estimation, however, because Dr. Dunbar's estimate – and all the expert forecasts – include value for claimants who later develop lung cancer because of exposure to Owens Corning products.[31]

C. Punitive Damages.

The Debtors claim that "it is very difficult, if not impossible," to determine the impact of punitive damages on the settlement values. (Debtors' Post-Trial Br. 13.) This contention is perplexing, given that their own expert, Dr. Vasquez, made this calculation at the instruction of Debtors counsel who correctly informed him that the punitive damage factor should be excluded from the database because claimants would not be entitled to recover punitives in this case. Dr. Vasquez calculated the impact of punitive damages on pre-NSP settlements as 12.5%, and accordingly reduced the claim values by the amount. Moreover, both Dr. Vasquez and counsel were comfortable with Dr. Vasquez's punitive damages analysis and adjustment. The Debtors reported Dr.

[31] Finally, the Asbestos Claimants fall back on the meritless argument that a claimant may be impaired even if pulmonary function test results show lung function within the predicted normal range. (PP Post-Trial Br. at 24.) This argument is meritless for the reasons we explained in the Banks' Post-Trial Br. at 52 n.24.

Vasquez's estimate in their SEC reports (Mark Mayer Dep. at 115-116; CSFB Ex. 71 at 2-3), and they continue to use Dr. Vasquez's estimation, including the quantification and reduction for punitive damages in their current SEC reports.

Like Dr. Vasquez, Dr. Dunbar was also able to calculate the impact of punitive damages on Owens Corning's pre-bankruptcy claims values – and he, too, believed it was appropriate to remove this factor from the database before extrapolating from it for purposes of his forecast (*see* Appendix A). Dr. Dunbar's calculations show that the impact accounts for $1.088 billion of the difference between his estimate and that of Dr. Peterson. This is based on his considered analysis that the effect on settlement values was to increase values by 25%. (CSFB Ex. 307.)

Additionally, while the Debtors now argue – contrary to Dr. Vasquez's report and their SEC filings – that punitive damages had only "some small effect on settlement values" (Debtors' Post-Trial Br. 15), the Debtors provide no citation to the record to support this argument. In addition, the record shows that prior to this trial, Owens Corning stated that "virtually all [of the 369,200 claims filed against Owens Corning prior to 1998] have sought in jurisdictions where they are available, punitive damages." (PP Ex. 17 at 6.) Owens Corning also stated that it believed that a portion of the $2.2 billion it had paid to resolve claims had to be attributed to punitive damages as settlements "extinguished both the punitive and compensatory claims." (*Id.*) Thus, here again the Debtors' unsupported, anecdotal allegations and testimony is contrary to their own documented statements, their expert's determination, and their SEC filings.

In light of Dr. Vasquez's report and the other damning evidence in the record, the Plan Proponents have now contended that recovery of punitive damages are

not always categorically barred under the Bankruptcy Code. The Plan Proponents cite *United States v. Noland*, 517 U.S. 535 (1996) and *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996) in support of their argument that punitive damages cannot *categorically* be subordinated in chapter 11. The issue in this case, however, is not whether punitive damages are categorically subordinated or otherwise barred in all bankruptcy cases. Rather, as the Banks have shown (*see* Banks' Post-Trial Br. 62 n.31), the real point is that punitive damages are unavailable here based on the undisputed facts of this case, which demonstrate that it would be impermissible to "allow" – as that term is used in section 502(c)(3) – punitive damages claims to the asbestos claimants. And that is because (1) those punitive damages would be paid by the other creditors, not by the entity that engaged in the conduct to be deterred (i.e., Owens Corning); (2) the conduct at issue – the selling of products containing asbestos – ceased some thirty years ago; and (3) Owens Corning was repeatedly punished for this conduct to an extraordinary degree before its bankruptcy. Thus, punitive damages would serve no legitimate purpose in this case; indeed, only innocent creditors would be punished while other creditors – the Asbestos Claimants – would receive a windfall. As demonstrated in the Banks' Post-Trial Brief, awards of punitive damages under these circumstances would be patently improper. (Banks' Post-Trial Br. 62); *see In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000) (noting that in asbestos cases "it is responsible public policy to give priority to compensatory claims over exemplary punitive damages windfalls").

Neither the *Noland* nor *CF&I Fabricators* cases upon which the Plan Proponents rely were estimation cases, which involve a different set of considerations. In *Bittner*, the leading estimation case in this Circuit, the Third Circuit stated that the

principal consideration in an estimation proceeding "must be an accommodation to the underlying purposes of the Code." *Bittner* 691 F.2d at 135. A fundamental underlying purpose of the Bankruptcy Code is to treat similarly situated creditors similarly. *PlasmaNet, Inc. v. Phase2Media, Inc.*, 2002 Bankr. LEXIS 1457 at *33 (Bankr. S.D.N.Y. Dec. 20, 2002.) It would violate this fundamental purpose to take money away from one set of unsecured creditors to pay punitive damages to another group of unsecured creditors. Additionally, both *Noland* and *CF&I Fabricators* involved circumstances where the penalties at issue had already been imposed prepetition. Here, there are no actual awards of punitive damages that the Court is being asked to estimate – most of the claims to be estimated have not even been filed.[32]

Moreover, *Noland* and *CF & I Fabricators* do not render the earlier discussions in *Manville*[33] and *A.H. Robins,*[34] cases which recognize the Court's equitable powers to subordinate punitive damages, bad law. For example, other post-*Noland* cases have followed the holdings of *Manville* and *Robins*. *See, e.g., In re Hillsborough Holdings Corp.*, 247 B.R. 510, 512 (Bankr. M.D. Fla. 2000) ("It appears from the forgoing cases that courts considering this particular issue emphasized that the allowance

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[32] The Plan Proponents' reliance on *Noland* and *CF&I Fabricators* is misguided for the additional reason that both cases concerned whether claims could be equitably subordinated not whether such claims should be allowed. Equitable subordination enables bankruptcy courts to lower the priority of a claim that has already been deemed allowable. However, the issue currently before the Court is one of allowability, not one of priority. Here, the vast majority of claims have not even been filed, much less allowed.

[33] *In re Johns-Manville Corp.*, 68 B.R. 618, 627-28 (Bankr. S.D.N.Y. 1986) *aff'd in part, rev'd in part,* 78 B.R. 407 (Bankr. S.D.N.Y. 1987), *aff'd* 843 F.2d 636 (2d. Cir. 1988).

[34] *In re A.H. Robins Co.*, 89 B.R. 555 (E.D. Va. 1988)

of punitive damage claims in Chapter 11 is inappropriate if the allowance of such claims would render a determination of the feasibility of the plan impossible.") (citing *A.H. Robins*). Nor do *Noland* and *CF&I Fabricators* override *Bittner's* directive that the principle consideration must be an accommodation to the underlying purposes of the Bankruptcy Code. Rather, those cases merely state that there should be no categorical subordination of punitive damages – a position with which there is no disagreement. Similarly, though, there should be no categorical *allowance* of punitive damages, which would be the effective result of the Asbestos Claimants' position that the claim values used for purposes of estimation should include punitive damages.

As stated in the Banks' Post-Trial Brief, (Banks' Post-Trial Br. 62.) allowing for estimation purposes any element of punitive damages in this case would also violate at least two provisions of the Bankruptcy Code. Allowance of punitive damages here would be prohibited under the so-called "best interests of creditors" test set forth in section 1129(a)(7) of the Bankruptcy Code. (*Id.*) The Plan Proponents seek to deflect the applicability of the best interest of creditors test by claiming that the liquidation value of the Debtors is likely so low, creditors will receive more in chapter 11, even if asbestos personal injury creditors are awarded punitive damages. (*See* PP Post-Trial Br. 3) However, the Plan Proponents have failed to adduce any evidence on this point – a fact they concede. (*Id.* 32 n.13 indicating that no party introduced evidence regarding the best interests test).) Since the Plan Proponents are the movants, their failure to introduce any

evidence on this point is reason enough to decline to include punitive damages in the Court's estimation.[35]

Finally, the Plan Proponents fail to meaningfully address another fundamental reason why punitive damages should not be included in the estimate in this case – they will never be paid to any asbestos creditors in this case, because the Asbestos Claimants' own proposed TDPs plainly prohibit them. (*See* CSFB Ex. 218 at Section 7.4 ("In determining the value of any liquidated or unliquidated PI Trust Claim, punitive or exemplary damages, i.e., damages other than compensatory damages, shall not be considered or allowed, notwithstanding their availability in the tort system.").)

D. Age Adjustments To Claim Values.

The Asbestos Claimants make no reference at all to age adjustment in their Post-Trial Brief. As the Banks recounted at pages 67-69 of their Post-Trial Brief, the evidence at trial clearly established that the age of a claimant was very important in establishing settlement values. Drs. Dunbar and Vasquez both adjusted their forecasts to account for the age of claimants (*see* Appendix A). Drs. Peterson and Rabinovitz, in

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[35] In their post-trial briefs, the Debtor and Asbestos Claimants both assert that punitive damages were not included as a component part of Owens Corning's group settlements, which include the NSP agreements (Debtors' Post-Trial Br. 13-14; *see also,* PP Post-Trial Br. 34.) The evidence in the record is to the contrary. On cross examination Dr. Vasquez stated that while counsel told him that punitive damages had somewhat been eliminated in the NSP that "it was anticipated that five percent would be a decent estimate of the remaining punitives" (Vasquez 1/20/2005 p.m. tr. 7.) Dr. Vasquez later stated that the Debtors' counsel who had instructed him on punitive damages was Roger Podesta (Vasquez, 1/20/2005 p.m. tr. 13-14.) Moreover, the citations relied on by the Plan Proponents are anything but clear regarding this point. When asked on direct examination whether plaintiff lawyers agreed that punitive damages were not part of the value included in group settlements Mr. Tucker stated "they purported not to." (Tucker, 1/14/2005 a.m. tr. 18.)

contrast, ignored the issue and made no age adjustments. The unrebutted evidence demonstrated that this is a major driver of value in the estimates. Failure to adjust for age in calculating claim values accounts for $990 million of the difference between the Peterson and Vasquez forecasts. (CSFB Ex. 73.) The Asbestos Claimants' utter failure to address this significant flaw in their estimates is further evidence that their estimates are not credible and should be rejected.

E. Adjustments To Exclude Claims Supported By "Bad Doctors."

The evidence at trial established that Owens Corning's claims history was infected by a handful of doctors who consistently overread X-rays. Pages 33-37 and 55-58 of the Banks' Post-Trial Brief summarize this evidence. Much of the medical evidence came from Dr. Friedman, a well-respected and unbiased expert retained by the Debtors. Dr. Friedman identified five doctors in particular who were prolific in supporting claims against Owens Corning and whose X-ray interpretations were patently unreliable. (CSFB Ex. 6 at 20-21; *see also* CSFB Ex. 203.) After he did this extensive study of X-ray readings, at significant cost to the estate, the Debtors refused to call Dr. Friedman to testify at the hearing. Dr. Gitlin's study, published in late 2004, subsequently identified additional unreliable doctors.

Dr. Dunbar did a time-consuming study and analysis of the database. He found that the five bad doctors identified by Dr. Friedman accounted for about 40% of the claims in the pre-bankruptcy database for which doctor identification was available. (CSFB Ex. 159, App. B at 23.) He also found that the eight most prolific B-readers identified in the studies of Drs. Friedman and Gitlin together accounted for over 178,000 claims (which is 57% of the claims for which a doctor could be identified, and about 35%

of all claims in the database.) (CSFB Exs. 225, 306.) In light of this data, Dr. Dunbar made a conservative adjustment to the database, deducting 30%.[36] The Banks and Dr. Dunbar also sought leave to do a more extensive study of the X-ray evidence, which the Plan Proponents opposed – even though both Drs. Friedman and Gitlin had urged that such a study be done. They put on no evidence to rebut the proposition that the bad doctors were responsible for massive numbers of claims against Owens Corning. The existing evidence, however, is more than sufficient to support a finding that Dr. Dunbar's 30% reduction in the number of allowable claims to account for unreliable X-ray readings is reasonable.

The Asbestos Claimants cannot deny the importance of the Friedman study. Their own expert, Dr. Peterson, conceded that he was aware that Owens Corning had stopped paying claims by certain B-readers identified in the Friedman study prior to bankruptcy, and that he assumed, for purposes of his forecast, that Owens Corning would continue to do so in the future. (Peterson, 1/17/05 p.m. tr. 23-25.) However, Dr. Peterson made no attempt to determine how many of the claims in the database from which he was extrapolating had came from those doctors – even after testifying at his deposition that he would do so. (Peterson, 1/17/2005 p.m. tr. 32-33.) Moreover, he made no adjustment at all to the historical claims data that assigned value to claims by these same doctors, thereby extrapolating into the future claim values that are no longer supportable in light of what is now known.

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[36] Dr. Dunbar's 30% reduction was based upon the findings of the Manville Trust medical audit. (Dunbar, 1/19/2005 p.m. tr. 36-41.)

In an attempt to defend their failure to make any adjustment for the bad doctors, the Asbestos Claimants make two arguments. First, they claim that the Court should completely disregard the X-ray evidence because there is extensive "interreader variability" of X-rays by certified B-readers. The short answer to this is that while there may be some variability among honest doctors, Dr. Dunbar's adjustment is consistent with the work of Dr. Friedman, the Debtor's credible expert, who found that the five doctors he identified were not reliable and the systematic irregularities in their X-ray interpretations could not be explained away as interreader variability.[37] Moreover, the evidence that those doctors accounted for nearly 40% of the claims in the pre-bankruptcy database for which doctor identification is available is unrefuted. Accordingly, the 30% adjustment that Dr. Dunbar made, arrived at through an independent route, is consistent with and, indeed, reinforces the validity of, the Friedman number and is clearly reasonable. Had the X-ray study sought by Drs. Friedman, Gitlin and the Banks been conducted, the actual adjustment undoubtedly would be higher.

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[37] The results of the Gitlin study also cannot be explained away as inter-reader variability. Dr. Welch had to concede on cross-examination that she was not aware of any other study where consultant readers reviewing the same films agreed less with the results of the initial readers than they did in the Gitlin Study. (Welch, 01/14/2005 p.m. tr. 71-72.) And Dr. Welch herself characterized the lack of agreement between the original readers and Dr. Gitlin's consultant readers as "terrible." (CSFB Ex. 10, at 2.) The Ducatman study, PP Ex. 135, is not to the contrary. In that study, each of the readers looked at a different set of films, so any statistical differences in their finding may be explained in whole or in part by the simple fact that any one reader may have had a sample with more or less disease than others. But even accepting the Asbestos Claimants' argument that there is a high degree of natural interreader variability, the Ducatman study illustrates quite clearly the Banks' point that overreading occurs among a handful of doctors and it is absurd to accept at face value readings from doctors known to overread.

Second, the Asbestos Claimants also argue that it is unnecessary to make any adjustment for the bad doctors because the historic average claim values were the product of the parties' freely-negotiated assessments of the medical evidence, and it therefore is appropriate to extrapolate from them without adjustment. Here again, however, the Asbestos Claimants have relied entirely on anecdotal testimony of their lawyer witnesses, failing to provide any verifiable data or analysis of the database to support their anecdotes – which already have proven to be inaccurate in other significant respects. (*See*, *e.g.*, pages 49-51, *supra* (regarding inclusion of punitive damages in settlements).) Neither Dr. Peterson nor Dr. Rabinovitz did any systematic study or analysis to determine whether claims supported by X-ray interpretations of the suspect doctors actually received any less compensation than other claims. They failed to provide this type of verifiable, empirical data and analysis in a situation where it should have been readily available to them if their position were correct; and this is exactly the kind of serious analysis that it was incumbent upon their experts to do. Moreover, even if there were any such evidence, Owens Corning could not have taken the full scope of the overreading problem into account prior to the bankruptcy for its true dimensions only came to light afterwards with the studies by Drs. Friedman and Gitlin. Where subsequent evidence shows that the past is not representative of what the future will look like, even Dr. Peterson acknowledges that extrapolation is not a reliable method of forecasting. (*See* CSFB Ex. 81 at 207.)

Owens Corning echoes the Asbestos Claimants' view that historic average claim values reflected the strengths and weaknesses of the medical evidence. (Debtors' Post-Trial Br. 11.) But the evidence Owens Corning cites in support of that contention

proves exactly the opposite. Specifically, Owens Corning argues that it rooted out fraudulent testing firms where it could, and crows that it paid "only" $1,000 per claim to resolve a group of unimpaired claims based on X-ray readings by Drs. Harron and Segarra, who worked for the testing firms that Owens Corning sued under the Racketeer Influenced and Corrupt Organizations Act.[38] Owens Corning's admission that it paid anything at all to resolve these claims – the worst of the worst in terms of the sufficiency of the medical evidence – itself reflects that the pre-bankruptcy claims history is hopelessly distorted and must be adjusted to reflect the reality that claims supported by sham X-ray readings in mass screenings would never get to a jury in a federal bankruptcy claims resolution process or in the federal MDL case. Indeed, in the MDL those claims would be dismissed.

