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October 1, 2010

Via ECF and Hand Delivery

Honorable Robert E. Gerber
United States Bankruptcy Court
Southern District of New York
One Bowling Green, Courtroom 621
New York, New York 10004-1408

Re: ***In re Motors Liquidation Company, et al.*, No. 09-50026 (REG) (Bankr. S.D.N.Y.)**

Dear Judge Gerber:

As counsel for the Official Committee of Unsecured Creditors Holding Asbestos-Related Claims ("**ACC**"), we respectfully submit a proposed order (attached as Exhibit 1) implementing a protocol by which information produced by certain asbestos personal injury trusts (the "**Trusts**") pursuant to discovery authorized by the Court's August 24, 2010 Order (the "**UCC 2004 Order**"), would be rendered anonymous (the "**Anonymity Protocol**"). The ACC also hereby replies to the letter of September 20, 2010, from Philip Bentley, counsel to the Official Committee of Unsecured Creditors ("**Creditors' Committee**").

In accordance with the UCC 2004 Order, the ACC, the Creditors' Committee, the Legal Representative for Future Asbestos Claimants (the "**FCR**") and representatives of the Trusts attempted to reach agreement on an Anonymity Protocol. Those discussions led to impasse, and pursuant to the procedure spelled out in the UCC 2004 Order, the ACC filed a notice so advising the Court (attached as Exhibit 2). The ACC also filed a letter laying out the issues surrounding the Anonymity Protocol and describing two options for such a protocol. Letter to Hon. Robert E. Gerber from T. Swett. (Sept. 17, 2010) ("**ACC Letter**") (attached as Exhibit 3). The Creditors' Committee responded on September 20, arguing that no Anonymity Protocol should be implemented. Letter to Hon. Robert E. Gerber from P. Bentley, Esq. (Sept. 20, 2010) (the "**UCC Response**") (attached as Exhibit 4). A hearing on the matter is set for October 21, 2010 at 2:00 p.m.

Building on the Court's experience in the *Chemtura* bankruptcy, Your Honor directed the parties to attempt to agree upon a way for the third-party Trusts to make any production in response to the Creditors' Committee's proposed subpoenas in a fashion that would render the productions anonymous in the sense that the claims information provided would not be associated with the identity of any particular claimant. As the Court noted in the hearing on August 9, 2010:

> The second issue, and ultimately the most important, in my view, is protection of the legitimate needs and concerns of individual tort litigants in one-on-one litigation with New GM or anyone else with whom they might be involved in one-on-one litigation, all as contrasted to the macroeconomic estimation that we have before us here.

See Hr'g Tr. at 102 (Aug. 9, 2010). The Court also observed that an Anonymity Protocol would be most in keeping with the nature of the aggregate estimation of the Debtors' asbestos liability that the Court intends to conduct. *Id.* at 105.

Unfortunately, the Creditors' Committee's approach in negotiations on this subject has been to reject out of hand any proposal in the interest of maximizing the amount of information going to its expert and the flexibility accorded the expert in the use of that information. It is not surprising, of course, that an adversary would attempt to maximize its position in a discovery matter. But the task the Court has identified is to strike a reasonable balance between the discovery sought by the adversary and the protection of the rights of non-party individuals —individuals towards whose interests the Creditors' Committee and its expert are avowedly hostile, as the materials referenced in our letter of September 17, 2010, make clear. (*See* ACC Letter at 1-2.) Because the Creditors' Committee has been unwilling to strike such a balance voluntarily, protection of the absent claimants depends upon the Court's intervention.

1. The Proposed Anonymity Protocol

In the interests of moving the process forward, the ACC offers a proposed order implementing the compromise proposal in its previous letter. (*See* Exhibit 1.) Under this proposed Anonymity Protocol, the Trusts would submit their respective data to the neutral third-party. Bates White, the Creditors' Committee's claims estimation expert who has indicated that it wishes to merge certain information with the Trusts' data, would also submit its data to the neutral. The neutral would merge the Trusts' and Bates White's data to create a single database, then remove identifying data from the merged database and provide that anonymous database to the parties. Such a procedure provides a reasonable level of anonymity

while permitting the experts to handle the data themselves and run whatever analyses they deem appropriate.

Alvarez & Marsal ("**A&M**"), a well-known, global professional services firm with extensive forensic data analysis and technology capabilities, is available to serve as the neutral under this proposal and has the necessary resources to do so efficiently. No serious objection to using that firm as the neutral has been raised. A&M would be jointly retained by the Debtors, the Creditors' Committee, the ACC, and the FCR, and its duties would run to the Court under a retention order delineating its responsibilities. A&M has estimated that charges for its services, at normal hourly rates, would be in the range of $150,000 to $225,000.