F. Dismissal Rates.

The Plan Proponents focus much of their attention on the issue of dismissal rates, and criticize Dr. Dunbar's dismissal rate adjustment on two grounds. First, the Plan Proponents criticize the method by which Dr. Dunbar calculated the dismissal rate. (PP Post-Trial Br. 40.) Second, they complain that Dr. Dunbar's adjustment for dismissal rates results in double counting because, in addition to this

[38] (Debtors' Post-Trial Br. 11-12.) These are the very same X-ray readings that Dr. Gitlin determined lacked consistency with the interpretations of qualified consultant readers to the degree that they could be explained only as evidence of "an intent to deceive or to commit fraud" by the doctors in question. (CSFB Ex. 23, 21.) And the very same X-rays that, as Mr. Leff testified, Owens Corning sent to a plaintiff-oriented B-reader, who likewise concluded that a very high percentage of them did not indicate evidence of an asbestos related disease. (Leff, 1/17/05 p.m. tr. 41.) Drs. Harron and Segarra alone were responsible for almost 85,000 historic claims against Owens Corning, many of which were paid more than $1,000. (CSFB Ex. 225.)

adjustment, he also made adjustment to eliminate the claims from doctors identified by Drs. Friedman and Gitlin as unreliable and determined that unimpaired claimants should not receive payment. According to the Plan Proponents, these adjustments supposedly resulted in double counting because many of the dismissed claims were allegedly the same claims that were supplied by the unreliable doctors or were the unimpaired claims. (*Id.*) We address each complaint below.

1. *Dr. Dunbar properly calculated the dismissal rate.*

As explained in the Banks' Post-Trial Brief, all four experts recognize that some of the pre-bankruptcy claims filed against Owens Corning were resolved without any payment. Such claims have been referred to in this case as "dismissals" or sometimes as "zero pays." All four experts also agree that because there would continue to be dismissals in the future, before the pre-bankruptcy database can be extrapolated from in order to forecast the number of compensable future claims, an adjustment needs to be made to remove the dismissals. (Banks' Post-Trial Br. 69-73.)

The dispute among the experts over the appropriate calculation of the dismissal rate concerns whether the NSP should be included in the calculation. During the NSP period, there were virtually no dismissals, as Owens Corning settled and paid almost every claim. Indeed, Dr. Rabinovitz calculated that the dismissal rate had been 54.2% in 1996, and 43.4% in 1997, (PP Ex. 235; Rabinovitz, 1/18/2005 p.m. tr. 28-29), but fell to 0.2% in 2000. Because there was no reason why there would be such a dramatic drop in dismissals under the NSP other than the fact that the company stopped objecting to claims, Dr. Dunbar did not include the NSP period in calculating the dismissal rate.

In calculating their dismissal rates, Drs. Peterson, Rabinovitz and Vasquez, used a calibration period that included the NSP period. While the Plan Proponents complain that Dr. Dunbar's calculation of the dismissal rate was improper because it excluded the NSP period, the evidence at the hearing showed that his methodology was correct. Thus, the Plan Proponents presented no evidence indicating that the 0.2% dismissal rate was an accurate reflection of what would have occurred during the 1999-2000 if the Company had not entered into the NSP. Moreover, the Plan Proponents sought to explain away the 0.2% NSP dismissal rate by contending that the NSP was only in early-to-mid stride when Owens corning filed for bankruptcy. (Snyder, 1/14/2005 a.m. tr. 75.) Mr. Snyder's testimony serves only to further undermine their position. More specifically, the Plan Proponents' witnesses testified that dismissals would not be reflected in the database in the early period of the NSP, because it took some time for a claim to cycle through the claims processing period, and therefore would not be reflected as dismissed in the database as of the date of the Bankruptcy Petition. The evidence also showed that less meritorious cases would likely be filed in greater numbers after the initial NSP period had passed, (Mayer Dep. at 98-99), and that less meritorious cases that would be more likely to be dismissed would be filed later in the NSP program. Accordingly, the Plan Proponents evidence explained why the dismissal rates in 1996 and 1997 were higher, while the very low 1999-2000 NSP rates were not only an anomaly, but an anomaly that would have disappeared if the NSP had proceeded, with dismissals returning to their former level.

Thus, the evidence clearly established that the dismissal rate in the NSP period cut short by Owens Corning's bankruptcy was anomalous. Accordingly, Dr.

Dunbar appropriately excluded this anomaly from his calculation and the other experts' estimates should also be adjusted to account for this anomalous depression of the true dismissal rate.

2. *There is no evidence of double counting.*

The Plan Proponents also complain that Dr. Dunbar, after making an adjustment for dismissal rates, double counted when he made an adjustment for claims that were "supported" by suspect medical records and for not compensating unimpaired claimants. (PP Post-Trial Br. 40.) However, neither the Debtors nor the Asbestos Claimants presented any data or analysis to support their allegation that any of the dismissals (or zero pays) were due to instance where claims relied on diagnoses from the bad doctors. They also presented no evidence to show how many claims in the database came from these unreliable doctors. Having failed to come forward with any evidence supporting their double counting allegation, it should be rejected. Indeed, the evidence at the hearing relevant to this issue presented by the Debtors undercut the Plan Proponents' position, as they contended that Owens Corning was never able to get cases dismissed on medical evidence. (Leff, 1/13/2005 p.m. tr. 41-42.) Accordingly, the only evidence in the record shows there was no overlap between the adjustments made for dismissal rates and bogus medical records – and hence no double counting. Similarly, the Plan Proponents' claim that Dr. Dunbar double counted because he valued unimpaired claims at zero is also without evidentiary support or analysis. Finally, the Asbestos Claimants contended that, in the state tort system, unimpaireds were compensated because impairment was not a prerequisite to recovery. Thus, these claims, according to the Plan

Proponents, would not have been zero pays. Once again, the Asbestos Claimants' own evidence shows there was no double counting.

G. Discount Rate.

The Asbestos Claimants' argument that the Court should use a risk-free discount rate, (*see* PP Post-Trial Br. 53), is another improper attempt to increase the recovery of asbestos creditors at the expense of other similarly-situated creditors.

Dr. Dunbar used an 8.12% discount rate in his estimate. His rate is supported by the leading case on discount rates in the bankruptcy context *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).[39] *Till* arose in the context of the interest rate to be paid to a secured creditor in a chapter 13 cram down. In rejecting a risk-free rate, the Supreme Court established a general rule of applicability on discount rates in bankruptcy cases, stating that:

> the Bankruptcy Code includes numerous provisions, that like the cram down provision require a court to: 'discoun[t] . . . [a] stream of deferred payments back to the[ir] present dollar value' . . . to ensure that a creditor receives at least the value of its claim . . . *We think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions.*

124 S. Ct. at 1958 (emphasis added) (internal citations omitted). Thus, the Asbestos Claimants' efforts to distinguish *Till* as factually different from this case (PP Post-Trial Br. 58 & n.42) are unavailing because *Till* establishes a general rule to be used in setting

[39] Using Dr. Dunbar's 8.12% discount rate netted against the Plan Proponents' 2.5% inflation rate and making no other adjustments, the Peterson estimate of future claims drops to $5.2 billion and the Rabinovitz estimate drops to $5.1 billion. (CSFB Ex. 158, at 4.) According to Dr. Vasquez's Report, using an 8.1% discount rate drops his Method I by $359 million to $1.609 billion and his Method II by $593 million to $2.581. (CSFB Ex. 73 at 86, 88.)

discount rates cases under all of the "numerous provisions" of the Bankruptcy Code where a discount rate is required.

The Asbestos Claimants' rely on inapposite, pre-*Till* and nonbankruptcy cases to support a risk-free rate. (PP Post-Trial Br. 57, *citing Jones & McLaughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), *Russell v. City of Wildwood*, 428 F.2d 1176, 1882 (3d Cir. 1970),[40] *Monaghan v. Uiterytk Lines, Ltd.*, 607 F. Supp. 1020, 1024-25 (E.D. Pa. 1985)[41] and *Thomas v. Conemaugh Black Lick R.R.*, 133 F. Supp. 533, 544 (W.D. Pa. 1955).) None of these cases concerned the estimation of future claims in bankruptcy cases; each dealt with a *current* claim for loss of future income. All of these cases apply a risk-free rate specifically to discounting a "stream of future income to replace . . . *lost wages*." *See Jones & McLaughlin*, 462 U.S. at 537; *Monaghan*, 607 F. Supp. at 1024 ("*future lost earning capacity* must be calculated and reduced to present value" at an appropriate below-market discount rate"; *Russell*, 428 F.2d at 1182 ("the measure of damages *as to loss or impairment of future earnings* is the present cash value of the loss . . .. This is to be calculated at a net rate of interest at which the money can be safely invested"); *Conemaugh*, 133 F. Supp. at 544 ("different formulae have been applied in arriving at the present value of *future earnings*") (emphasis added in all). Here, however,

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[40] *Russell*'s use of a risk-free rate was also premised on the notion that the recipient of the funds was immediately entitled to receive them and would be a "person of ordinary prudence, but without particular financial experience and skill." 428 F.2d at 1183. Here, of course, future claimants have no immediate right to receive funds (they cannot be paid until their claim has ripened and is allowed by the Trust), and the Trust has a fiduciary obligation to manage funds and hire skilled advisors to do so.

[41] *Monagahan* does not even use a risk-free rate – it uses a "low-risk" rate. 607 F. Supp. at 1025 ("Mr. Monaghan would invest in low risk, short-term securities.")

the Court must apply a discount rate to determine the present value of future claims, for the purpose of determining how much the Trust would need over the next forty-to-fifty years to pay future claims of Asbestos Claimants as they become due – claims that have not yet been asserted and do not yet exist.

There is a fundamental difference between a current claim for future lost wages which has been reduced to judgment, and a claim which has not yet arisen and for which damages are undetermined (like future tort claims). In the former, there has been an adjudication that, but for his injuries, the current claimant would have earned a sum certain in future income and that the defendant owes that plaintiff the money now (discounted to present value).[42] In contrast, there is no current liability at all to the future claimant; it is only because of these chapter 11 cases that money has to be set aside now to pay future obligations. That money will be invested by a Trust acting as a fiduciary and it will be required by the Trust documents to invest the trust assets in a prudent manner. (Hass, 1/17/2005 p.m. tr. 124.) Thus, instead of trying to set the appropriate discount rate for particular claims which are currently due, the relevant task is that once the Court estimates the indemnity value of the future claims against Owens Corning, it must decide how much would need to be put into the Trust today to satisfy those claims.

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[42] This also explains why the bank debt and bondholder claims are paid at their face value now – because the holders of those claims have a current right to payment in contrast to future claimants who are not owed anything by Owens Corning now. Thus, the Plan Proponents' assertion that using a risk-free rate to discount future claims puts those claims in parity with bank and bond claims to future claimants is wrong. Moreover, as the Plan Proponents conceded, the Banks will not be paid any interest by Owens Corning because of the bankruptcy which leaves them in a far worse position than any benefit they obtain by having future obligations accelerated to be due as of the date Owens Corning filed for bankruptcy. (*See* 1/20/2005 p.m. tr. at 25-26, argument of Mr. Inselbuch.)

Judge Lifland made this clear in *LTV Corp. v. Pension Benefit Guaranty Corp. (In re Chateaugay Corp.)* 126 B.R. 165 (Bankr. S.D.N.Y.), *aff'd in relevant part* 130 B.R. 690 (S.D.N.Y. 1991), *vacated, op. withdrawn sub nom. LTV Corp. v. PBGC*, 1993 WL 38809 (Bankr. S.D.N.Y. June 16, 1993).[43] There, the PBCG sought to use a risk-free rate to discount the amount of money it determined was due to the debtor's pension plan beneficiaries in the future on the basis that individual pensioners were entitled to have their pensions discounted at a risk-free rate. 126 B.R. at 174. Judge Lifland rejected this, noting that the "correct question is what amount of cash . . . would the PBGC have to receive . . . to be able to pay the Debtors' future obligations as they become due." *Id.* To set the discount rate Judge Lifland adopted a "theoretical framework" that was

> grounded on the proposition that *claims for a series of cash payments in the future should be discounted to present value by a discount factor which would result in estimating the amount of cash required, as of the petition date, which when prudently invested would allow the obligations to be met as they became due.*

(*Id.* at 176) (emphasis in original).

Accordingly, the court chose a discount rate based upon an analysis of the "'the rate of return achievable by a reasonable, prudent, long-term . . . investor who seeks to achieve the best long-term return on his investment consistent with preserving his capital and minimizing risk." *Id.* The court adopted expert testimony finding that a reasonable investor would hold a portfolio of 61.5% equities and 38.5% bond investments with an anticipated return of 11.5%, *id.*, an asset mix almost identical to the

[43] Although the opinion in that case was withdrawn while on appeal to the Second Circuit due to a settlement, Judge Lifland's well-reasoned decision remains persuasive authority.

holdings of the Manville Trust, (Hass, 1/17/2005 p.m. tr. 130-31), and higher than the return on assets projected by Dr. Dunbar. (Dunbar, 1/19/2005 p.m. tr. 63.) The Plan Proponents presented no contrary testimony.

The reasoning of *LTV Corp.* has been adopted by other courts. *Pension Benefit Guaranty Corp. v. Belfance (In re CSC Indus.)*, 232 F.3d 505 (6th Cir. 2000); *Pension Benefit Guaranty Corp. v. CF&I Fabricators (In re CF&I Fabricators)* 150 F.3d 1293 (10th Cir. 1998). In *Belfance*, for example, the PBGC urged a discount rate of 6.4% to set the present value the debtors would have to pay for liabilities due within twenty years; the bankruptcy court rejected that rate as too low and instead used the "prudent investor rate" – or the rate which "a reasonably prudent investor would receive from investing the funds" paid to the PBGC, which the bankruptcy court concluded was 10%. 232 F.3d at 508-09. The Sixth Circuit affirmed, holding that to use anything other than the "prudent investor rate" would have impermissibly benefited the PBGC at the expense of other unsecured creditors. *Id.* at 509; *see also CF&I Fabricators*, 150 F.3d at 1301 (holding that using the "prudent-investor discount rate to reach the present value of a claim" satisfies the chapter 11 principal that all similarly situated creditors be treated alike).[44]

There is no justification for ignoring what will actually happen here – that the Trust will invest in assets that, on average and over time, are projected to grow at

[44] The Plan Proponents also rely on the decision of the bankruptcy court in *Eagle-Picher* in support of their risk-free rate. The decision there, however, is unsupported by any citation to precedent or explanation why a risk-free rate is appropriate, and it is inconsistent with the more persuasive authority cited herein. Therefore, we submit that the Court should decline to follow it.

more than a risk-free rate. As demonstrated at trial, a discount rate as high as 10% could easily be justified. Dr. Dunbar's proposed 8.12% discount rate is conservative and should be adopted by the Court.

H. Synthesis Of The Estimates.

There are stark differences between the competing estimates, and examination of those differences compels the conclusion that the Banks' estimate is far more defensible than those of the Asbestos Claimants or the Debtors. The Asbestos Claimants' estimates are tied inextricably to Owens Corning's historic experience in the state court system prior to bankruptcy. But the evidence has demonstrated overwhelmingly that the company's claim history was shaped by factors that will not apply in any bankruptcy claims resolution process – either in the federal tort system or a bankruptcy trust – factors like the whip of punitive damages, the inability to eliminate claims based on sham X-ray readings conducted in mass screenings because it was cheaper to pay such claims than it was to dispute them, the massive surge of claims that accompanied the NSP, and the corresponding decline of dismissal rates. Simply put, the Asbestos Claimants asked the wrong question. Their estimates approximate what would happen if the abuses of a broken system were perpetuated in the future. In contrast, the Banks have estimated what it would cost to fairly compensate those truly injured by Owens Corning products, based on the indisputable premise that, as a court of equity charged with implementing the bankruptcy code's fundamental policy of equal treatment of creditors, this Court will not find itself bound to replicate the abuses of the past.

Dr. Dunbar prepared the most sophisticated, precise and relevant estimate available to this Court for the allowable value of pending and future asbestos personal

injury claims against Owens Corning. He performed more analyses, considered more sources of data, and evaluated more alternative approaches than any of the other experts. When mischaracterizations of Dr. Dunbar's work by the plan proponents are corrected, as we have done in this brief, Dr. Dunbar's estimate of $2.046 billion stands as the most reliable and realistic estimate.

Drs. Peterson and Rabinovitz, in contrast, use forecasting methodologies designed to replicate the past, regardless of the likelihood that future circumstances will change. So, they project into the future all the abuses and anomalies of Owens Corning's experience in the tort system, including claim values skewed upward by punitive damages, claim rates exaggerated by the anomalous 1999-2000 surge associated with the NSP, and dismissal rates artificially depressed by the company's inability to fend off wave after wave of claims generated by mass screenings and the non-adversarial approach of the NSP in which the company found it more beneficial to pay claims rather than dispute them. And even while they erroneously claim that they are legally bound to replicate the past, the Asbestos Claimants and their experts feel free to depart from the past when doing so will increase their estimates. Thus, they present as their preferred estimate Dr. Peterson's $11.1 billion number, based on the thoroughly discredited increasing propensity model in which he assumes that claiming rates in the future will be even higher than they were in the past. This embodies the flaws in the Plan Proponents' approach to estimation. These flaws are further illuminated when one examines the views of Dr. Peterson at times when he was not advocating for the highest estimate possible, such as his comments to Judge Weinstein in the Manville case cautioning that extrapolation from the past is problematic if circumstances have changed.