2. The Anonymity Protocol is Necessary for the Protection of Tort Claimants and Appropriate to the Purposes of the Estimation Proceedings

When the Court directed the parties to negotiate an Anonymity Protocol, it had already ruled that the order granting the Creditors' Committee's discovery would include a strict confidentiality agreement. Nevertheless, the Court recognized the desirability of implementing additional protections through procedures for rendering the production anonymous as to claimants. *See* Hr'g Tr. at 105 (Aug. 9, 2010). In part, this reflected the Court's intention that the estimation of the Debtors' total asbestos liability will be in the nature of a high-level statistical extrapolation from available data. In such a process, the identity of particular claimants is essentially beside the point. Furthermore, an analysis that focuses too closely on individual claims risks triggering the due process rights of the absent claimants. In addition to the Anonymity Protocol's consistency with the task at hand, anonymity provides reasonable additional protection to individual claimants, many of whom are currently in the tort system facing solvent defendants who would seek advantage from the Trusts' claimant data. While the confidentiality order provides some protection, the nature and extent of the claimant data to be provided, the number of persons involved in the transmission, receipt, and use of that information, and the stated intention of the Creditors' Committee's expert to "merge" the Trust's data with databases that the expert already possesses, all make the policing of compliance with a confidentiality order difficult. The Creditors' Committee's assurances that it and its expert intend to comply with the Confidentiality Order are no substitute for the objective and verifiable protections of an Anonymity Protocol.[1]

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[1] The Creditors' Committee's letter does not deny that it has stood silent in the face of the ACC's pointed request for assurance that, if an Anonymity Protocol is decreed by the Court, the Creditors' Committee and its expert will refrain from efforts at circumventing the *(Footnote continued on next page.)*

Ironically, when it comes to its own interests, and that of its expert, the Creditors' Committee argues that a confidentiality order is not enough. It complains, for example, that the neutral administering the Anonymity Protocol should not be permitted to become "aware of the analyses being performed by each expert," and that "[e]nsuring that the analyses of each expert remain confidential until expert reports are filed would be of utmost concern." (UCC Response at 6.) On behalf of its expert, the Creditors' Committee also expresses anxiety that if the expert were required to submit data queries to a neutral in sole possession of the Trusts' production, the neutral would be in a position to misappropriate confidential methods and know-how. (*Id.*) The order now proposed, however, embraces the alternative Anonymity Protocol under which, disclosure of analyses and methods to the neutral would not be an issue, because the experts would receive the data for their use in private, and the neutral's only function would be to render the data anonymous before turning it over. But the telling point is that, when it comes to their own purposes, the Creditors' Committee and its expert are not willing to trust entirely to confidentiality strictures alone. Non-party tort claimants should not be required to do so either.

To deprecate the need for enhanced protections, the Creditors' Committee says that "[s]tate courts regularly require asbestos plaintiffs to disclose amounts they have recovered from settled co-defendants, including trusts." (UCC Response at 4.) This is a misleading half-truth. Such payments typically are disclosed, if at all, only *after* the non-settling defendant has suffered an adverse verdict and the trial court addresses the task of molding a judgment with whatever offsets for prior settlements are appropriate under applicable law.[2] Thus, the

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(Footnote continued from previous page.)
protocol. What the Creditors' Committee has said instead is that they will abide by the confidentiality order. (*See* UCC Response at 8 n.3.) That is not the same thing.

[2] *See, e.g.*, 44A N.Y. Jur. 2d Disclosure § 214 ("in an action against multiple defendants, non-settling defendants are not entitled to discover the terms of confidential settlement agreements between the plaintiffs and codefendants . . . [they] need not be disclosed until a verdict in the plaintiffs' favor and the apportionment of damages under the Joint Obligations Act"). And the Supreme Court has clearly held that the law that would shape the value of a claim if there were no bankruptcy controls valuation of the claim in a bankruptcy process as well. *E.g., Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000); *Travelers Cas. and Sur. Co. of Am. v. Pacific Gas & Electric Co.*, 549 U.S. 443, 451 (2007). Historically, of course, General Motors tried very few asbestos cases, but instead achieved consensual resolutions of almost all of them. No one contends that this pattern would have
(Footnote continued on next page.)

Creditors' Committee cannot fairly contend that its discovery of settlement payment information from the responding Trusts is anything but an unusual foray into sensitive information that plaintiffs and co-defendants generally do not provide in pre-trial discovery in the tort system. Indeed, historically, when General Motors settled claims jointly with other defendants, it deemed settlement information so sensitive that it would not disclose its own individual settlement contribution *even to the settling plaintiffs themselves*. Ensuring that the Trusts' payment information will not be misused to the detriment of individual tort claimants is therefore an important goal, as this Court has already recognized. An Anonymity Protocol is a reasonable, and indeed indispensable, means to that end.

3. The UCC's Objections are Unpersuasive and Its Rejection of an Anonymity Protocol in any Meaningful Form is Unreasonable

In urging that any form of Anonymity Protocol would hinder its expert's analysis, the Creditors' Committee emphasizes the detailed particulars of individual claims — what its letter refers to as "granularity." (UCC Response at 7.) Whether this approach is compatible with the needs of aggregate liability is a question for another day. The point now is that the Creditors' Committee has not even come close to substantiating its overblown arguments that claimants' names, social security numbers, and other identifying details must be revealed in order for the expert to perform the tasks described. For example, the Creditors' Committee's argument that it requires individuals' job site information suggests strongly that its purpose here is to collect as much information as possible, rather than conduct a macroeconomic estimation of the Debtors' liability. (*Id.*) It is inconceivable that any experts' analysis will turn on, or this Court will entertain, estimation arguments that distinguish a particular auto repair shop from a second shop down the street.[3] The idea that the value of a claim would depend on the month and day of its filing is likewise farfetched. The Creditors' Committee's suggestion that an anonymity protocol will "likely bias the resultant estimate high," (*id.*), is rhetoric unsupported by analysis or fact.

(Footnote continued from previous page.)
changed in the future if General Motors remained in the tort system. There will be, moreover, no tort "judgment molding" in the estimation process in this bankruptcy case.

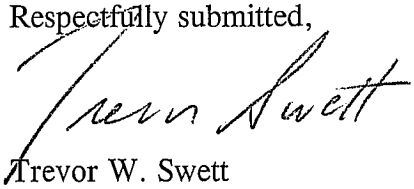
[3] The Creditors' Committee's stated desire to differentiate between the claims of brake mechanics and the claims of non-mechanics will be accommodated by the applicable occupation and industry codes that would be available under the Anonymity Protocol proposed in the attached order.

The Creditors' Committee's own proposal for an "anonymity protocol" (UCC Response at 8) is nothing of the sort, but mere window-dressing. Under that proposal, all the Trusts' claimant data, including personal identifiers, is produced to everyone. The only gesture towards anonymity is that the data in the hands of the experts is shuffled into different linked data tables. It is a change in form, rather than substance, and would have no practical effect.

Finally, the Court should not be deterred from requiring a genuine Anonymity Protocol by complaints that such a procedure would impose costs. The cost estimates provided by the proposed neutral ($150,000 to $225,000) are modest in the overall scheme of a case involving billions of dollars in assets and liabilities. That estimate is undoubtedly far less than what the Creditors' Committee itself has spent in pursuit of its discovery, to say nothing of the costs it has already inflicted upon the respondent Trusts. Devoting modest resources to the protection of the legitimate interests of thousands of non-party claimants whose information is to be discovered from the Trusts is essential to the fairness and legitimacy of the process.

For all the foregoing reasons and those set forth in our letter of September 17, 2010, the ACC respectfully requests that the Court enter the attached proposed order implementing the Anonymity Protocol.

Respectfully submitted,



Trevor W. Swett

Enclosures

cc: (with enclosures)
Steven Karotkin, Esq., *Counsel to Debtors*
Robert Weiss, Esq.
Joseph Sgroi, Esq., *Counsel to New GM*
Philip Bentley, Esq., *Counsel to the Unsecured Creditors Committee*
Sander L. Esserman, Esq.
Robert Brousseau, Esq., *Counsel to the Future Claims Representative*
Steven M. Juris, Esq., *Counsel to Certain Trusts*
Emily Stubbs, Esq., *Counsel to Manville Trust*

Exhibit 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11 Case No.:
MOTORS LIQUIDATION COMPANY., et al., f/k/a General Motors Corp., et al.,	:	09-50026 (REG)
Debtors.	:	(Jointly Administered)

[PROPOSED] ORDER IMPLEMENTING AN ANONYMITY PROTOCOL FOR DISCOVERY FROM CERTAIN CLAIMS PROCESSING FACILITIES AND FROM CERTAIN TRUSTS CREATED PURSUANT TO BANKRUPTCY CODE SECTION 524(G)

This Court, having entered an Order on August 24, 2010 pursuant to Bankruptcy Rule 2004, (the "**UCC 2004 Order**") [Docket No. 6749], authorizing the Official Committee of Unsecured Creditors of Motors Liquidation Company (the "**Creditors' Committee**") to obtain discovery from (1) the Delaware Claims Processing Facility and Claims Resolution Management Corporation (the "**Claims Processing Facilities**") and Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust, the Celotex Asbestos Settlement Trust, the Babcock & Wilcox Company Asbestos Personal Injury Settlement Trust, the Owens Corning/Fibreboard Asbestos Personal Injury Trust, the DII Industries, LLC Asbestos PI Trust, the United States Gypsum Asbestos Personal Injury Settlement Trust and the Manville Personal Injury Settlement Trust (collectively, the "**Trusts**") for the purposes of an estimation of the Debtors' liability for asbestos-related personal injury and wrongful death claims (the "**Estimation Proceeding**"), such discovery consisting of, in electronic form:

> (a) the claim information electronically maintained by the Trust(s) in current datafield format for each identifiable Mesothelioma Claimant who filed a pre-petition asbestos personal injury lawsuit against one or more of the Debtors for

> mesothelioma, as supplied by each claimant and/or his or her counsel to the Trust(s), but excluding medical and financial information (other than date of diagnosis) and medical and financial records; (b) the amounts paid to each Mesothelioma Claimant by each Trust; and (c) the claim status of each Mesothelioma Claimant who filed a claim against any Trust but has received no recovery from that Trust (*i.e.*, whether that claim is still pending or has instead been dismissed)

UCC 2004 Order, ¶ 5 (the "**Trust Claimant Data**");

The UCC 2004 Order having further required that, before service of the subpoenas on the Claims Processing Facilities and the Trusts, the parties, including the Official Committee of Unsecured Creditors Holding Asbestos-Related Claims (the "**ACC**"), attempt to reach agreement on a protocol by which the information to be produced by the Trusts would be rendered anonymous (the "**Anonymity Protocol**"), and failing agreement, could apply to the Court;

The parties having failed to agree on a consensual Anonymity Protocol; and,

The parties having filed written submissions with the Court regarding the Anonymity Protocol;

IT IS HEREBY ORDERED THAT:

1. The Creditors' Committee, the ACC, and the Legal Representative for Future Asbestos Claimants (the "**FCR**") shall jointly retain Alvarez & Marsal to serve as the third-party neutral (the "**Neutral**") to administer this Anonymity Protocol.