While the Asbestos Claimants ignore this advice from their own expert, the Debtors quite remarkably ignore the entire estimate prepared by their expert, Dr. Vasquez. The Debtors are compelled to concede that Dr. Vasquez and Mr. Mayer's combined estimate of present and future asbestos liability is reasonable. (Debtors' Br. at 25.) This concession notwithstanding, in their cross-examination and in their brief the Debtors manipulate Dr. Vasquez's numbers in an effort to inflate his estimate as high as possible. These facts demonstrate the degree to which the Debtors have abdicated their fiduciary duties and improperly ceded control of these cases to the Asbestos Claimants.

The Court should disregard the Debtors' effort at trial and in their papers (*see* Debtors' Post-Trial Br. 28-31) to distance themselves from Dr. Vasquez's well-reasoned report as part of a pattern in which the Debtors repeatedly presented the Court "evidence" that varied substantially from their conduct in the world outside these estimation proceedings. The record is replete with examples.

First, the Debtors called their own lawyers to testify that punitive damages played no role in NSP settlements. Perhaps they even believed this to be true, knowing as they did that plaintiffs' lawyers would never agree to call any component of the settlement payments punitive damages, for to do so would require their clients to pay income tax on that portion of the payment. (Leff, 1/13/2005 p.m. tr. 79.) But while they denied at trial that settlements had any punitive component, for *two years* prior to the trial the Debtors were fully aware of the report of their own expert, which found that there was a significant punitive component of both NSP and non-NSP settlements. If the Debtors truly believed Dr. Vasquez was wrong to exclude punitive damages from his

estimate, they would have asked him to change his report – which was and is being used in their SEC filings – at some point prior to his testimony on the last day of the trial.

Second, while the Debtors now deny that punitive damages had any effect on settlement values, in an affidavit submitted to numerous courts prior to bankruptcy in an attempt to demonstrate that the company had already been punished enough, Owens Corning took exactly the opposite position. (*See* above at 50.)

Third, the Debtors now assert that determining the impact of punitive damages requires "speculation" (Debtors' Post-Trial Br. 15), but Dr. Vasquez's extensive, well-reasoned report, drafted in consultation with the very same lawyers who represented the Debtors at the estimation hearing, precisely calculated the impact of punitive damages on settlements. (*See* above at 49-50.)

Finally, a fourth example is the Debtors' contention regarding the effects of consolidation. While Owens Corning now contends the Banks' focus on consolidation of "small groups of nonmalignancy claims with . . . malignancies" is misplaced, as we demonstrated, the record shows Owens Corning took a different position pre-bankruptcy. (*See* above at 31-35.)

Given this pattern, the Debtors' current representations to the Court lack credibility. The Court should consider Dr. Vasquez's analysis as set forth in his thoroughly documented and well-reasoned report, not the revisionist version that Owens Corning crafted out of whole cloth by asking Dr. Vasquez to add items back into his estimate, such as punitive damages, that he himself does not believe should be added back. As the Debtors have conceded, Dr. Vasquez's Method I estimate of $3.2 billion (when combined with the value of pending claims) is squarely within the range of

reasonableness, although its discount and dismissal rates are too low, and it does not properly account for the role that bogus medical evidence played in inflating claim counts, as previously explained. For example, adjusting Dr. Vasquez's Method I estimate to use the legally correct discount rate of 8.1% brings his estimate to approximately $2.85 billion – very close to Dr. Dunbar's analysis.[45] Using Dr. Dunbar's more thorough and detailed analysis on the remaining issues would make the Vasquez and Dunbar estimates even closer.[46] Because Dr. Dunbar's analysis incorporates all of these adjustments already, we respectfully submit it should be adopted by the Court.

IV. CONCLUSION.

For the reasons set forth herein and in the Banks' Post-Trial Brief, the Court should conclude that the present value of all pending and future asbestos claims against Owens Corning, including settled but not paid contract claims, is $2.046 billion.

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[45] CSFB. Exhibit 12 (the Vasquez Report) demonstrates at page 86 the impact of increasing the discount rate used by Dr. Vasquez by 2 percentage points.

[46] Alternatively, as explained in the Banks' Post-Trial Brief the only adjustments to the analysis of Dr. Dunbar that could be supported by evidence are three changes, which collectively increase his estimate by $301 million. (*Id.* 90-91.) These changes, if all adopted, would produce an adjusted forecast of $2.347 billion.

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Dated: February 18, 2005

APPENDIX A – COMPARISON OF VARIOUS ESTIMATION METHODOLOGIES[i]

ISSUE	DR. DUNBAR	DR. VASQUEZ	DR. PETERSON	DR. RABINOVITZ
NSP SURGE	**Conclusion:** *NSP caused an unsustainable surge in claims.* **Support:** *Written analysis demonstrated that NSP claims were much older than claims had been historically.*[ii]	**Conclusion:** *NSP caused an unsustainable surge in claims.* **Support:** *Written analysis demonstrated that NSP claims were much older than claims had been historically.*[iii]	**Conclusion:** *NSP surge "not even an issue" in this case.* **Support:** *No written analysis as to "whether or not increase in claims under the NSP was an anomalous surge or something that would continue."*[iv]	**Conclusion:** *NSP caused claims increase that needed to be "smoothed out." Did not remove full effect of NSP surge.* **Support:** *Incomplete analysis which fails to rely on all available data.*[v]
INCREASING PROPENSITY TO SUE MODEL	**Conclusion:** *Rejected increasing propensity to sue model.* **Support:** *Increase inconsistent with Owens Corning historical experience.*[vi]	**Conclusion:** *Rejected increasing propensity to sue model.* **Support:** *Increase inconsistent with Owens Corning historical experience.*[vii]	**Conclusion:** *Projected increase in claims filing adding $2.7 billion to forecast.* **Support:** *Used Manville and National Gypsum experience from 1993-1994 and 1996-1997 (not Owens Corning data) to calculate nonmalignant multiplier.*[viii]	**Conclusion:** *Rejected increasing propensity model.* **Support:** *Inconsistent with Owens Corning historical experience.*[ix]
AGE ADJUSTMENT TO PROPENSITY TO SUE	**Conclusion:** *Propensity to sue Owens Corning decreases as claimants age.* **Support:** *Analysis of Owens Corning historical database.*[x]	**Conclusion:** *Propensity to sue Owens Corning decreases as claimants age.* **Support:** *Analysis of Owens Corning historical database.*[xi]	**Conclusion:** *No adjustment based on claimant age.* **Support:** *No written analysis.*[xii]	**Conclusion:** *No adjustment based on claimant age.* **Support:** *No written analysis.*[xiii]
KPMG V. NICHOLSON MODEL	**Conclusion:** *Used data substantially similar to KPMG but removed workers with primary exposure to non Owens Corning products.* **Support:** *Testing showed KPMG data more closely tracks actual incidence of mesothelioma.*[xiv]	**Conclusion:** *KPMG data is superior.* **Support:** *Testing showed KPMG data more closely tracks actual incidence of mesothelioma.*[xv]	**Conclusion:** *Used unmodified Nicholson data.* **Support:** *Believed Nicholson data matched government statistics on incidence. but did not statistically demonstrate accuracy of conclusion.*[xvi]	**Conclusion:** *KPMG data is superior.* **Support:** *KPMG used more current data to project future incidence than Nicholson.*[xvii]
AGE ADJUSTMENT TO CLAIM VALUES	**Conclusion:** *Claim values decrease as claimants age.* **Support:** *Multiple regression analysis revealed "statistically significant" difference in claim values by age of claimant.*[xviii]	**Conclusion:** *Claim values decrease as claimants age.* **Support:** *Analysis showed that "the older the claimant, the less the settlement amount."*[xix]	**Conclusion:** *No adjustment based on claimant age.* **Support:** *No written analysis. Dr. Peterson has adjusted claim values for age in previous cases.*[xx]	**Conclusion:** *No adjustment based on claimant age.* **Support:** *No analysis of "whether age tended to correlate with settlement amounts to comparable disease."*[xxi]
PUNITIVE DAMAGES ADJUSTMENT	**Conclusion:** *Decreased historical claim values to reflect impact of punitive damages.* **Support:** *Extensive analysis of Owens Corning's database. Recognized that "the threat of punitive damages at trial" inflated the settlement value of claims.*[xxii]	**Conclusion:** *Decreased historical claim values to reflect impact of punitive damages.* **Support:** *Discussions with Owens Corning lawyers that NSP settlements included punitive damages component. Multiple regression analysis of impact of punitive damages.*[xxiii]	**Conclusion:** *No adjustment for punitive damages.* **Support:** *No written analysis of " the extent to which punitive damages or the risk thereof impacted the pre-bankruptcy claims values paid by Owens Corning."*[xxiv]	**Conclusion:** *No adjustment for punitive damages.* **Support:** *No quantification of the impact of punitive damages on settlements.*[xxv]
VERDICT ADJUSTMENT	**Conclusion:** *Decreased historical claim values to remove impact of verdicts.* **Support:** *Analysis of database to determine impact of verdicts. Verdicts will not occur in bankruptcy resolution of claims.*[xxvi]	**Conclusion:** *Decreased historical claims values to remove impact of verdicts.* **Support:** *Analysis of database to determine impact of verdicts. Verdicts will not occur in bankruptcy resolution of claims.*[xxvii]	**Conclusion:** *No adjustment for impact of verdicts.* **Support:** *Analysis assumed claims would be resolved as they were in the pre-petition world.*[xxviii]	**Conclusion:** *No adjustment for impact of verdicts.* **Support:** *Analysis assumed claims would be resolved as they were in the pre-petition world.*[xxix]
PAYMENTS TO UNIMPAIRED CLAIMANTS	**Conclusion:** *Unimpaired claimants paid either $1,000 or $0.00 – impaired nonmalignant claimants paid more.* **Support:** *. NSP future values. provisions of many non-NSP agreements and NSP agreements for current claimants. ability of court to distinguish between people with injury and people without injury.*[xxx]	**Conclusion:** *Under Method I. unimpaired claimants paid $1.000 – impaired nonmalignant claimants paid more.*[xxxi] **Support:** *NSP future values and provisions of many NSP agreements for current claimants.* [xxxii]	**Conclusion:** *Unimpaired nonmalignant claimants paid same amount as impaired nonmalignant claimants.* **Support:** *Projected values without distinguishing between impaired claimants and unimpaired claimants.*[xxxiii]	**Conclusion:** *Unimpaired nonmalignant claimants paid same amount as impaired nonmalignant claimants.* **Support:** *Assumes that impaired claimants cannot be distinguished from unimpaired claimants.*[xxxiv]

END NOTES TO APPENDIX A

[i] In addition to the issues highlighted in this chart there are certain other differences between the methodologies of the various experts – including between Dr. Dunbar and Dr. Vasquez – such as their approaches to dismissal rates, discount rates, and whether they adjust to account for overreading by certain B-readers. These other differences in the methodologies (and the merits of Dr. Dunbar's approach) are fully addressed in our brief in Section III(e)(f)&(g).

[ii] (*See* CSFB Ex. 159 at 11; Dunbar, 1/19/2005 a.m. tr. 43-44; Dunbar 1/19/2005 p.m. tr. 10-12.)

[iii] (*See* Vasquez, 1/20/2005 a.m. tr. 25-31.)

[iv] (*See* Peterson, 1/17/2005 p.m. tr. 11.)

[v] (*See* Rabinovitz, 1/18/2005 a.m. tr. 24-25, 83-84; Vasquez, 1/20/2005 p.m. tr. 15-17.)

[vi] (*See* Dunbar, 1/19/2005 a.m. tr. 43-44; Dunbar 1/19/2005 p.m. tr. 10-12.)

[vii] (*See* Vasquez, 1/20/2005 a.m. tr. 25-31, 33-34.)

[viii] (*See* Peterson, 1/17/2005 p.m. tr. 56-57.)

[ix] (*See* Rabinovitz, 1/18/2005 a.m. tr. 24-25.)

[x] (*See* Dunbar, 1/19/2005 p.m. tr. 13-17.)

[xi] (*See* Vasquez, 1/20/2005 a.m. tr. 39-40.)

[xii] (*See* Vasquez, 1/20/2005 a.m. tr. 41.)

[xiii] (*See* Rabinovitz, 1/18/2005 a.m. tr. 85.)

[xiv] (*See* Dunbar, 1/19/2005 a.m. tr. 46-49.)

[xv] (*See* Vasquez, 1/20/2005 a.m. tr. 36-37.)

[xvi] (*See* Peterson, 1/17/2005 a.m. tr. 53-57.)

[xvii] (*See* Rabinovitz, 1/18/2005 a.m. tr. 31-32.)

[xviii] (*See* Dunbar, 1/19/2005 p.m. tr. 54-55.)

[xix] (*See* Vasquez, 1/20/2005 a.m. tr. 18-19.)

[xx] (*See* Vasquez, 1/20/2005 a.m. tr. 41; Peterson, 1/17/2005 a.m. tr. 94.)

[xxi] (*See* Rabinovitz, 1/18/2005 tr. 85-86.)

[xxii] (*See* Dunbar, 1/19/2005 p.m. tr. 51-52; CSFB Ex. 307.)

[xxiii] (*See* Vasquez, 1/20/2005 a.m. tr. 46-50; Vasquez, 1/20/2005 p.m. tr. 7-8; CSFB Ex. 12 at 70-71.)

[xxiv] (*See* Peterson, 1/17/2005 p.m. tr. 12-13.)

[xxv] (*See* Rabinovitz, 1/18/2005 a.m. tr. 64.)

[xxvi] (*See* Dunbar, 1/19/2005 p.m. tr. 58.)

[xxvii] (Vasquez, 1/20/2005 a.m. tr. 45.)

[xxviii](Rabinovitz, 1/18/2005 a.m. tr. 37.)

[xxix] (Peterson, 1/17/2005 a.m. tr. 42; PP Ex. 65 at 4-5; Vasquez, 1/20/2005 a.m. tr. 42.)

[xxx] (*See* Dunbar, 1/19/2005 p.m. tr. 58-59; Leff, 1/13/2005 p.m. tr. 38-39, 60-62.)

[xxxi] Under Method 2, Dr. Vasquez did not distinguish between impaired and unimpaired nonmalignant claims. (*See* CSFB Ex. 12 at 73, Table 4-6.)

[xxxii] (*See* Vasquez, 1/20/2005 a.m. tr. 29-31, 59.)

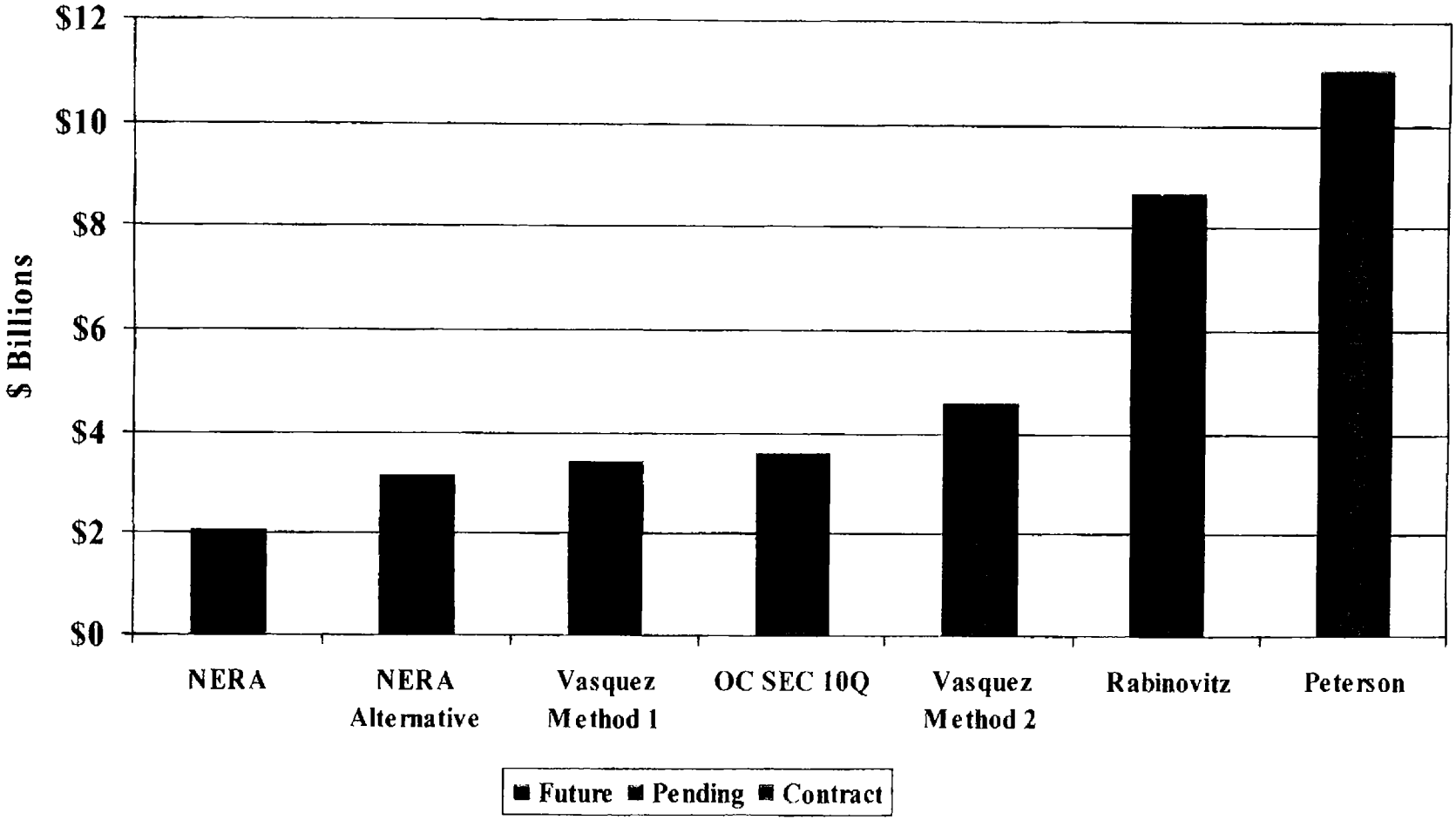
[xxxiii] (*See, e.g.*, PP Ex. 65 at 27-28 (applying average indemnity amount to aggregate projected future non-malignant claims without distinguishing between impaired and unimpaired claims.)