2. All Trust Claimant Data produced by the Claims Processing Facilities and the Trusts pursuant to subpoenas issued under the UCC 2004 Order shall be provided solely to the Neutral and to no other person.

3. The Creditors' Committee shall be entitled to submit additional claimant data to the Neutral (the "**Additional Claimant Data**") consisting of:

> Claimant name
> Claimant SSN

Claimant birth date
Claimant death date
Claimant diagnosis date
Filing date against GM
Earliest filing date in the tort system
Occupation code
Industry code
Jurisdiction of filing
Disposition with regard to GM (dismissed, paid or pending)
Settlement amount with GM (if applicable)

With respect to each individual claimant, any such Additional Claimant Data may contain less than all of the fields identified above but must contain at least two of the following three fields (i) the social security number, (ii) first and last name, and (iii) date of birth.

4. The Neutral shall merge the Trust Claimant Data and the Additional Claimant Data into a single database (the "**Master Database**"). The Master Database shall not be produced or further disseminated to any party except as described below.

5. The Neutral shall prepare a database (the "**Anonymized Database**") by removing or limiting certain information and data fields from the Master Database as defined in Paragraph 6 below.

6. The information and data fields that the Neutral shall remove or limit (the "**Indentifying Information**") are the following:

Claimant name, SSN, address, phone, fax, email (except state)
Claimant date of birth (except year)
Claimant date of death (except year)
Claimant death certificate date (except year)
Personal Representative name, SSN, address, phone, fax, email
Contact name, address, phone, fax, email
Occupationally exposed person name, SSN, address, phone, fax, email (except state)
Other exposed person name, SSN, address, phone, fax, email (except state)
Exposure affiant name
Dependant name
Dependant date of birth (except year)
Work history (except occupation code and industry code)

Exposure sites (except state)
Dates of diagnosis (except year)
Dates of exposure (except year)
Dates of lawsuits (except year)
Lawsuit case numbers
Attorney name/firm/address

7. The Trust Claim Data and the Master Database shall not be subject to subpoena or further disclosure of any kind.

8. The Anonymized Database shall be "Confidential Estimation-Related Information" under the terms of the Confidentiality Agreement and Protective Order dated August 24, 2010 (the "**Confidentiality Order**"), and shall be so marked. Each party and each expert who receives the Anonymized Database as provided in paragraph 9 below shall be subject, with respect to the Anonymized Database, to all of the duties created by the Confidentiality Order.

9. Subject to the Confidentiality Order, the Neutral shall provide the Anonymized Database to the parties to the Estimation Proceeding and their respective claims estimation experts.

10. Upon the later of (a) entry of a final non-appealable order in the Estimation Proceeding and (b) the effective date of a plan of liquidation in the Debtors' Bankruptcy Cases, the Neutral shall destroy all copies of the Trust Claimant Data, the Additional Claimant Data, the Master Database and the Anonymized Database, whether whole or partial, and certify such destruction to the Court.

Dated: New York, New York
October ___, 2010

UNITED STATES BANKRUPTCY JUDGE

Exhibit 2

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Attorneys for the Official Committee of Unsecured Creditors Holding Asbestos-Related Claims

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 11
MOTORS LIQUIDATION COMPANY, *et al.*, f/k/a GENERAL MOTORS CORP., *et al.*,	)	Case No. 09-50026 (REG)
Debtors.	)	Jointly Administered

NOTICE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS HOLDING ASBESTOS-RELATED CLAIMS REGARDING THE ANONYMITY PROTOCOL

TO: THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY COURT

Pursuant to this Court's Order Pursuant to Bankruptcy Rule 2004 Authorizing the Official Committee of Unsecured Creditors of Motors Liquidation Company to Obtain

Discovery from (i) the Claims Processing Facilities for Certain Trusts Created Pursuant to Bankruptcy Code Section 524(g), (ii) the Trusts, and (iii) General Motors LLC and the Debtors, dated August 24, 2010 [Docket No. 6749] (the "**UCC 2004 Order**"), the Official Committee of Unsecured Creditors Holding Asbestos-Related Claims (the "**ACC**") hereby notifies the Court that the parties have engaged in negotiations over the terms of an anonymity protocol for the discovery to be provided under the UCC 2004 Order, but that the Official Committee of Unsecured Creditors (the "**Creditors' Committee**") has unreasonably refused to agree to the terms of an anonymity protocol. Under the express provisions of the UCC 2004 Order, the Creditors' Committee may not serve the subpoenas in question until the Court resolves the issue raised by this notice. In furtherance of this procedure, the ACC respectfully shows as follows:

1. On July 20, 2010, the Creditors' Committee filed a Motion for an Order Pursuant to Bankruptcy Rule 2004 Directing Production of Documents by (i) the Claims Processing Facilities for Certain Trusts Created Pursuant to Bankruptcy Code Section 524(g), and (ii) General Motors LLC and the Debtors [Docket No. 6383] (the "**Motion**").