[xxxiv] (*See* Rabinovitz, 1/18/2005 p.m. tr. 22-23.)

Appendix B

Comparison of Experts Demonstrative Exhibit 310 (See 1/20/2005 p.m. tr. at 88, argument of Mr. Miller.)

Comparison of Forecasts



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

OWENS CORNING, *et al.*,	:	
	:	**Civil Action**
v.	:	
	:	**No. 04-905 (JPF)**
CREDIT SUISSE FIRST BOSTON	:	

COMPENDIUM OF UNREPORTED CASES IN SUPPORT OF POST-HEARING REPLY BRIEF OF CSFB, AS AGENT, IN OPPOSITION TO PLAN PROPONENTS' MOTION FOR ESTIMATION OF OWENS CORNING'S PENDING AND FUTURE ASBESTOS LIABILITIES

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February 18, 2005

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EXHIBIT 1

C

Judicial Panel on Multidistrict Litigation.
In re ASBESTOS Bankruptcy Litigation
No. 950.

Dec. 9, 1992.

Before NANGLE, POLLACK, MERHIGE, ENRIGHT, BRIMMER, GRADY and SANDERS, [FN*], JJ.

ORDER

NANGLE, Judge.

***1** On August 21, 1992, the Panel issued an order to show cause why the bankruptcy cases pending in eight districts and listed on the attached Schedule A should not be transferred to the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407 and assigned to the Honorable Charles R. Weiner and such other judges as might be designated. The issuance of the show cause order was prompted by a request from Judge Weiner acting in his capacity as the transferee judge for MDL-975, *In re Asbestos Products Liability Litigation (No. VI)*. Judge Weiner requested that the Panel either centralize the bankruptcy cases under Section 1407 or facilitate assignment of a single district judge to the eight districts where the bankruptcy cases had been brought. [FN1]

On the basis of the papers filed and the hearing held, the Panel is persuaded that transfer under 28 U.S.C. § 1407 at this time would not necessarily best serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation. Accordingly, we shall vacate our August 21st order to show cause.

When the Panel entered its i)pinion and order centralizing MDL-875 in the Eastern District of Pennsylvania, one of the matters left open for future Panel consideration was how and whether all or part of the legal proceedings involving asbestos company defendants that had entered bankruptcy should be included in Section 1407 centralization. *In re Asbestos Products Liability Litigation (No. VI)*, 771 F.Supp. 415, 421 n.6 (J.P.M.L.1991). The bankruptcy reorganization proceedings were not subject to the Panel's MDL-875 order to show cause and the question was therefore not ripe for a Panel decision. The Panel considered it appropriate to address the myriad of complex issues surrounding the 1407 transfer of asbestos bankruptcy cases only upon benefit of hearing from all the parties and constituencies involved in the bankruptcy cases.

The responses to the Panel's August 21st order to show cause and the arguments at the MDL-950 hearing held on November 19, 1992, have provided important information relevant to the Panel's 1407 transfer decision. Specifically, the parties to the bankruptcy cases have 1) offered serious concerns that transfer would adversely impact the constituent bankruptcy cases, and 2) expressed their confidence that the problems raised by Judge Weiner (*e.g.*, quantification of claims in the bankruptcy proceedings, determination of the availability of funds to compensate claimants with **valid** claims against debtor companies and non-debtor MDL-875 defendants, mechanisms for more efficient claims processing and distribution of funds, reducing attorneys' fees and costs, etc.) could be resolved through consultation, exchange of information and coordination between Judge Weiner and the concerned bankruptcy courts. [FN2] The Panel wishes to fully develop these suggestions before further contemplating 1407 transfer. We emphasize, however, that the Panel could reconsider 1407 transfer should the bankruptcy courts and the paties fail in their voluntary efforts to coodinate with Judge Weiner.

***2** Accordingly, at this time: 1) we invite the various bankruptcy courts to coordinate with Judge Weiner concerning identification and implementation of the means necessary to secure their mutual objectives of fair and efficient resolution of bankruptcy cases and asbestos personal injury claims; 2) we request quarterly updates from the bankruptcy courts and Judge Weiner to the Panel identifying the procedural and substantive progress toward reaching those objectives; and 3) we order that the Panel's August 21, 1992 order to show cause entered in this docket be, and the same hereby is, VACATED without prejudice.

FN* Judge Sanders took no part in the decision of this matter.

FN1. Judge Wiener stated four reasons for his

request: 1) transaction costs in the bankruptcies, including attorneys' fees, an extremely high and may deplete assets at the expense of worthy asbestos injury claimants; 2) there is a need for uniform rulings on such matters as how asbestos injury claimants are defined, how claimants who have not progressed to asbestos related diseases are treated, and how punitive damages should be handled; 3) there is a need for a single facility or mechanism created to process and pay existing and future claimants; and 4) a single judge exercising authority over all the bankruptcies can better facilitate and assist settlement negotiations between claimants and debtor companies.

FN2. Such an approach is already being used successfully by Judge Weiner and state court judges throughout the nation assigned to personal injury asbestos litigation.

END OF DOCUMENT

EXHIBIT 2

LEXSEE 2002 US DIST LEXIS 16590

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI); This Document Relates to: ALL ACTIONS

CIVIL ACTION NO. MDL 875 (Including MARDOC, FELA, and TIREWORKER cases)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2002 U.S. Dist. LEXIS 16590

January 14, 2002, Decided
January 15, 2002, Filed; January 16, 2002, Entered

DISPOSITION: [*1] Cases administratively dismissed.

COUNSEL: For FRANCIS E. MCGOVERN, SPECIAL MASTER: FRANCIS E. MC GOVERN, THE UNIVERSITY OF ALABAMA, TUSCALOOSA, AL USA.

For STEPHEN B. BURBANK, SPECIAL MASTER: STEPHEN B. BURBANK, UNIV OF PA LAW SCHOOL, PHILA, PA USA.

JUDGES: Charles R. Weiner, S.J.

OPINIONBY: Charles R. Weiner

OPINION:

ADMINISTRATIVE ORDER NO. 8

THE COURT, has previously received the Motion For Case Management Order Concerning Mass Litigation Screenings, and has held a hearing thereon and reviewed the briefs and comments from counsel regarding the issue. The Court notes that a similar situation regarding the massive MARDOC filings was resolved by an administrative order dismissing those cases without prejudice and tolling the applicable statutes of limitations while retaining those actions in a special active status category. The Court feels that this administrative process has worked well with the Court's continued supervision as well as counsel monitoring the cases that become ready for trial or disposition.

Priority will be given to the malignancy and other serious health cases over the asymptomatic claims.

Furthermore, the position of the moving parties, that the screening cases have [*2] been filed without a doctor-patient medical report setting forth an asbestos related disease, has not been refuted. The basis of each filing, according to the evidence of the moving parties, is a report to the attorney from the screening company which states that the potential plaintiff has an x-ray reading 'consistent with' an asbestos related disease. Because this report may set in motion the running of any applicable statutes of limitations, a suit is then commenced without further verification. Oftentimes these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.

The Court has the responsibility to administratively manage these cases so as to protect the rights of all of the parties, yet preserve and maintain any funds available for compensation to victims.

THE COURT FINDS that the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of [*3] depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs.

IT IS THEREFORE THE ORDER OF THIS COURT:

1. All non-malignant, asbestos related, personal-injury cases assigned to MDL 875 which were initiated through a mass

screening shall be subject to administrative dismissal without prejudice and with the tolling of all applicable statutes of limitations. A dismissal order may be prompted by motion of any party and, upon request, shall be subject to a hearing at which time the Court may receive evidence that such case does or does not qualify for administrative dismissal hereunder.

2. Once a case is administratively dismissed, the case will remain active for the Court to continue to entertain settlement motions and orders, motions for amendments to the pleadings, substitutions, and other routine matters not requiring a formal hearing.

3. Any party may request reinstatement to active status of a case by filing with the Court a request for reinstatement together with an affidavit setting forth the facts that qualify the case for active processing. The motion for reinstatement shall be served by [*4] mail (known counsel of record for a particular defendant shall suffice) upon all parties (whether previously served or not) and any party may within ten (10) days request a hearing on the motion. The burden at any hearing to reinstate shall be upon the plaintiff to show some evidence of asbestos exposure and evidence of an asbestos-related disease. Exposure to specific products shall not be a requirement for reinstatement.

4. Following reinstatement, counsel shall have thirty (30) days to complete initial service of process and answers will be due twenty (20) days following service.

The Court encourages the parties to work informally upon discovery and settlement of these cases during any period of administrative dismissal and will entertain necessary discovery motions to facilitate the process. The Court will also be available to convene all the necessary parties and to facilitate the progress of the cases that are ready for early settlement decisions, setting of trial dates, and/ or remand if desired.

BY THE COURT

Charles R. Weiner S.J.

Date: 1/14/02

EXHIBIT 3

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, MISSISSIPPI

MAXWELL NOBLE, ET AL. — PLAINTIFFS

v.

E.H. O'NEIL COMPANY, ET AL. — DEFENDANTS

RECEIVED & FILED
JAN 24 2005
BURNELL HARRIS, Circuit Clerk
By _____ D.C.

CIVIL ACTION NO. 98-0024

ORDER

COMES NOW this Court and having been fully advised in the premises, does hereby find that the claims of the Plaintiffs in the above-referenced matter shall be severed and transferred or dismissed without prejudice as indicated below.

IT IS THEREFORE ORDERED that:

1. The claims of the plaintiffs in this action who are not residents of the State of Mississippi and who do not allege exposure to asbestos in the State of Mississippi (see Exhibit A attached hereto and fully incorporated herein by reference) are hereby dismissed without prejudice. Plaintiffs subject to this dismissal order are indicated on Exhibit A attached hereto by the notation "Dismissed Without Prejudice" in the Transfer/Dismissal Status Column.

2. The claims of all plaintiffs in this action who are residents of the State of Mississippi or who allege exposure to asbestos in the State of Mississippi are hereby transferred to the Circuit Court in the county indicated for each claimant in the Transfer/Dismissal Status Column on Exhibit A attached hereto. Said transfer is based on the information provided by Plaintiffs' Counsel subject to the mandates of Rule 11 of the Mississippi Rules of Civil Procedure. The Defendants have not waived their right to challenge venue in the transferee Court should it be determined that the information provided by Plaintiffs' Counsel to support venue was inaccurate.

3. To aid in the transfer of so many claims and in an effort to preserve some judicial economy, any Plaintiffs (all of which are severed from one another by order of this Court) who are being transferred to the same county may be transferred en mass and assigned separate cause of action numbers upon arrival in the transferee Court.

4. TRANSFERS ARE at the cost of the PLAINTIFFS

SO ORDERED this the 24th day of JANUARY, 2005.

CIRCUIT COURT JUDGE

Submitted By:

Marcy Bryan Croft (MBN 10864)
Forman Perry Watkins Krutz & Tardy LLP
200 S Lamar St
Ste 100
Jackson, MS 39201

TO: GKP
CYC
NBC

EXHIBIT "A"

MAXWELL NOBLE, ET AL. Vs. E.H. O'NEIL COMPANY, ET AL
JEFFERSON COUNTY, MISSISSIPPI CA.NO.: 98-0024

NO.	NAME OF PLAINTIFF	COUNTY/STATE OF RESIDENCE	COUNTY/STATE OF EXPOSURE	COUNTY OF RESIDENCE OF DEFENDANT'S INCORPORATED IN MISSISSIPPI	TRANSFER/DISMISSAL STATUS
1	Irwin, Herman Calvin	Abbeville, AL	Alabama, Tennessee, Georgia	None	Dismissed Without Prejudice
2	Graham, Jr., Samuel Thomas	Abernant, Al	Alabama	None	Dismissed Without Prejudice
3	Reid, Sr , Saul Edward	Abernant, AL	Alabama, Louisiana	None	Dismissed Without Prejudice
4	Allred, Bobby Earl	Adams County, MS	Adams County MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
5	Barber, Augustine	Adams County, MS	Adams County, MS	None	Adams County, MS
6	Baroni, Sr., Joseph Carroll	Adams County, MS	Adams County, MS	None	Adams County, MS
7	Bateman, Linda Elese	Adams County, MS	Adams County, MS	None	Adams County, MS
8	Berryhill, Charles David	Adams County, MS	Hinds County, MS	Jackson County, MS	Hinds County, MS
9	Brewer, Sr., Jimmie Carl	Adams County, MS	Adams County, MS	None	Adams County, MS
10	Brice, Robert E.	Adams County, MS	Adams County, MS	None	Adams County, MS
11	Brin, Jr , Louie Jimmy	Adams County, MS	Adams County, MS	None	Adams County, MS
12	Brumfield, Sr., Henry H	Adams County, MS	Adams County, MS	None	Adams County, MS
13	Buckles, Elizabeth Ann	Adams County, MS	Adams County, MS	None	Adams County, MS
14	Buckles, Sr., Benny Ray	Adams County, MS	Adams County, MS, Warren County, MS	None	Adams County, MS
15	Campbell, Lola Mae	Adams County, MS	Adams County, MS	None	Adams County, MS
16	Causey, Clarence Ray	Adams County, MS	Adams County, MS, Pearl River County, MS	None	Adams County, MS
17	Claiborne, Joseph	Adams County, MS	Adams County, MS	None	Adams County, MS
18	Coleman, Nathaniel	Adams County, MS	Adams County, MS	None	Adams County, MS
19	Cotten, Jr , Julius Collier	Adams County, MS	Adams County, MS	None	Adams County, MS
20	Davis, Jr., Tommie	Adams County, MS	Adams County, MS	None Adams	~~Dismissed Without Prejudice~~
21	Davis, Robert Wayne	Adams County, MS	Texas, Adams County, MS	None	Adams County, MS
22	Dixon, Sr., Elmer	Adams County, MS	Adams County, MS		Adams County, MS
23	Foster, Jr., Stewart	Adams County, MS	Adams County, MS	None	Adams County, MS
24	Gordon, Eugene	Adams County, MS	Adams County, MS		Adams County, MS
25	Gray, Alton Earl	Adams County, MS	Adams County, MS	None	Adams County, MS
26	Hammett, Jr , Bill Grover	Adams County, MS	Adams County, MS	None	Adams County, MS
27	Harrigill, Jr., Charles Lenroe	Adams County, MS	Georgia; Adams County, MS; Hinds County, MS	None	Hinds County, MS
28	Harrigill, Sr , Charles Lenroe	Adams County, MS	Adams County, MS	None	Adams County, MS
29	Harrison, Jessie Clinton	Adams County, MS	Adams County, MS	None	Adams County, MS
30	Harrison, Mary Bell	Adams County, MS	Adams County, MS	None	Adams County, MS
31	Johnson, Wilbert M	Adams County, MS	Adams County, MS	None	Adams County, MS
32	Joseph, Jr , Leo Lawrence	Adams County, MS	Adams County, MS	None	Adams County, MS
33	Kimball, Wardell	Adams County, MS	Adams County, MS	None	Adams County, MS
34	Klar, Byrline E	Adams County, MS	Adams County, MS	None	Adams County, MS
35	Laird, Sr., Hendrick Jefferson	Adams County, MS	Adams County, MS; Jackson County, MS; Lincoln County, MS	None	Adams County, MS
36	Lindley, Charles Arthur	Adams County, MS	Adams County, MS	None	Adams County, MS
37	McDonald, Lillie M.	Adams County, MS	Adams County, MS	None	Adams County, MS
38	Minor, Carl T	Adams County, MS	Adams County, MS	None	Adams County, MS
39	Murray, Leslie James	Adams County, MS	Warren County, MS	None	Warren County, MS
40	Reagan, Sr., Jessie W.	Adams County, MS	Louisiana, California, Adams County, MS	None	Adams County, MS
41	Schleet, Mary Wanda	Adams County, MS	Adams County, MS	None	Adams County, MS
42	Smith, Ione	Adams County, MS	Adams County, MS	None	Adams County, MS
43	Smith, Margaret Evelyn	Adams County, MS	Adams County, MS	None	Adams County, MS
44	Smith, Paul	Adams County, MS	Adams County, MS	Hinds County, MS	Hinds County, MS
45	Sterling, Edward Harold	Adams County, MS	Adams County, MS	None	Adams County, MS
46	Stroud, Charles Edward	Adams County, MS	Adams County, MS	None	Adams County, MS
47	Sullivan, Charles Ray	Adams County, MS	Louisiana, Adams County, MS	Hinds County, MS, Jackson County, MS, Jones County, MS, Forrest County, MS	Hinds County, MS
48	Taylor, Sr , David Samuel	Adams County, MS	Adams County, MS	None	Adams County, MS
49	Washington, Percy Allen	Adams County, MS	Adams County, MS	None	Adams County, MS
50	Watkins, Eugene M.	Adams County, MS	Adams County, MS	None	Adams County, MS
51	Watkins, Glenn R.	Adams County, MS	Adams County, MS	None	Adams County, MS
52	West, Sr., Plez	Adams County, MS	Illinois, Adams County, MS	None	Adams County, MS
53	Williams, Sr , Louis	Adams County, MS	Adams County, MS	None	Adams County, MS
54	Aldridge, James	Adamsville, AL	Alabama	None	Dismissed Without Prejudice