2. After briefing and a hearing, on August 24, 2010, the Bankruptcy Court entered the UCC 2004 Order, which, *inter alia*, authorized the Creditors' Committee to subpoena the following information from the Claims Processing Facilities and the Trusts in electronic form: (a) the claim information electronically maintained by the Trust(s) in current datafield format for each identifiable claimant who filed a pre-petition asbestos personal injury lawsuit against one or more of the Debtors for mesothelioma, as supplied by each claimant and/or his or her counsel to the Trust(s), but excluding medical and financial information (other than date of

diagnosis) and medical and financial records; (b) the amounts paid to each such mesothelioma claimant by each Trust; and (c) the claim status of each such mesothelioma claimant who filed a claim against any Trust but has received no recovery from that Trust (*i.e.*, whether that claim is still pending or has instead been dismissed).

3. At the August 24th hearing, counsel for the ACC suggested that it might be possible to develop a protocol by which the information to be produced by the Trusts would be rendered anonymous. The Court was receptive to this suggestion. In its ruling on the Motion, the Court found the anonymity proposal better in a number of respects, if it could be implemented without material prejudice to the Creditors' Committee, in that compliance would likely be more focused on the real issues, almost as fast in delivery of data, faster with respect to data analysis, and more protective of individual asbestos litigant confidentiality. Transcript of August 24, 2010 Hearing at 105 [Docket No. 6641].

4. Accordingly, the UCC 2004 Order further required that, before service of the subpoenas on the Claims Processing Facilities and the Trusts, the parties attempt to reach agreement on such a protocol (the "**Anonymity Protocol**").

> 8. Prior to service of the Subpoenas, the Creditors' Committee, the Claims Processing Facilities, the Trusts, the Asbestos Claimants Committee, the Future Claims Representative, the Debtors and GM shall continue their efforts to reach agreement on the terms of an Anonymity Protocol. In the event that the foregoing parties reach agreement on the terms of an Anonymity Protocol prior to service of the Subpoenas, the Creditors' Committee shall not issue the Subpoenas, and the parties shall instead submit to the Court a stipulation and proposed order embodying the terms of the Anonymity Protocol.
>
> 9. In the event the Creditors' Committee, the Claims Processing Facilities, the Trusts, the Asbestos Claimants Committee, the Future Claims Representative, the Debtors and GM are unable to reach agreement, within two weeks' time from the entry of (i) this Order and (ii) the Confidentiality Order, on the terms of an Anonymity Protocol, the Creditors' Committee is authorized to issue the Subpoenas; provided, however, that if an Anonymity Protocol has

> been proposed and any of the other foregoing parties believes the Creditors' Committee has unreasonably refused to agree to its terms, such other party may so notify the Court and, in the event of such notification, the Creditors' Committee shall not issue the Subpoenas pending further direction from the Court.

UCC 2004 Order ¶¶ 8-9.

5. Pursuant to that Order, the ACC, the UCC and other parties began negotiation of an Anonymity Protocol on August 27, 2010. Negotiations continued through the week of August 30th and then through September 13, 2010. The parties have agreed that the UCC shall not serve subpoenas before 7:00 p.m. on September 14, 2010, so that any other party may seek the Court's prior intervention on the question of an Anonymity Protocol.

6. The protocol that would offer the strongest anonymity and which is most in line with the comments the Court made at the hearing would be one in which the Trusts submit their data to a neutral third-party and the UCC, through its expert Bates White, also submit to the neutral any data they contemplated merging with the Trust data. The neutral would then merge the Trusts' and Bates White's databases. The combined database would reside exclusively on the neutral's computers, and the neutral would respond to queries for aggregate and statistical information by the experts.

7. An alternative protocol with similar features, but which offers somewhat less anonymity, could be structured as follows: the Trusts and Bates White would submit their respective data to the neutral third-party, the neutral would merge the Trusts' and Bates White's databases, and the neutral would then anonymize the database and provide it to the parties.

8. The ACC has contacted the firm Alvarez & Marsal, who is willing and able to serve as the third-party neutral to administer the Anonymity Protocol, under either approach described above.

9. The Creditors' Committee has unreasonably refused to agree to any protocol proposed by the ACC. Pursuant to Paragraph 9 of the UCC 2004 Order, the Creditors' Committee may not issue Subpoenas to the Trust pending further direction from the Court.

10. To resolve the dispute over the Anonymity Protocol, the ACC requests the Court's intervention on the issue. The ACC proposes that the parties make written submissions to the Court regarding the Anonymity Protocol by 5:00 p.m., September 17, 2010 and requests a conference with the Court as soon thereafter as the Court's calendar will permit.

Date: September 14, 2010

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September 17, 2010

By ECF and Hand Delivery

The Honorable Robert E. Gerber
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, New York 10004-1408

Re: In re Motors Liquidation Co., No. 09-50026 (REG) (Bankr. S.D.N.Y.)

Dear Judge Gerber:

On behalf of the Official Committee of Unsecured Creditors Holding Asbestos-Related Claims (the "**ACC**"), I write regarding the protocol by which the individual claims information sought by the Official Committee of Unsecured Creditors (the "**Creditors' Committee**") from several asbestos personal injury trusts (the "**Trusts**") may be made available on an anonymous basis.

As the Court recognized at our August 9, 2010 hearing, an anonymity protocol is desirable here. The UCC and its expert Bates White are being provided discovery well beyond the scope of what defendants are ordinarily entitled to in the tort system. They seek information about more than 7500 individual mesothelioma claimants reflecting those individuals' claims against defendants other than General Motors and settlements made among those third parties. This information encompasses many claimants whose asbestos personal injury claims are currently pending in the tort system against non-settling solvent defendants.

At the hearing, counsel for the UCC admitted that its discovery of the trust claim and settlement information is part of a litigation strategy calculated to affect individual claims against solvent defendants unrelated to the Motors Liquidation bankruptcy:

> This is an issue that's being fought out in courtrooms, state courtrooms, across the country. And it's very heated. It's one of the cutting edge[] issues in this

> tort litigation across the country, the asbestos litigation. And if it were to get out, if Your Honor were to rule in your estimation ruling that the spike and values that occurred over the last decade was a short term thing and that the trusts are now paying as much, we believe in the aggregate, as those companies were paying in the tort system before they went bankrupt and that those values should be and probably will be reflected in the tort system going forward. That is a damaging ruling to the plaintiffs in state courts across the country.

Hr'g Tr. 19, Aug. 9, 2010.

The UCC's expert, Charles Bates, and his company, Bates White, are part of a concerted effort to alter the rules of evidence and substantive law so as to favor corporate defendants in asbestos personal injury cases. Far from being a dispassionate expert, Bates White has become an active participant in individual asbestos cases in its own right—outside of its work as an expert. For example, Bates White filed an amicus brief several weeks ago in a California case, *O'Neil v. Crane Co*, in support of the corporate defendant's position and in which it certified that "[n]o party or counsel for any party to this appeal authored the proposed amicus curiae brief in whole or in part or made a monetary contribution to fund the preparation or submission of the brief." Application and Amicus Curiae Brief of Bates White LLC Supporting Respondents, *O'Neil v. Crane Co*, No. S177401, 2010 WL 2984322, at *7 (Cal. July 28, 2010). Unfunded by any litigant, Bates White made broad assertions hostile to asbestos plaintiffs, alleging without evidence that they file their claims in secret, lie to courts and trusts, and collect duplicative damages. *Id.* at *5-7.

Bates White also holds itself out as an expert in individual asbestos cases against solvent defendants, offering testimony about what individual claimants are likely to be paid by third-party settlement trusts based on information that it has obtained through bankruptcy cases. For example, in another recent California case, *Lindenmeyer v. Allied Packing and Supply, Inc.*, purported expert Marc Scarcella, an employee of Bates White, disclosed that he would testify about

> the likelihood of, basis for, and dollar amounts of recovery available to Mr. Lindenmayer and his estate from various asbestos bankruptcy trusts. Mr. Scarcella's testimony will be based on the discovery conducted in this case, the publicly available documentation produced by various trusts established pursuant to section 11 U.S.C. 524(g), and his experience and expertise evaluating the processes used by various trusts in paying claims for asbestos-related diseases.

Declaration of Counsel in Support of Defendant Warren Pump LLC's Amended Designation of Expert Witnesses at 29-30, *Lindenmeyer v. Allied Packing and Supply, Inc.*, No. RG-09-

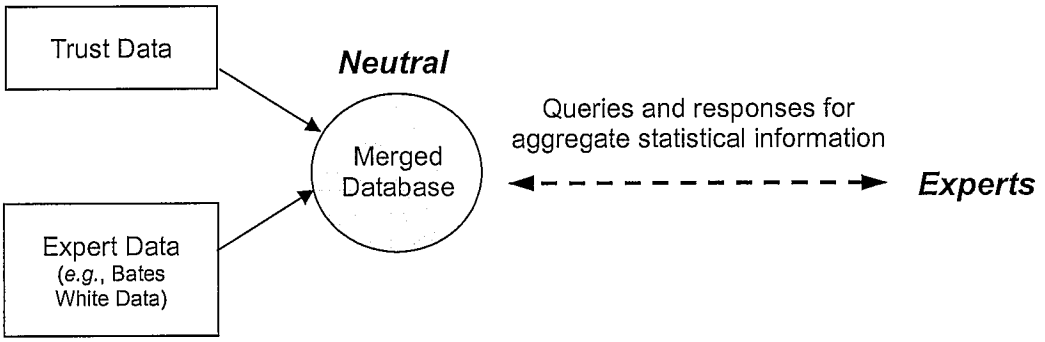
483370 (Cal. July 2, 2010) (attached as Ex. A). Thus, Bates White markets itself as expert in the claim processing and payment practices of asbestos trusts and has a vested interest in using the claims estimation dispute in this case to accumulate information and knowledge that it can market to asbestos defendants, bankrupt or solvent, for use in tort suits and in other bankruptcies.