[Pages 2 of 72 through 71 of 72, inclusive, redacted for brevity]

EXHIBIT "A"

MAXWELL NOBLE, ET AL. Vs. E.H. O'NEIL COMPANY, ET AL
JEFFERSON COUNTY, MISSISSIPPI CA.NO.: 98-0024

NO.	NAME OF PLAINTIFF	COUNTY/STATE OF RESIDENCE	COUNTY/STATE OF EXPOSURE	COUNTY OF RESIDENCE OF DEFENDANTS INCORPORATED IN MISSISSIPPI	TRANSFER/DISMISSAL STATUS
4281	Russell, Jr., Henry McCarty	Wilsonville, AL	Alabama	None	Dismissed Without Prejudice
4282	Allred, William Lloyd	Winfield, AL	Alabama	None	Dismissed Without Prejudice
4283	Henderson, Jimmie Earl	Winfield, AL	Alabama	None	Dismissed Without Prejudice
4284	Norris, James Edwin	Winfield, AL	Alabama	None	Dismissed Without Prejudice
4285	Price, Hershell Dale	Winfield, AL	Alabama	None	Dismissed Without Prejudice
4286	Vaughn, Ernest	Winfield, AL	Alabama	None	Dismissed Without Prejudice
4287	Gillett, James Olyn	Winston County, MS	Winston County, MS	None	Winston County, MS
4288	Harry, Jr., Billy Briggs	Winston County, MS	Lauderdale County, MS	None	Lauderdale County, MS
4289	Robertson, Sr., Charles David	Winston County, MS	Tennessee	None	Dismissed Without Prejudice
4290	Young, Harold William	Winston County, MS	Winston County, MS	None	Winston County, MS
4291	Gafnea, Georgia Hazel	Woodstock, AL	Alabama	None	Dismissed Without Prejudice
4292	Green, Raymond Calvin	Woodstock, AL	Alabama	None	Dismissed Without Prejudice
4293	Jones, Gary Randall	Woodstock, AL	Alabama	None	Dismissed Without Prejudice
4294	Read, Dale Eugene	Woodstock, AL	Alabama	None	Dismissed Without Prejudice
4295	West, Alvin Jack	Woodstock, AL	Alabama	None	Dismissed Without Prejudice
4296	Whitsett, Clayton Leon	Woodstock, AL	Alabama	None	Dismissed Without Prejudice
4297	Williams, Curtis Edward	Woodstock, AL	Alabama	None	Dismissed Without Prejudice
4298	Hess, Sr , Charles Clinton	Worthington, WV	West Virginia	None	Dismissed Without Prejudice
4299	Adams, Elwood	Wurtland, KY	Kentucky	None	Dismissed Without Prejudice
4300	DeLoach, Charles Edward	Wylam, AL	Alabama, California	None	Dismissed Without Prejudice
4301	Baty, J. B	York, AL	Alabama	None	Dismissed Without Prejudice

EXHIBIT "A"

MAXWELL NOBLE, ET AL. Vs. E.H. O'NEIL COMPANY, ET AL
JEFFERSON COUNTY, MISSISSIPPI CA.NO.: 98-0024

NO.	NAME OF PLAINTIFF	COUNTY/STATE OF RESIDENCE	COUNTY/STATE OF EXPOSURE	COUNTY OF RESIDENCE OF DEFENDANTS INCORPORATED IN MISSISSIPPI	TRANSFER/DISMISSAL STATUS
1	Baldwin, John Albert	Adams County, MS	Alabama, Adams County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
2	Bland, Jodie Lee	Adams County, MS	Adams County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
3	Harveston, Lewis Bruce	Adams County, MS	Adams County, MS	Jackson County, MS	Jackson County, MS
4	Mason, Ray Eldred	Adams County, MS	Adams County, MS, Texas	Jackson County, MS, Jones County, MS	Jackson County, MS
5	Patt, John Wayne	Adams County, MS	Adams County, MS	Forrest County, MS, Jackson County, MS	Jackson County, MS
6	Williams, Solomon	Anniston, AL	Alabama	None	Dismissed Without Prejudice
7	Morris, James Lloyd	Birmingham, AL	Alabama, Forrest County, MS	Forrest County, MS, Hinds County, MS	Hinds County, MS
8	Williams, Robert	Birmingham, AL	Alabama	None	Dismissed Without Prejudice
9	Busby, Billy Bruce	Chickasaw County, MS	Chickasaw County, MS, Clay County, MS, Lee County, MS, Monroe County, MS	Hinds County, MS	Hinds County, MS
10	Poole, David Elroy	Chickasaw, AL	Alabama, Hinds County, MS, Forrest County, MS	Jackson County, MS	Hinds County, MS
11	Freeman, Robert Hugh	Copiah County, MS	Copiah County, MS, Hinds County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
12	King, Harry Wayne	Copiah County, MS	Pike County, MS	Forrest County, MS, Jackson County, MS, Jones County, MS	Jackson County, MS
13	Dye, Jimmy Ray	Covington County, MS	Alabama, Forrest County, MS, Lawrence County, MS	Forrest County, MS	Forrest County, MS
14	Andrews, Donnie Ray	DeSoto County, MS	Alabama	Jackson County, MS, Jones County, MS	Jackson County, MS
15	Pharr, Gerald Wayne	Eight Mile, AL	Alabama	None	Dismissed Without Prejudice
16	Richardson, John Daniel	Fairhope, AL	Alabama, Kentucky, Jones County, MS, Harrison County, MS	Hinds County, MS, Jones County, MS	Hinds County, MS
17	Bounds, Samuel Carl	Forrest County, MS	Forrest County, MS	Forrest County, MS, Hinds County, MS, Jones County, MS	Hinds County, MS
18	Clearman, William Michael	Forrest County, MS	Forrest County, MS	Forrest County, MS, Jones County, MS	Forrest County, MS
19	Cooley, William Lester	Forrest County, MS	Alabama, Texas	Forrest County, MS, Hinds County, MS, Jackson County, MS	Hinds County, MS
20	Hendry, Bobby Franklin	Forrest County, MS	Forrest County, MS	Forrest County, MS, Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
21	Jefferson, Jesse Leon	Forrest County, MS	Forrest County, MS	Forrest County, MS, Jones County, MS	Forrest County, MS
22	Jenkins, Sr., Herbert Roger	Forrest County, MS	Forrest County, MS; Jones County, MS	Jackson County, MS, Jones County, MS	Forrest County, MS
23	Jones, Thomas	Forrest County, MS	Harrison County, MS	Forrest County, MS, Jackson County, MS, Jones County, MS	Jackson County, MS
24	Lee, Bennie Joe	Forrest County, MS	Forrest County, MS, Pearl River County, MS	Forrest County, MS	Forrest County, MS
25	McBeth, James Herbert	Forrest County, MS	Forrest County, MS	Forrest County, MS, Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
26	McBeth, Roger Gary	Forrest County, MS	Forrest County, MS	Forrest County, MS	Forrest County, MS
27	Williams, Clinton	Forrest County, MS	Forrest County, MS	Forrest County, MS, Jackson County, MS, Jones County, MS	Jackson County, MS
28	Broome, Rigsby	George County, MS	Jackson County, MS	Hinds County, MS, Jackson County, MS	Jackson County, MS
29	Davis, Franklin H.	George County, MS	George County, MS	Forrest County, MS, Jackson County, MS	Forrest County, MS
30	Shepherd, Jr., Claude Albert	George County, MS	Texas, Massachusetts, Arizona, Colorado, Louisiana, George County, MS, Oklahoma	Hinds County, MS, Jackson County, MS	Hinds County, MS
31	Taylor, James Alfred	George County, MS	George County, MS, Forrest County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
32	Crosby, Johnnie	Greencove Springs, FL	Florida, Jones County, MS	Forrest County, MS, Hinds County, MS, Jackson County, MS	Hinds County, MS
33	Holder, Ellis Erwin	Greene County, MS	Alabama, Tennessee	Forrest County, MS, Jackson County, MS	Jackson County, MS
34	Bourgeois, Sr., Warren Louis	Hancock County, MS	Hancock County, MS, Pearl River County, MS, Clay County, MS	None	Clay County, MS
35	Burch, Jessie David	Hancock County, MS	Hancock County, MS	Jackson County, MS	Jackson County, MS
36	Chambers, IV, Thomas Jefferson	Harrison County, MS	Harrison County, MS	Jackson County, MS	Jackson County, MS

EXHIBIT "A"

MAXWELL NOBLE, ET AL. Vs. E.H. O'NEIL COMPANY, ET AL
JEFFERSON COUNTY, MISSISSIPPI CA.NO.: 98-0024

37	Dean, Sr., Jack Wayne	Harrison County, MS	Maryland, Harrison County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
38	Kinsey, Jesse Lewis	Harrison County, MS	Harrison County, MS	Jackson County, MS	Jackson County, MS
39	Newell, Harry Garland	Harrison County, MS	Jones County, MS	Hinds County, MS, Jones County, MS	Hinds County, MS
40	Singley, Daniel Edward	Harrison County, MS	Florida, Harrison County, MS	Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
41	Duncan, Ronald Patrick	Hinds County, MS	Louisiana, Hinds County, MS, Warren County, MS	Jones County, MS	Hinds County, MS
42	Holmes, J. W.	Hinds County, MS	Hinds County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
43	Whitley, Joseph Lucius	Hinds County, Ms	Hinds County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
44	Alford, Jr , Archie Houston	Jackson County, MS	Connecticut, Louisianna, Jackson County, MS, Harrison County, MS	Jackson County, MS	Jackson County, MS
45	Bailey, Sr., Darrell Keith	Jackson County, MS	Jackson County, MS, Harrison County, MS	None	Jackson County, MS
46	Bennett, Dennis Boyd	Jackson County, MS	Jackson County, MS	Hinds County, MS, Jones County, MS, Jackson County, MS	Jackson County, MS
47	Brewer, Donald Eugene	Jackson County, MS	Jackson County, MS, Wayne County, MS, Florida	Forrest County, MS, Hinds County, MS, Jackson County, MS	Jackson County, MS
48	Carter, Sr , Charles Erra	Jackson County, MS	Jackson County, MS, Greene County, MS	Jackson County, MS	Jackson County, MS
49	Childers, Ernest Johnson	Jackson County, MS	Jackson County, MS, Harrison County, MS	Jackson County, MS	Jackson County, MS
50	Clay, Gary Michael	Jackson County, MS	Jackson County, MS	Forrest County, MS, Jackson County, MS, Jones County, MS	Jackson County, MS
51	Davis, David Levi	Jackson County, MS	Jackson County, MS	Jackson County, MS	Jackson County, MS
52	Hallmark, Sr., Billy Wayne	Jackson County, MS	Alabama	Jackson County, MS	Jackson County, MS
53	Harger, Howard Delmar	Jackson County, MS	Jackson County, MS, Harrison County, MS	Jones County, MS	Jackson County, MS
54	Hobby, Henry Crawford	Jackson County, MS	George County, MS; Jackson County, MS; Texas	Forrest County, MS, Hinds County, MS, Jackson County, MS	Jackson County, MS
55	Holloman, Michael Everette	Jackson County, MS	Jackson County, MS	Jackson County, MS	Jackson County, MS
56	Landrum, Ronald Vernon	Jackson County, MS	Jackson County, MS	Hinds County, MS, Jones County, MS, Jackson County, MS	Jackson County, MS
57	Nobles, Jack Clifford	Jackson County, MS	Louisiana, Jackson County, MS	Forrest County, MS, Jackson County, MS, Jones County, MS	Jackson County, MS
58	Presley, Edwin Miller	Jackson County, MS	Michigan, Jackson County, MS, Clay County, MS, Lauderdale County, MS	Jackson County, MS	Jackson County, MS
59	Simpson, Jr , Ben Luther	Jackson County, MS	Jackson County, MS	Jackson County, MS	Jackson County, MS
60	Thigpen, Sr., Robert Winford	Jackson County, MS	Alabama, Jackson County, MS	Jackson County, MS	Jackson County, MS
61	Tynes, Billy Wayne	Jackson County, MS	Jackson County, MS	Jackson County, MS	Jackson County, MS
62	Wages, Jack Madison	Jackson County, MS	Jackson County, MS	Hinds County, MS, Jackson County, MS	Jackson County, MS
63	Nix, James Edward	Jasper County, MS	Texas, Jasper County, MS, Jones County, MS	Jones County, MS	Jasper County, MS
64	Chambliss, Bernard	Jefferson County, MS	Hinds County, MS	Forrest County, MS	Hinds County, MS
65	Johnson, Sr., Benjamin Franklin	Jefferson Davis County, MS	Forrest County, MS	Forrest County, MS, Hinds County, MS	Hinds County, MS
66	Rutland, Andrew Clifford	Jefferson Davis County, MS	Forrest County, MS	Forrest County, MS	Forrest County, MS
67	Brashier, Robert W	Jones County, MS	Texas, Jones County, MS, Jasper County, MS	Hinds County, MS, Jones County, MS	Hinds County, MS
68	Brooks, Sr , Bernie Louis	Jones County, MS	Alabama, Jackson County, MS, Jefferson Davis County, MS	Forrest County, MS, Jackson County, MS, Jones County, MS	Jackson County, MS
69	Dearman, Sr , Hermon Ray	Jones County, MS	Illinois, Jones County, MS	Jackson County, MS, Jones County, MS	Jackson County, MS
70	Jones, Sr., William Theron	Jones County, MS	Lawrence County, MS; Smith County, MS	Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
71	Laird, Jr., James Owen	Jones County, MS	Jones County, MS	Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
72	Seals, Carlton Harrison	Jones County, MS	Jones County, MS	Jackson County, MS, Jones County, MS	Jackson County, MS
73	Williamson, Sr , Geoffrey Roy	Jones County, MS	Smith County, MS, Forrest County, MS, Jasper County, MS	Forrest County, MS, Jones County, MS	Jasper County, MS
74	Evans, Walter Everett	Kemper County, MS	Hinds County, MS, Warren County, MS	Hinds County, MS	Hinds County, MS
75	Inmon, George Washington	Lamar County, MS	Forrest County, MS; Jackson County, MS	Forrest County, MS, Jones County, MS	Jackson County, MS

EXHIBIT "A"