For its part, the UCC has indicated that its interest in this data is on an aggregate basis. Hr'g Tr. 70, Aug. 9, 2010. The UCC has claimed it has no interest in the identities of claimants. *Id.* Given this claim, the extraordinary scope of the UCC's proposed subpoenas, its announced strategy of seeking rulings in this case that will disadvantage claimants elsewhere, and Bates White's unusual role in individual asbestos cases, an anonymity protocol is a prudent and appropriate check on the misuse, inadvertent or otherwise, of sensitive settlement information from thousands of mesothelioma victims.

An anonymity protocol is preferable to relying on the confidentiality order alone for several reasons. First, it restricts the sheer number of parties and entities who hold sensitive information, significantly limiting the chances that error or carelessness would result in the data being compromised. Second, it reduces the difficulties of policing the confidentiality agreement. Finally, without affecting whatever utility this information might have in the aggregate estimation that will take place in this case, it curtails the potential misuse of the information outside this case.

A strong anonymity protocol

The protocol that would offer the strongest anonymity protection and that is most in line with the observations the Court made at the hearing would be one in which the Trusts submit their data to a neutral third-party and the UCC's expert Bates White also submits to the neutral any data it contemplates merging with the Trust data. The neutral would then merge the Trusts' and Bates White's databases. The combined database would reside exclusively on the neutral's computers, and the neutral would respond to queries for aggregate and statistical information by the experts without revealing to them the identity of any individual claimant in those responses.



The advantages of such an approach are several. First, the individual claimant information would be provided only to one party, rather than to multiple parties, increasing security and decreasing the likelihood of misuse. In addition, the work of merging the databases would be done only once, by the neutral, rather than multiple times by different experts, saving time and associated expert costs.

The ACC has contacted the firm Alvarez & Marsal, who is willing and able to serve as the neutral to administer the anonymity protocol. The Alvarez & Marsal professionals would be jointly retained by the parties and would charge hourly rates. While the total cost would depend on the nature of the data provided and the number and types of expert inquiries made, a preliminary estimate of the fees is $150,000 to $225,000. Both preparation of a merged database and the associated analysis are steps that would likely be undertaken by one or more of the parties' experts without a protocol, so there would be little additional time required. Overall, the protocol would have a relatively small impact on the overall expenditure or schedule of any estimation proceedings.

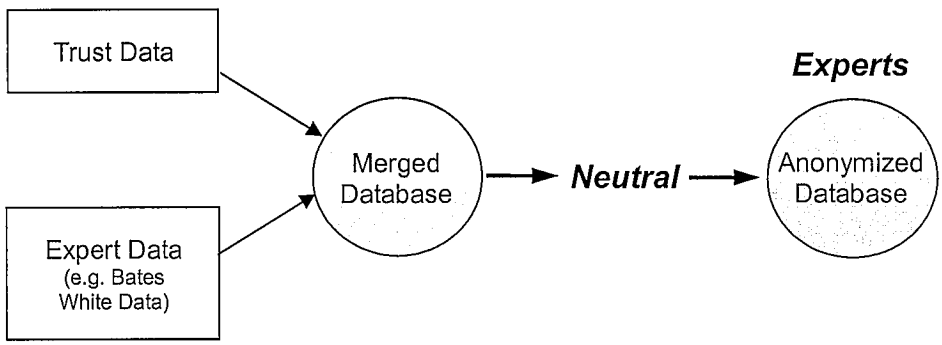
The UCC rejected this proposal for two principal reasons. First, it claimed that the neutral would not be able to merge the databases from the Trusts and from Bates White to their satisfaction. However, each of the component databases will have sufficient identifying information—such as name, social security number, or birthdate—to make merging them a relatively simply task. In the unlikely event that some additional work in merging the component databases is required, Alvarez & Marsal has experts in the field of claims data processing capable of that function.

Second, the UCC claimed that receiving only statistical and aggregate information from the neutral would interfere with its analysis of the data. While submitting requests to the neutral to run on the merged database might cause some modest inconvenience to the parties' experts, who would prefer to have the data on their own computers, nothing would prevent the

experts from extracting any aggregate or statistical information from the database that they required. In seeking a fair balance, the inconvenience for the experts is outweighed by the interests of the non-party claimants in the security of this information. If the UCC complains that it needs access to detailed individual claimant information as output, moreover, that contention would be at odds with its representation that its interest in the data is on an aggregate basis only.

A compromise anonymity protocol

An alternative protocol with similar features, but that offers somewhat less anonymity, could be structured to eliminate the objection that having experts work through the neutral would be cumbersome. It would work as follows: The Trusts and experts, here likely only Bates White, would submit their respective data to the neutral third-party, the neutral would merge the Trusts' and Bates White's data and create a single, merged database, and the neutral would then anonymize the database and provide it to the parties.