MAXWELL NOBLE, ET AL. Vs. E.H. O'NEIL COMPANY, ET AL
JEFFERSON COUNTY, MISSISSIPPI CA.NO.: 98-0024

76	Nobles, Alton Donald	Lamar County, MS	Alabama, Forrest County, MS, Lafayette County, MS	Forrest County, MS, Jackson County, MS	Jackson County, MS
77	Rutledge, St., Arnold E	Lamar County, MS	Jones County, MS, Forrest County, MS	Forrest County, MS, Jackson County, MS	Jackson County, MS
78	Sullivan, William Eugene	Lamar County, MS	Louisiana, Lamar County, MS	Forrest County, MS, Jones County, MS	Forrest County, MS
79	Sumrall, Jack	Lamar County, MS	Forrest County, MS	Forrest County, MS, Hinds County, MS	Hinds County, MS
80	Alawine, Sr., Ronald Jerome	Lauderdale County, MS	Alabama	None	Dismissed Without Prejudice
81	Archie, George David	Lauderdale County, MS	Lauderdale County, MS; Newton County, MS (Chuncky,MS is in both counties)	Jackson County, MS	Jackson County, MS
82	Burton, Ruben	Lauderdale County, MS	Alabama, Lauderdale County, MS	Jackson County, MS	Jackson County, MS
83	Smith, John Garry	Lawrence County, MS	Lincoln County, MS, Lawrence County, MS	Forrest County, MS, Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
84	Stembridge, Jr , Clyde Melford	Lee County, MS	Lee County, MS, Lauderdale County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
85	Ricks, Sr , Billy Max	Lincoln County, MS	Arizona, Louisiana, Lincoln County, MS	Jackson County, MS	Jackson County, MS
86	Smith, Ronald Morrell	Lincoln County, MS	Pike County, MS	Jackson County, MS	Jackson County, MS
87	Austin, Howell Olian	Lowndes County, MS	Alabama, Florida, Michigan, Lowndes County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
88	Bradley, Jr., Edward Lee	Lowndes County, MS	Lowndes County, MS	Hinds County, MS	Hinds County, MS
89	Burks, Douglas S.	Lowndes County, MS	Lowndes County, MS	Jackson County, MS	Jackson County, MS
90	Burns, William David	Lowndes County, MS	Lowndes County, MS	Forrest County, MS, Hinds County, MS, Jackson County, MS	Hinds County, MS
91	Cash, Edward E.	Lowndes County, MS	Lauderdale County, MS	Forrest County, MS	Forrest County, MS
92	Cash, Jr., Martin Tillman	Lowndes County, MS	Lowndes County, MS	Hinds County, MS	Hinds County, MS
93	Gallop, Jr., Lee Floyd	Lowndes County, MS	Alabama, Lowndes County, MS	Jackson County, MS	Jackson County, MS
94	Gibson, Jr , Cecil Turner	Lowndes County, MS	Lowndes County, MS	Jackson County, MS	Jackson County, MS
95	McGrew, Kenneth Ray	Lowndes County, MS	Lauderdale County, MS, Lowndes County, MS	Jackson County, MS, Jones County, MS	Jackson County, MS
96	Richardson, Henry Lee	Lowndes County, MS	Lowndes County, MS	Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
97	White, James William	Lowndes County, MS	Wisconsin, Illinois, Lowndes County, MS, Monroe County, MS	Jackson County, MS	Jackson County, MS
98	Browning, Donald Allen	Monroe County, MS	Alabama, Monroe County, MS, Lee County, MS	Hinds County, MS	Hinds County, MS
99	Dodds, Herman	Monroe County, MS	Monroe County, MS	Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
100	Johnson, Sr., Artis	Newton County, MS	Hinds County, MS, Louisiana	Forrest County, MS, Hinds County, MS	Hinds County, MS
101	Kinard, Sr., Ted L.	Oktibbeha County, MS	Clay County, MS, Texas	Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
102	Taylor, LaDan Jackson	Oktibbeha County, MS	Clay County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
103	Dearman, A.B.	Perry County, MS	Jones County, MS, Perry County, MS	Jackson County, MS	Jackson County, MS
104	Marsalis, James Lee	Pike County, MS	Pike County, MS	Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
105	Toole, Jr., Mann	Pike County, MS	Pike County, MS	Forrest County, MS	Forrest County, MS
106	McDonald, Sr., Sherman	Rankin County, MS	Georgia, Forrest County, MS, Harrison County, MS, Hinds County, MS	Forrest County, MS, Hinds County, MS, Jackson County, MS	Hinds County, MS
107	Myrick, Cleveland Tullos	Rankin County, MS	Marion County, MS, Hinds County, MS, Hancock County, MS	Hinds County, MS	Hinds County, MS
108	Parker, Titus E.	Rankin County, MS	Forrest County, MS	Forrest County, MS	Forrest County, MS
109	Tolar, Doyle Wayne	Rankin County, MS	Hinds County, MS	Hinds County, MS	Hinds County, MS
110	Norris, Dewey Wayne	River Ridge, LA	Louisiana, Forrest County, MS	Jackson County, MS	Jackson County, MS
111	Jenkins, James Mack	Scott County, MS	Jones County, MS	Forrest County, MS, Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
112	Mayers, Willie Lee	Smith County, MS	Hinds County, MS; Illinois, Smith County, MS	Jackson County, MS	Hinds County, MS
113	Fairley, Jr , George	Stone County, MS	Texas, Stone County, MS	Jackson County, MS	Jackson County, MS
114	Fortner, Victor Rowan	Stone County, MS	South Carolina, Lamar County, MS, Stone County, MS	Forrest County, MS, Jones County, MS	Forrest County, MS
115	Mills, Wallace Reed	Stone County, MS	Texas, Pearl River County, MS, Harrison County, MS, Virginia,	Jackson County, MS	Jackson County, MS

EXHIBIT "A"

MAXWELL NOBLE, ET AL. Vs. E.H. O'NEIL COMPANY, ET AL
JEFFERSON COUNTY, MISSISSIPPI CA.NO.: 98-0024

116	Perry, Lawrence Amos	Stone County, MS	Alabama, Michigan, Jackson County, MS, Harrison County, MS	Jones County, MS	Jackson County, MS
117	Williams, Robert	Tuscaloosa, AL	Alabama, Tishomingo County, MS	None	Tishomingo County, MS
118	Nall, Jr., Louis Clayton	Vidalia, LA	Adams County, MS, Jefferson County, MS	None	Adams County, MS
119	Martin, Sr., Vernon Russell	Warren County, MS	Florida, Sharkey County, MS; Warren County, MS	Hinds County, MS, Jackson County, MS	Hinds County, MS
120	Mozingo, J T	Warren County, MS	Hinds County, MS, Warren County, MS	Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
121	Tickell, Miles Joseph	Warren County, MS	Warren County, MS	Hinds County, MS, Jones County, MS, Jackson County, MS	Hinds County, MS
122	Wells, Sr., Fred Henry	Warren County, MS	Warren County, MS	Jackson County, MS	Jackson County, MS
123	Williams, David Cecil	Warren County, MS	Winston County, MS	Forrest County, MS	Winston County, MS
124	Anderson, Tommie J	Wayne County, MS	Lauderdale County, MS	Forrest County, MS	Forrest County, MS
125	Pugh, Walter Edward	Winston County, MS	California, Winston County, MS	Jones County, MS	Winston County, MS

EXHIBIT 4

1 of 1 DOCUMENT

In re Phase2Media Inc., Debtor. PlasmaNet, Inc., Plaintiff, v. Phase2Media Inc., Defendant.

Case No. 01-14020 (ALG), Chapter 11, Adv. Proc. No. 01-2980

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2002 Bankr. LEXIS 1457

December 20, 2002, Decided

DISPOSITION: [*1] Plaintiff's motion for summary judgment was denied, and Debtor's motion for judgment on the constructive trust claim was granted.

LexisNexis(R) Headnotes

COUNSEL: PHILIPPE ADLER, ESQ., FREIDMAN KAPLAN SEILER & ADELMAN LLP, New York, NY, for PLASMANET, INC., Plaintiff.

SCOTT B. FISHER, ESQ., HAROLD D. JONES, ESQ., JASPAN SCHLESINGER HOFFMANN, LLP, Garden City, NY, for PHASE2MEDIA, INC., Debtor.

SCOTT B. FISHER, ESQ., HAROLD D. JONES, ESQ., JASPAN SCHLESINGER HOFFMANN, LLP, Garden City, NY, for PHASE2MEDIA, INC., Defendant.

A. PETER LUBITZ, ESQ., KATTEN, MUCHIN, ZAVIS, ROSENMAN, New York, NY, for Official Creditors' Committee.

PAUL SCHWARTZBERG, ESQ., OFFICE OF THE UNITED STATES TRUSTEE, New York, NY.

AARON R. CAHN, ESQ., CARTER, LEDYARD & MILBURN, New York, NY, for VECTOR CAPITAL II, L.P., Secured Creditor.

JUDGES: Allan L. Gropper, UNITED STATES BANKRUPTCY JUDGE.

OPINIONBY: Allan L. Gropper

OPINION:

MEMORANDUM OF DECISION

Allan L. Gropper
UNITED STATES BANKRUPTCY JUDGE

PlasmaNet Inc. ("PlasmaNet", "Plantiff") seeks to impose a constructive trust over funds collected by the Debtor, Phase2Media, Inc. (the "Debtor"), for advertising posted on PlasmaNet's website. It relies on a clause in its contract [*2] with the Debtor, prohibiting the Debtor from commingling PlasmaNet's "funds with its own" and declaring that the Debtor "is not the beneficial owner of the advertising payments beyond its 30% (thirty percent) fee." PlasmaNet has moved for partial summary judgment in an adversary proceeding brought against the Debtor declaring that the Debtor has no beneficial interest in such funds. n1

n1 Plaintiff seeks: (i) $ 520,099, from a segregated account the Debtor established under a post-petition stipulation on August 27, 2001; (ii) $ 135,352, from the Debtor's other accounts representing the amount allegedly traceable into those accounts under constructive trust tracing principles; plus (iii) $ 307,735.00, equal to 70% of additional funds the Debtor received on PlasmaNet's behalf prior to August 1, 2001, and allegedly converted.

The Debtor has opposed the motion and has cross-moved for summary judgment against PlasmaNet, arguing that Plaintiff holds only a general unsecured claim. The Debtor has also filed a counterclaim [*3] alleging that PlasmaNet, in violation of the parties'

contract, collected and is withholding commissions for sales that the Debtor arranged, but it has not moved for summary judgment on this claim. The Creditors Committee and a secured creditor, Vector Capital II, have filed memoranda in opposition to Plaintiff's motion arguing, generally, that Plaintiff is attempting to create a priority claim for itself without justification, to the prejudice of other creditors. n2

n2 PlasmaNet is the only remaining creditor of the Debtor pursuing a constructive trust claim. MaximNet, Inc., and Hachette-Filipacchi Media U.S., Inc., other clients of the Debtor, initially brought adversary proceedings seeking to impose constructive trusts for their respective benefit on funds collected by the Debtor from advertisers on their websites, but they have since settled their claims with the Debtor. PlasmaNet appeared in opposition to the effort of Hachette to assert a constructive trust claim, principally on the ground that Hachette's contracts with the Debtor did not prohibit the commingling of funds.

[*4]

For the reasons set forth below, Plaintiff's motion for summary judgment is denied, and the Debtor's motion for judgment on the constructive trust claim is granted.

FACTS

The material facts are not in dispute and appear from the comprehensive affidavits and supporting documents submitted by the parties. The Debtor was an Internet advertising sales and marketing company that sold advertising inventory on the websites of branded web publishers, including the PlasmaNet website. Before it filed for bankruptcy and ceased doing business, the Debtor entered into agreements to sell advertising space on more than 60 websites, and it developed marketing and advertising strategies, based on each client's needs, that were targeted to attract visitors to the sites. It also possessed software to calculate the number of "hits" on the websites and thus the amount payable by the buyer of the advertising space. Most of the Debtor's revenue came from commissions received for its Internet advertising sales.

PlasmaNet is the creator of an Internet sweepstakes game accessible at its website, freelotto.com, and the owner and operator of freelotto.com and Lottonet.com. In April 1999 and again [*5] in March 2000, PlasmaNet and the Debtor entered into advertising agreements under which PlasmaNet hired the Debtor, on an exclusive basis, to solicit and sell advertising on its websites, and in the case of the later agreement, on PlasmaNet's Click2win email newsletters. n3 Both agreements provided that the Debtor would sell advertising for PlasmaNet and be responsible for invoicing, collecting and accounting for all amounts owed for the advertisements. Under both agreements, the Debtor was generally required to invoice and collect payments on a monthly basis.

n3 PlasmaNet argues that the second agreement superceded the first, and the Debtor contends that the second agreement was a mere continuation of the first. It is unnecessary to resolve this issue, as the two agreements are substantially similar concerning the collection of proceeds and the requirement to segregate funds.

The April 1999 agreement provided that the parties were to establish a lockbox in PlasmaNet's name at PlasmaNet's bank, Republic Bank [*6] of New York, to which all payments by advertisers were to be made. Republic Bank was to send a notice to both the Debtor and PlasmaNet within 72 hours of receipt of a payment and then pay 30% to the Debtor, as commissions, and the remaining 70% to PlasmaNet. Apparently, however, such a lockbox was never created. When the parties again contracted for the exchange of services, in March 2000, they again provided for payment to the same type of lockbox; however, under the second agreement, the lockbox was to be created only upon PlasmaNet's election, upon twenty (20) days written notice. The Debtor contends that PlasmaNet requested the creation of a lockbox account on only one occasion, in August of 2000, to which request the Debtor agreed. (Nachmias Aff. PP 26-27.) The Debtor alleges that following that agreement, PlasmaNet made no effort to establish the lockbox account until December of 2000, at which point the parties were informed that governing banking regulations barred a distribution of funds deposited into a lockbox to two separate entities. (*Id.* at P 28.) PlasmaNet contends that it made repeated efforts over the course of the contract term to induce the Debtor to establish [*7] a lockbox, that the Debtor continued to drag its feet, and that this state of affairs continued until February 2001, when the Debtor terminated the contract for PlasmaNet's alleged default. In any event, a lockbox account was never created, and the Debtor was evidently in default as to this contractual requirement.

PlasmaNet also contends that the Debtor was continually in default for failing or refusing to pay over amounts received from advertisers, and that it was the Debtor's practice to withhold payments and make them only when compelled by the force of Plaintiff's remonstrances and demands for the creation of a

lockbox. In July 2000, for example, according to the affidavit of PlasmaNet's general counsel, Edward Curtin, the Debtor was in default of paying hundreds of thousands of dollars to PlasmaNet and was, in PlasmaNet's view, tardy in collecting fees from the advertisers. In order to rectify these problems, the parties entered into a letter agreement, dated August 2, 2000, in which they modified the March 2000 Agreement and provided as follows: (i) PlasmaNet acknowledged receipt of the Debtor's payment of $ 400,000 "on account of a portion of all amounts payable to us by advertisers [*8] which are outstanding more than sixty (60) days"; (ii) with respect to June 2000 and later invoices, it was agreed that the Debtor would pay PlasmaNet "all amounts due us within sixty days of the invoice date, subject to a 10% holdback for bad debts", provided that if an invoice were paid within the 60-day period, "[PlasmaNet's] portion will be remitted immediately"; (iii) the Debtor agreed, upon PlasmaNet's request, and subject to the approval of Fleet Bank, to "cooperate in establishing a lockbox account at Fleet Bank, and to direct all advertisers to make their remittances directly to said account"; and (iv) the Debtor agreed to sign a UCC Form-1 to evidence, in PlasmaNet's words, "our 70% ownership interest in the receivables from our advertisers, in the form annexed to the letter agreement." n4 According to the affidavit of PlasmaNet's general counsel, "Given the substantial payment [the Debtor] had now made, and the insurance policy represented by this expected change in the payment terms under the Agreement, PlasmaNet's need for a lockbox account diminished." (Curtin Aff. P 11.)

> n4 Although there is an indication in the record that this UCC Form-1 was signed by the Debtor, the record does not contain a copy of the Form, and PlasmaNet does not rely on it in connection with its motion for summary judgment or contend that it has the rights of a secured creditor with a perfected security interest in the Debtor's property.

[*9]

In addition to the provisions for the creation of a lockbox account, the agreements between PlasmaNet and the Debtor specifically prohibited the Debtor from commingling "PlasmaNet's funds" from sales of advertisements on PlasmaNet websites with its "own" funds. Both the April, 1999 and the March 2000 agreements provided:

> "Notwithstanding anything to the contrary, the Representative [Debtor] shall not commingle the Client's [PlasmaNet's] funds with its own and the Representative [Debtor] hereby agrees that it is not the beneficial owner of any of the proceeds of the Advertising payments beyond its 30% (thirty percent) fee." (April 1999 Agreement at P 6; March 2000 Agreement at P 5.)

Despite this specific prohibition, over the course of two years, the Debtor collected payments from the advertisers on PlasmaNet's website, deposited the collected funds into its own general account, and then from time to time remitted the funds, minus commissions, to PlasmaNet. (Nachmias Aff. PP 8-10.) The Debtor alleges that PlasmaNet was aware of this arrangement, as evidenced by its endorsement and deposit of the checks marked as having come from the Debtor's general operating [*10] accounts at U.S. Trust Company and, later, at Fleet Bank. (Nachmias Aff. PP 14-17, 22-25.) PlasmaNet's chief financial officer has submitted an affidavit, claiming it "did not know and did not believe it was responsible for knowing whether the Debtor was in fact segregating the appropriate funds". (See PlasmaNet Memo at 6, n.4.) But PlasmaNet did know, as detailed in the affidavit submitted by its general counsel, of the Debtor's continued defaults under the Agreement, in its refusal or failure to set up a lockbox, and of the resolution fashioned in August 2000 whereby the Debtor committed, among other things, to pay all amounts billed to advertisers no later than 60 days of invoice whether or not collected, subject to a bad debt reserve, and to pay over immediately all amounts received from advertisers within the 60-day period.

According to the Debtor the total amount remitted to PlasmaNet over the course of two years was very substantial, exceeding over $ 23,000,000. (Nachmias Aff. P 45.) Nevertheless, PlasmaNet continued to dispute the timeliness of the Debtor's remission of funds and by November 2000, according to Curtin, the Debtor "had again fallen hundreds of thousands of dollars [*11] behind in remittances to PlasmaNet, this time claiming that it had the right to hold back remittances because of PlasmaNet's supposed breaches of the Agreement." (Curtin Aff. P 13.) These alleged breaches involved the defaults of PlasmaNet, or its affiliates, when they entered into direct agreements with advertisers in breach of the exclusivity provisions of the March 2000 Agreement. In response to PlasmaNet's pressure, the Debtor remitted $ 869,677 to PlasmaNet in December 2000, but relations deteriorated to the extent that by letter dated February 13, 2001 the Debtor sent PlasmaNet a notice terminating the Agreement, alleging that PlasmaNet had breached the exclusivity provisions of the contract. PlasmaNet claims this notice was sent within days of the Debtor's final

promise to open a lockbox account, and that after termination of the contract the parties did not further discuss the establishment of a lockbox.

Subsequent to the termination of the contract, the Debtor continued to collect funds on advertisements previously sold on PlasmaNet's websites. On July 18, 2001 the Debtor filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code (the "Code). At an early [*12] date, PlasmaNet acted to protect its claimed interest in funds held and collected by the Debtor, asserting the rights of a constructive trust beneficiary. On August 27, 2001 this Court "so ordered" a stipulation between the Debtor and PlasmaNet which established a segregated account (the "PlasmaNet Segregated Account"). The Debtor agreed to deposit therein an initial $ 400,000 plus 70% of all advertising payments received after August 1, 2001, from former advertisers on PlasmaNet's websites, without prejudice. The stipulation expressly provided that it was not to be construed as an admission of liability on the part of either party. (Order Aug. 27, 2001 P 4.)

The stipulation also provided for the establishment of a Phase2Media account (the "Phase2Media Account"), into which PlasmaNet was required to deposit, without prejudice, 30% of all proceeds received directly from accounts that were acquired as a result of Phase2Media's sales efforts. This obligation related to the Debtor's claim that PlasmaNet owed it roughly $ 100,000 in unauthorized collections by PlasmaNet from advertisers that were introduced by the Debtor, as well as other amounts relating to adjustments in [*13] the minimum commission price. (Nachmias Aff. P 29.)

DISCUSSION

Standards for Summary Judgment

In a motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Bankruptcy Rule 7056, a movant is entitled to relief if it can show that there is no genuine issue as to any material fact at issue in the matter. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 885, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990). A movant has the burden to show that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In opposing the motion, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The nonmoving party "must set forth specific facts showing that there is a genuine issue for trial," indicating those that a reasonable trier of fact could find in its favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). [*14] In a motion for summary judgment, the inquiry should be whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. The Court is to accept the allegations of the parties without making any judgment as to credibility or giving consideration to the weight of evidence, as those are essentially functions of the fact finder. *Id.* at 255. "The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." *Id.*

In the present case, the material facts on the constructive trust issue are not contested. For its right to impose a trust over the funds the Debtor collected on its accounts, PlasmaNet relies on the language of its Agreements with the Debtor that provided that the Debtor would not "commingle [PlasmaNet's] funds with its own" and that the Debtor was not "the beneficial owner of any of the proceeds of the Advertising payments beyond its 30% (thirty percent) fee." The Debtor does not dispute the existence of these contractual provisions. With respect to the commingling of funds, PlasmaNet [*15] also contends that the Debtor wrongfully, over an extended period of time, failed to set up a lockbox account, despite the contract requirements. The Court will assume that the Debtor's commingling and failure to set up a separate account were willful and constituted a material breach of contract, but this assumption, for the reasons stated below, does not entitle PlasmaNet to summary judgment or defeat the Debtor's cross motion on the constructive trust issue. The Debtor contends that PlasmaNet knew or "must have known" about the commingling of funds, and certainly PlasmaNet made constant demands that a lockbox be established to receive all of the payments from the advertisers. As will appear hereafter, however, PlasmaNet makes no claim that the Debtor lied to it about the commingling of funds, and it is not a necessary predicate to a resolution of these motions in favor of the Debtor that PlasmaNet knew specifically that the Debtor was commingling funds.

Basic Principles of Constructive Trust Law

The basic legal principles applicable to the creation of a constructive trust over property are well established. Under New York law, which both parties agree is applicable, n5 [*16] a constructive trust arises against a person who, by fraud (actual or constructive), duress, abuse of confidence or any other form of unconscionable conduct, obtains or holds the legal right to property which in equity and in good conscience he ought not to hold. *See Simonds v. Simonds,* 45 N.Y. 2d 233, 408

N.Y.S. 2d 359, 380 N.E.2d 189 (1978); *Equity Corp. v. Groves* 294 N.Y. 8, 60 N.E.2d 19 (1945). As stated in $S 160 of the Restatement of Restitution, a constructive trust should be imposed:

> "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." RESTATEMENT (FIRST) OF RESTITUTION § 160, CONSTRUCTIVE TRUST.

The New York Court of Appeals has declared, "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Simonds,* 45 N.Y.2d at 241, 408 N.Y.S. 2d at 363, 380 N.E.2d at 193. [*17]

> n5 Both the Debtor and PlasmaNet are located in New York and the March 2000 Agreement is governed by New York law. The existence of a constructive trust and other issues as to right to property and property interests are covered, in a bankruptcy case, by applicable state law. *See Butner v. United States,* 440 U.S. 48, 54-55, 99 S.Ct. 914, 918, 59 L. Ed. 2d 136 (1979)("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law."); *see also In re Koreag,* 961 F.2d 341, 352 (2d Cir. 1992) (where the Court looked to state law in determining whether a constructive trust existed).

Constructive trust principles apply in bankruptcy, and property that the debtor holds in trust for another entity does not form part of its estate and is not held for the benefit of its creditors. Section 541(b) of the Code excludes from the definition of property of the estate "any power that the debtor may exercise solely for the benefit of an entity [*18] other than the debtor", and this includes property held in constructive trust for the benefit of another. *United States v. Whiting Pools, Inc.,* 462 U.S. 198, 205 n.10, 103 S.Ct. 2309, 2314 n.10, 76 L. Ed. 2d 515 (1983). As the Second Circuit has stated in two cases involving the application of constructive trust principles in bankruptcy, a constructive trust "confers on the true owner of the property an equitable interest in the property superior to the trustee's." *In re Koreag, Controle et Revision, S.A. v. Refco F/X Assoc., Inc. (In re Koreag),* 961 F.2d 341, 352 (1992), quoting *In re Howard's Appliance Corp.,* 874 F.2d 88, 93 (2d Cir. 1989), quoting in turn *In re General Coffee Corp.,* 828 F. 2d 699, 706 (11th Cir. 1987).

Koreag and *Howard's Appliance* also establish, for purposes of this case, the following principles. First, the requirements for establishing a constructive trust in a bankruptcy case are, *prima facie,* the same as in any other case. *Koreag* sets forth the basic principles as follows: "a party claiming entitlement to a constructive trust [*19] must ordinarily establish four elements: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment." *Koreag,* 961 F.2d at 352, citing *Bankers Sec. Life Ins. Soc. v. Shakerdge,* 49 N.Y.2d 939, 406 N.E.2d 440, 428 N.Y.S.2d 623 (1980). Second, these requirements are to be applied flexibly. As the Court stated in *Koreag,* 961 F.2d at 352-53, quoting *Simonds,* 45 N.Y. 2d at 241, although the foregoing "factors provide important guideposts, the constructive trust doctrine is equitable in nature and should not be 'rigidly limited.'" Third, even the absence of one of the four factors listed above will not prevent the court from imposing a constructive trust in an appropriate case. In *Koreag,* the Court found, *in dictum,* that a constructive trust would likely be established under the facts of the matter even though the plaintiff had not established a "confidential or fiduciary relationship" between the parties. *See also, Counihan v. Allstate Insurance Co.,* 194 F.3d 357, 361 (2d Cir. 1999) (constructive trust [*20] established in non-bankruptcy case despite lack of a fiduciary relationship between plaintiff and defendant).

Nevertheless, as will be further discussed below, in bankruptcy cases, these general principles must take account of the fact that many unpaid creditors can credibly assert that the Debtor has been "unjustly enriched" by being able to retain "its" property without payment. In bankruptcy cases like this one, the contest is not between a party seeking to retain property and a party wronged, but among equally innocent creditors of the wrongdoer. *See Pan Am. World Airways, Inc. v. Shulman Transport Enters., Inc. (In re Shulman Transport Enters., Inc.),* 744 F.2d 293 (2d Cir. 1984); *Cherno v. Dutch Am. Mercantile Corp. (In re Itemlab, Inc.),* 353 F.2d 147, 154 (2d Cir. 1965).

With these principles in mind, the Court will consider, in light of the facts of this case, the two principal factors which are at issue--whether there was a fiduciary relationship between the parties and whether there was unjust enrichment.

The Existence of a Confidential or Fiduciary Relationship

The first element that is usually, but not invariably necessary where [*21] a party seeks to establish the existence of a constructive trust is the existence of a confidential or fiduciary relationship. The existence of such a relationship "triggers the equitable considerations leading to the imposition of a constructive trust." *Brand v. Brand,* 811 F.2d 74, 78 (2d Cir. 1987), citing *Sharp v. Kosmalski,* 40 N.Y.2d 119, 121, 351 N.E.2d 721, 723, 386 N.Y.S.2d 72, 75 (1976). PlasmaNet argues that the Debtor was its fiduciary, in that the Debtor was an agent entrusted to hold funds for PlasmaNet and, specifically, was barred from commingling these funds with its own. *See In re Morales Travel Agency,* 667 F.2d 1069, 1071 (1st Cir. 1981); *see also In re Ames Dept. Stores, Inc.,* 274 B.R. 600, 619-621 (Bankr. S.D.N.Y. 2002); *In re Black & Geddes,* 35 B.R. 830, 837 (Bankr. S.D.N.Y. 1984); *Restatement of Agency* § 1(1) (1958).

It is "a firmly established principle that if a recipient of funds is not prohibited from using them as his own and commingling them with his own monies, a debtor-creditor, not a trust relationship exists." *Koreag,* 961 F.2d at 353, quoting [*22] *In re Black & Geddes, Inc.,* 35 B.R. at 836. The converse, however, is not established. In *In re Morales Travel Agency,* 667 F.2d at 1073, discussed below, the Court specifically left open the question whether a provision requiring the segregation of funds, whether met or not, would by itself create a constructive trust for bankruptcy purposes. PlasmaNet has not cited any case for the proposition that a prohibition against commingling inserted in a contract will, *ipso facto,* result in a trust relationship between the parties or justify the creation of a constructive trust over the relevant funds. In any event, it is clear that the language used in a contract is not determinative of the relationship between the parties for purposes of concluding whether a constructive trust should be established. *See In re Shulman Transport Enters., Inc.,* 744 F.2d at 295; *In re Morales Travel Agency,* 667 F.2d at 1071. The relationship between the parties arises from the "real character" of their interaction, "rather than by the form the parties have given it." *In re Ames,* 274 B.R. at 615. It is of particular importance [*23] in bankruptcy cases that "substance not give way to form" in determining whether a contractual relationship creates duties in the nature of a trust, as "the relative rights of a bankrupt's creditors are at issue." *Shulman,* 744 F.2d at 295; *see also Ames,* 274 B.R. at 615.

In *Shulman,* the Second Circuit weighed the rights of a secured creditor, Continental Bank, against those of an air carrier, Pan American World Airways ("Pan Am"), in determining their respective rights to the assets of the debtor, Shulman Air Freight. Shulman, a freight forwarder, arranged for the transport of its clients' materials in carriers such as Pan Am and received commissions out of its charges to the shipper. Pan Am contended that it had a constructive trust over the proceeds Shulman received from shippers, relying on a clause in Shulman's contract with its carriers that termed Shulman their "agent." The Second Circuit found that the word "agent" was insufficient to establish the existence of a trust or agency relationship. "A debtor does not become the agent of his creditor simply because he is called an agent," the Court held, finding that Pan Am's lack of control over [*24] Shulman's use of the monies, the absence of any provision requiring Shulman to segregate Pan Am's funds, and the "apparent lack of concern on the part of the carriers about how Schulman handled the monies it collected," indicated that the parties were not in an agency relationship. *Shulman,* 744 F.2d at 295.

The *Shulman* court relied on a decision of the First Circuit, *In re Morales Travel Agency,* 667 F.2d at 1071, which held that funds collected by a travel agent from airline ticket sales were not held in trust for the airline, even though the relevant agreement expressly provided that all ticket proceeds were property of the airline. As in *Shulman,* the *Morales* court rejected the argument that the contract's terms were dispositive and instead found that the daily dealings between the parties, including the travel agent's practice of turning over the proceeds at regular intervals and not upon demand, indicated a debtor-creditor relationship. *Id.* at 1072. "If a ritualistic incantation of trust language were deemed conclusive, it would be a simple matter for one creditor, at the expense of others, to circumvent the rules pertaining [*25] to the creation of bona fide security interests." *Id.*

The *Ames* case drew on *Shulman* and *Morales* to find that proceeds collected by the debtor, a retailer, from the sale of Baker shoes in its stores were not held in constructive trust. The contract between the parties provided:

> "all proceeds from the sale of merchandise of Baker to customers ... shall be the property of Baker from the time of such sale, that Ames shall act as Baker's agent in the collection and holding of such proceeds, and that Ames shall hold such proceeds in trust for Baker until such time as they are paid over to Baker."

274 B.R. at 608. Notwithstanding these requirements, Ames collected the Baker sales proceeds and

commingled them with proceeds from other accounts and used them in an unrestricted manner. The *Ames* court determined that there was no trust or agency relationship between the parties, contrary to the language of the contract, in that: 1) Ames commingled the sales proceeds; 2) the funds were kept in an account available to Ames's secured creditors; 3) Ames's payments in respect of the shoes came from its general funds account, and thus were not traceable; [*26] and (4) under New York law, a fiduciary relationship does not exist where the parties "were acting and contracting at arms-length to a business transaction." *Ames,* 274 B.R. at 626.

The Debtor as the so-called "Representative" of its "Client" acted in many respects in an agency relationship with PlasmaNet. As an Internet advertising sales and marketing company, the Debtor was an intermediary between the advertisers and its clients, such as PlasmaNet, and had two primary roles: 1) to market and sell advertising space for its clients and 2) to provide an invoicing, collection, and management service for its sales. It solicited business for the client, collected funds, turned over certain funds to the client, and had certain duties toward the client. But a close examination of the record establishes that the relationship that actually existed between the Debtor and PlasmaNet is more appropriately characterized as one of debtor and creditor.

The Debtor was never forbidden to handle the collections from advertisers, notwithstanding the prohibition in the agreements against the "commingling of funds." With respect to commingling, the agreement provided that the Debtor would [*27] not "commingle Clients' [PlasmaNet's] funds with its own," and that the Debtor was not "the beneficial owner" of the 70 percent of the advertising payments destined for the client. This gave the Debtor temporary control over all the proceeds from the advertisers, prior to segregating the 70 percent due to PlasmaNet, and at no time did the contract provide PlasmaNet with control over all of the funds received from the advertisers. This would have resulted if a lockbox had been established, but that never took place. A debtor's right to control funds, even briefly, is often significant in determining whether they are protected from other creditors' claims or should be considered property of the estate. *Coral Petroleum, Inc. v. Banque Paribas-London,* 797 F.2d 1351, 1358 (5th Cir. 1986), *reh'g denied,* 801 F.2d 398 (5th Cir. 1986).

In any event, whatever the prior relationship of the parties, the August 2, 2000 modification to the March 2000 Agreement largely rendered the "no commingling" and "agency" language of the contract a nullity. By that time PlasmaNet was dissatisfied with the Debtor's collection efforts, and it required the Debtor to pay over [*28] PlasmaNet's 70 percent of amounts due from advertisers within 60 days of the invoice date, subject to a 10% holdback for bad debts, whether or not the underlying amount had been collected from the advertisers. In its papers, PlasmaNet calls this provision an "insurance policy" that lessened its need for a lockbox account. It also establishes the debtor-creditor nature of the parties' relationship, as the Debtor was personally liable to make payments to PlasmaNet, whether or not it collected funds from the advertisers. The August 2 modification also provided that if an advertiser paid an invoice within the 60-day period, PlasmaNet's portion "will be remitted immediately." As a practical matter, this provision cancelled out the contractual clause regarding segregation of funds, as PlasmaNet's duty was to pay over funds "immediately."

As part of the "insurance policy" represented by the August 2, 2000 letter agreement, PlasmaNet also required the Debtor to sign a UCC-1, presumably in order to give PlasmaNet a security interest in the receivables to be collected from the advertisers. It also again insisted on the establishment of a lockbox. If all of the requirements for a valid security [*29] interest had been complied with, and a lockbox had been created, PlasmaNet would presumably have protected itself, by means of a valid security interest in the receivables and in the collections from the advertisers. PlasmaNet did not take these steps, but its efforts to establish itself as a secured creditor are a further indication that it was not the beneficiary of a trust relationship. A beneficiary of a trust does not need to and does not seek to establish a lockbox or a lien on its trustee's property. n6

> n6 *See* N.Y. EST. POWERS & TRUSTS LAW § 7-2.1(a), "Except as otherwise provided in this article, an express trust vests in the trustee the legal estate, *subject only to the execution of the trust,* and ..."; *see also* SCOTT & FRATCHER, THE LAW OF TRUSTS (SCOTT ON TRUSTS), § 128, pg. 338 (4th ed. 1987), "Where a trust is created, the extent of the interest of the beneficiaries depends on the manifestation of intention of the settlor."

"The essential feature of a fiduciary relationship is reliance [*30] by one party on the integrity or discretion of another ... a fiduciary duty generally does not arise out of a contractual relationship between parties where the duties of the parties are dictated by the terms of a contract." *Mia Shoes v. Republic Factors Corp.,* 1997 U.S. Dist. LEXIS 12571, No. 96 Civ 7974(TPG), at *2 (S.D.N.Y. Aug. 21, 1997). There is no indication that PlasmaNet reposed special trust or confidence in the Debtor and allowed it thereby to gain a position of superiority or influence. *See Litton Industries, Inc. v.*

Lehman Bros. Kuhn Loeb, Inc., 767 F. Supp., 1220, 1231 (S.D.N.Y. 1991), *rev'd on other grounds*, 967 F.2d 742 (2d Cir. 1992). PlasmaNet has never alleged that the parties were not comparable in sophistication and did not have comparable bargaining power and ability to contract to their mutual benefit. The transactions were essentially arms-length commercial transactions, and PlasmaNet cannot claim to need the special protection of a court of equity. *See In re United Cigar Stores Co. of America*, 70 F.2d 313, 315 (2d Cir. 1934); *see also Ames*, 274 B.R. at 627; *In re Braniff Int'l Airlines, Inc.*, 164 B.R. 820, 825, 827 (Bankr. E.D.N.Y. 1994); [*31] *In re Drexel Burnham Lambert Group, Inc., et al*, 142 B.R. 633 (Bankr. S.D.N.Y. 1992).

As noted above, the absence of a trust or fiduciary relationship is not necessarily fatal to an entity's claim that the debtor must hold property in constructive trust. *See Koreag*, 961 F.2d at 353-54, citing *E.W. Lines v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 743 F.Supp 176, 179-80 (S.D.N.Y. 1990); *Republic of Philippines v. Marcos*, 806 F.2d 344, 355 (2d Cir. 1986), *cert. denied*, 480 U.S. 942, 107 S.Ct. 1597, 94 L. Ed. 2d 784 (1987). Nevertheless, the fact that the parties had equal bargaining power and were engaged in a commercial contractual relationship that, especially after the August 2, 2000 letter agreement, put them in the position of debtor and creditor; that the putative beneficiary did not rest on its status as such but took steps to protect itself by demanding a security interest in the form of a lockbox and a lien over receivables -- all of these factors are relevant in arriving at a final determination as to the claim of PlasmaNet to a constructive trust over the funds at issue. n7

> n7 Debtor argues that PlasmaNet was aware of the Debtor's commingling, by its receipt of disbursements from the Debtor's general account and the parties' failure to open a lockbox account, which at least after the second agreement PlasmaNet was required to initiate. As noted above, this decision assumes PlasmaNet did not know and took no action to find out whether the Debtor was commingling funds. PlasmaNet argues that the existence of an anti-waiver clause in its agreement preserves its right to claim that it did not have any actual knowledge of the commingling. This argument, in any event, misses the point; it is not what the contract says, but what the parties do that will determine the existence of a fiduciary relationship in a bankruptcy case.

[*32]

Unjust Enrichment

The single most important factor to a finding that a constructive trust exists is unjust enrichment. The New York courts mandate "a showing that property is held under circumstances that render unconscionable and inequitable the continued holding of the property and that the remedy is essential to prevent unjust enrichment." *Counihan*, 194 F.3d at 361-62; *see also Ames*, 274 B.R. at 626. The party against whom the constructive trust is sought need not have performed a wrongful or unconscionable act. *Koreag*, 961 F.2d at 354; *Tekinsight.Com, Inc. v. Stylesite Marketing, Inc. (In re Stylesite Marketing, Inc.)*, 253 B.R. 503, 508-09 (Bankr. S.D.N.Y. 2000). It is necessary, however, that the property be held by the party "under such circumstances that in equity and good conscience he ought not retain it." *In re Koreag*, 961 F.2d at 354; *Miller v. Schloss*, 218 N.Y. 400, 113 N.E. 337, 339 (1916); *Stylesite*, 253 B.R. at 508-09. "Unjust enrichment results when a person retains a benefit which, under the circumstances of the transfer and considering the [*33] relationship of the parties, it would be inequitable to retain." *Counihan*, 194 F.3d at 361-62.

In a bankruptcy case, in considering whether equity demands the creation of a constructive trust to prevent unjust enrichment, it is necessary to take into account that the contest is not between the transferee of funds and alleged beneficiary of the constructive trust, but between the debtor's other creditors and the putative beneficiary. "The principle that equality is equity" is the spirit of the bankruptcy law. *Cunningham v. Brown*, 265 U.S. 1, 13, 68 L. Ed. 873, 44 S. Ct. 424 (1924); *In re Corrozella & Richardson*, 247 B.R. 595, 602 (B.A.P. 2d Cir. 2000). As the Sixth Circuit stated in *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443, 1451 (6th Cir. 1994), "A constructive trust is fundamentally at odds with the general goals of the Bankruptcy Code." The Fifth Circuit recently wrote:

> The remedy of a constructive trust is ... a potent one in bankruptcy because it gives the successful claimant 'priority over the defendant's unsecured creditors to the extent of the property subject to the trust. [*34] As a result, creditors of the bankrupt debtor have every incentive to argue that their unsecured claims are eligible under state law for the remedy of a constructive trust. Because the constructive trust doctrine can wreak such havoc with the priority system ordained by the Bankruptcy Code, bankruptcy

> courts are generally reluctant to impose constructive trusts without a substantial reason to do so.'

Southmark Corp. v. Grosz (In re Southmark Corp.), 49 F.3d 1111, 1119 (5th Cir. 1995), quoting its prior opinion in *In re Haber Oil Co.,* 12 F.3d 426, 436 (5th Cir. 1994). *See also In re U.S. Financial, Inc.,* 648 F.2d 515, 521 (9th Cir. 1980)(permitting creditor to "rescind and reclaim" would render absolute priority rule "meaningless"); *In re Itemlab, Inc.,* 353 F.2d at 154; *In re Morales,* 667 F.2d at 1071-72; *In re First Century Financial Corp.* 269 B.R. 481, 500 (Bankr. E.D.N.Y. 2001)(if constructive trust is recognized, creditor can "leapfrog" over other creditors); *In re Black & Geddes,* 35 B.R. at 836 ("Imposition of a constructive trust must include a consideration [*35] of the relative equitities between a proposed trust beneficiary and other creditors."); *Ames* 274 B.R. at 626; *Cf. SEC v. Credit Bancorp, Ltd.,* 297 F.3d 127, 139 (2d Cir. 2002). Thus, in considering whether there would be "unjust enrichment" and whether it would be "unconscionable and inequitable" for the Debtor's estate to retain the funds at issue here, it is necessary to consider the fact that the party at fault, the Debtor, is out of business. The funds at issue will either be awarded to PlasmaNet or shared by PlasmaNet and the Debtor's other creditors, who are as innocent as PlasmaNet of any wrongdoing or breach of contract.

The Debtor had approximately 60 other clients for which it performed essentially the same services it performed for PlasmaNet. In examining the precise nature of the Debtor's wrongs, on which the creation of a constructive trust would be premised, it is significant that the Debtor breached its duty to and contracts with many of these clients, as well as PlasmaNet, by failing to pay over their respective entitlements from advertising revenues. Although it appears that none of these other clients was as careful as PlasmaNet, [*36] and none inserted a clause in its contract requiring segregation of certain of the funds collected, it cannot be said that these other clients of the Debtor, as well as other creditors, would be unjustly enriched if they were permitted to share in the PlasmaNet collections. The only difference between the Debtor's breach of contract with PlasmaNet and its breach of contract with the other clients is the breach of the contractual clause requiring segregation of funds. This was not a separate wrong to PlasmaNet of such magnitude that it would be "unconscionable and inequitable" for the Debtor's other, less clever clients to share in the funds. *See McKee v. Paradise,* 299 U.S. 119, 57 S. Ct. 124, 81 L. Ed. 75 (1936)(holding that that mere failure to pay debts is not a circumstance in which equity will fasten a constructive trust upon property); *In re Itemlab, Inc.,* 353 F.2d at 154 ("Breach of a contract concerning payment of a debt furnishes no basis for the finding of a constructive trust."); *Amendola v. Bayer,* 907 F.2d 760, 763 (7th Cir. 1990)(finding that a breach of an agreement, without other wrongful activity, is insufficient to justify [*37] the imposition of a constructive trust); *In re Stylesite,* 253 B.R. at 509 (party enriched by virtue of its breach of a contract is not unjustly enriched).

This conclusion is bolstered by the fact that PlasmaNet could have protected itself by perfecting a security interest in the Debtor's property and establishing a lockbox, or by terminating the contract if the Debtor refused to perform and open a lockbox account. A lockbox and a filed security interest in receivables would also have provided notice to the Debtor's other creditors of PlasmaNet's interest in the subject property. It would also have permitted a tracing of the property as to which PlasmaNet claims an equitable interest. n8 PlasmaNet's failure to obtain a security interest that would have provided it with protection and would have given notice to the Debtor's other creditors of its rights further weakens PlasmaNet's claim that it is equitably entitled to superior rights. n9 As the Second Circuit said in *In re Itemlab, Inc.,* 353 F.2d at 155, a creditor who fails to obtain a valid security interest cannot, by asserting the rights of a beneficiary of a constructive trust or equitable lien, [*38] transform its unsecured position into a "preferred secured obligation. The adoption of such a construction of the law would be completely destructive of the intent and purpose of the recording act and cannot be seriously entertained." The Court continued:

> "Dutch American [the creditor] would be barred from equitable relief because of the basic principle that he who seeks equity must do equity. By its failure and neglect to file or record any instrument giving notice of its claim of an equitable interest in the chattels, Dutch American enabled Blanmill and Itemlab [the debtor and its principal] to mislead 18th Avenue Land Corp. [a substantial unsecured creditor]." 353 F.2d at 155.

Although there is nothing in this record to indicate that the Debtor misled third parties, PlasmaNet could have protected itself and could have given notice to third parties of its rights, but it did not. n10

n8 By failing to set up a lockbox account, and by failing to make any efforts to police the requirement of segregation of funds, PlasmaNet also made it virtually impossible to trace the funds in which it claims an interest. *In re Corrozzella & Richardson,* 247 B.R. at 602. PlasmaNet argues that most of the funds at issue can be traced into the Debtor's cash account. In view of the Court's conclusion that a constructive trust was not established, it is not necessary to determine this issue. Commingling, however, makes tracing difficult, and a matter of chance. [*39]

n9 PlasmaNet would not have had any rights as a secured party against the Debtor, after its bankruptcy filing, if the Debtor had segregated 70 percent of the funds collected from the relevant advertisers in an account under the Debtor's control, unless a lockbox had been created. As a debtor in possession, the Debtor has all of the rights of a trustee, which includes the status of judicial lien creditor and bona fide purchaser for value. 11 U.S.C. § § 544 (a), 1107(a). Under New York law, prior to the adoption of the amendments to UCC Article 9 effective July 1, 2001, a creditor had to have control over a deposit account or have possession of an indispensable instrument providing it with control in order to assert a viable lien or pledge over funds in a deposit account. *Miller v. Wells Fargo Bank Intl. Corp.,* 540 F.2d 548 (2d Cir. 1976). Under current law, Article 9 of the revised UCC governs, but the key factor is still control over the deposit account. *See* N.Y. UCC 9-314, 9-312(b), 9-102(a)(29), 9-104. The establishment of a lockbox account at PlasmaNet's bank would apparently have given PlasmaNet the degree of control over the funds at issue to maintain a valid security interest against the intervening powers of a bankruptcy trustee. Similarly, if PlasmaNet had perfected its interest and taken the other steps necessary to obtain a valid lien over receivables, PlasmaNet would presumably have had a valid security interest in receivables and, for a time at least, in their proceeds. *See* UCC 9-306(4) (Revised UCC 9-203(f), 9-315(c)). Although PlasmaNet evidently knew what had to be done, it never enforced its contractual rights. [*40]

n10 There are cases that hold that the action of a debtor in fraudulently preventing a secured party from perfecting its lien or continuing such perfection may give rise to a constructive trust or equitable lien and accord the secured party the rights it would have had absent the fraud. *See, e.g., In re Howard's Appliance Corp.,* 874 F.2d at 93 (debtor failed to inform creditor that property had been moved out of State and thereby prevented creditor from re-filing under the UCC). Here, however, PlasmaNet was aware that the Debtor had refused or failed to open a lockbox account, and it accepted alternative performance.

A further factor that detracts from PlasmaNet's appeal to equity for a priority over other creditors is the absence of a fraud claim. PlasmaNet's claim against the Debtor is that it breached its commitment to segregate funds; PlasmaNet's papers admit it never asked the Debtor about its compliance with the clause requiring segregation of funds. Although PlasmaNet implies that the Debtor is guilty of misconduct amounting to fraud, where a claim of misrepresentation [*41] is based on an alleged breach of contractual duties, the plaintiff does not have a viable fraud claim absent proof of a misrepresentation that is collateral or extraneous to the terms of the agreement. *Bridgestone/ Firestone, Inc. v. Recovery Credit Services, Inc.,* 98 F.3d 13, 20 (2d Cir. 1996); *McKernin v. Fanny Farmer Candy Shops,* 176 A.D.2d 233, 234, 574 N.Y.S.2d 58, 59 (2d Dept. 1991). There is no such allegation here.

Only a handful of cases have considered whether to impose a constructive trust in connection with the bankruptcy of an agent who has allegedly diverted funds entrusted by a principal. In *Shulman, Morales* and *Ames,* discussed above, the courts characterized the relationship between the parties as that of debtor and creditor, and denied the application principally on that analysis. *Black & Geddes* applied the same analysis; it put substantial weight on a comparison of the position of the creditor seeking constructive trust treatment with the other creditors, and it found that the creation of a constructive trust could not be justified under the competing principle of equality of treatment provided for in the Bankruptcy Code.35 B.R. at 836. [*42] The few cases in which a constructive trust has been imposed involve unique claims of individual creditors who (unlike PlasmaNet) could credibly assert a special legal interest different from that of other creditors in a discrete and relatively limited portion of the debtor's property. *See In re Construction General, Inc.,* 737 F.2d 416 (4th Cir. 1984)(debtor required to pay over to owner one-half of the proceeds of a note collected prior to bankruptcy but withheld; court found that under local law the trustee's rights would be inferior to the ownership claim of the creditor); *see also In re Specialized Installers,* 12 B.R. 546 (Bankr. D. Colo. 1981)(creditor paid debt of debtor and expected reimbursement the same day; little analysis); *In re Treiling,* 21 B.R. 940, 943 (Bankr. E.D.N.Y. 1984) (dictum; claimants had deposited earnest money with broker); *In re Martin Fein & Co.,* 34 B.R. 333 (Bankr. S.D.N.Y. 1983) and 43 B.R. 623 (Bankr. S.D.N.Y. 1984) (deposit of proceeds of auction sales with bankrupt auctioneering firm). None of those cases

involves facts similar to those present here. n11 The cases cited by PlasmaNet, [*43] in its papers, also bear no relationship to the facts at bar. n12

n11 A 1989 article, attempting to find a common denominator among the cases as of that date, concludes that the common thread through the winning cases is the relative uniqueness of the creditor's claim compared to those of other general unsecured creditors. *See* Davis, *Equitable Liens and Constructive Trusts in Bankruptcy: Judicial Values and the Limits of Bankruptcy Distribution Policy,* 41 FLA. L. REV. 1 (1989). There the author writes:

> "An explicit agreement prohibiting an agent from treating the funds as his own will strengthen a claimant's clause. But the more telling characteristic seems to be the relative uniqueness of the claim. All claimants whose agents in a three-party transaction become bankrupt are entitled to sympathy. But the general creditors are entitled to sympathy, too. Only if a claimant's circumstances are relatively unusual is a court able to distinguish the equitable claim form those of the great mass of general claims." 41 Fla. L. Rev. at 52-53.

n12 PlasmaNet cites *Clancy v. Goldberg,* 183 B.R. 672 (Bankr. N.D.N.Y. 1995), where homeowners sought recovery of payments made to a debtor-contractor prior to completion of a home improvement project. The Court determined that the New York Lien Law applied and that the advance payments were held in escrow. Similarly, PlasmaNet cites *In re Mishkin,* 138 B.R. 410 (Bankr. S.D.N.Y. 1992), a case where plaintiff-investors sought funds the debtor stole for his own use, for the proposition that "the investors' funds were tendered to the general partner on a fiduciary basis, and they are not part of the bankrupt estate." In fact, the Court did not base its ruling on the existence of a fiduciary duty, but rather that the debtor, as an individual, had no property rights in stolen funds. *In re Vermont Real Estate Investment Trust,* 25 B.R. 813 (Bankr. D. Vt. 1982), an investor was held entitled to recover proceeds he invested in a real estate investment trust after it suspended securities transactions, since the funds were not part of the estate.

[*44]

In conclusion, PlasmaNet's complaint rests on the proposition that it can assert a constructive trust over funds by virtue of a clause requiring the Debtor to segregate 70 percent of the funds received from certain advertisers. For all of the reasons stated above, the Debtor's breach of this contractual requirement of the contract is insufficient, in equity or good conscience, to cause this Court to prefer PlasmaNet over all the other creditors of the Debtor who were also unpaid when the Debtor filed its Chapter 11 petition.

Conclusion

PlasmaNet's motion for summary judgment is denied, and the Debtor's motion on the constructive trust issue is granted. The Debtor has not moved for summary judgment on its counterclaim for commissions which it alleges were wrongfully withheld by PlasmaNet, and there has been insufficient information submitted by PlasmaNet to enable the Court to determine the viability of the Debtor's claim.

The Debtor is directed to settle an order on five days' notice dismissing PlasmaNet's constructive trust claims and scheduling a pretrial conference to consider further proceedings on its counterclaim.

Dated: New York, New York

December 20, 2002 [*45]

/s/ Allan L. Gropper

UNITED STATES BANKRUPTCY JUDGE