The fields from the merged database that would have to be redacted or limited would ultimately depend on what material the UCC wanted to add to the merged database, information that the UCC has not yet provided in any detail. Preliminarily, at least the following categories of fields in the Trusts' databases would need to be redacted or limited:

Claimant name, SSN, address, phone, fax, email (except state)
Claimant date of birth (except year)
Claimant date of death (except year)
Claimant death certificate date (except year)
Personal Representative name, SSN, address, phone, fax, email
Contact name, address, phone, fax, email
Occupationally exposed person name, SSN, address, phone, fax, email (except state)
Other exposed person name, SSN, address, phone, fax, email (except state)

Exposure affiant name
Dependant name
Dependant date of birth (except year)
Exposure site (except state)
Dates of diagnosis (except year)
Dates of exposure (except year)
Date of lawsuit (except year)
Lawsuit case numbers
Attorney name/firm/address

With respect to the material the UCC indicated that it wanted to add, these would generally be treated as described above. For example, dates would be rounded to years. The UCC did suggest that it would add detailed work history for each claimant. Including such information would not be compatible with anonymity, however. Nor is the detailed job history of individual claimants something this Court is likely to consider in an aggregate estimation. The ACC would be willing to include industry and occupation codes.

Alvarez & Marsal has confirmed that it is available to serve as the neutral under this proposal and has the necessary resources to do so efficiently. Once the list of fields to be removed or redacted from the merged database is finalized, the process of generating the anonymized database would be relatively quick. The cost would be roughly commensurate with the first proposal discussed above.

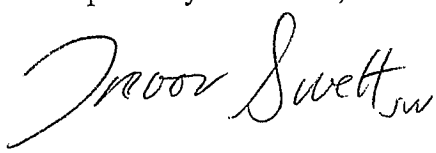
The UCC had objections to this alternative protocol as well. First, it claimed that various details, such as a work history, were necessary to their analysis. But, as noted above, claim-by-claim analysis of individual work histories and other details is inconsistent with the aggregate approach to estimation. As explained fully in the ACC's submission on the Rule 2004 requests, this Court cannot make case-by-case determinations of the validity of individual asbestos claims in an estimation context. Indeed, any attempt to do so would violate due process and the jury trial rights of claimants, which are protected both by the Seventh Amendment and by statute. *See* 28 U.S.C. § 1411(a) (providing, with irrelevant exceptions, that "this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable non bankruptcy law with regard to a personal injury or wrongful death tort claim"). Second, the UCC claimed that, even with certain fields removed or limited, it would be possible to circumvent the anonymity protocol by matching the anonymized database back to those source databases it held in unredacted form. While it is true that such circumvention might be theoretically possible (at least to some degree), it would depend on inferences that fall short of positive identification of claimants. Moreover, the UCC's argument is not compatible with good faith, in that it suggests that Bates White would in fact attempt to avoid the protocol

even if this Court adopted it. When asked directly whether they would agree not to attempt to circumvent the anonymity protocol in this fashion, the UCC and Bates White remained silent.

* * *

The data on thousands of individual claimants that the Trusts may produce is highly sensitive information to which co-defendants in the tort system—and their experts like Bates White—would not ordinarily have unfettered access. The ACC has suggested two viable methods by which the individual claims data produced by the Trusts could be rendered anonymous, providing protection to those individual claimants against misuse of the information in this case or in other settings. None of them would meaningfully add to the cost of these proceedings. The ACC therefore requests that the Court require one of the two anonymity protocols outlined here.

Respectfully submitted,



Trevor W. Swett

Attachment

cc: Stephen Karotkin, *Counsel to Debtors*
Robert Weiss, Joseph Sgroi, *Counsel to New GM*
Philip Bentley, *Counsel to the Unsecured Creditors Committee*
Sander Esserman, Robert Brousseau, *Counsel to the Future Claims Representative*
Stephen M. Juris, *Counsel to Certain Trusts*
Emily Stubbs, *Counsel to Manville Trust*

EXHIBIT A

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Attorneys for Defendant
WARREN PUMPS, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ROBERT LINDENMAYER AND BEVERLY LINDENMAYER,

Plaintiffs,

v.

ALLIED PACKING & SUPPLY, INC., et al.,

Defendants.

ASBESTOS

No. RG-09-483370

DECLARATION OF COUNSEL IN SUPPORT OF WARREN PUMPS, LLC'S AMENDED DESIGNATION OF EXPERT WITNESSES

Complaint Filed: November 5, 2009
Trial Date: August 2, 2010

I, Susanne G. Arani, declare:

1. I am an attorney at law licensed in all the courts of the State of California and am employed with the law firm of Carroll Burdick & McDonough, attorneys of record for Defendant Warren Pumps, LLC (hereinafter "Defendant") in the above captioned matter. As such, I am familiar with the facts of this case. If called and sworn as a witness, I would testify to the following:

2. The expert witnesses described herein have been contacted by or on behalf of Warren Pumps, LLC and have agreed to act as expert witnesses in this. Each of these expert witnesses will be prepared to give timely and meaningful deposition testimony. Each of these experts will have accomplished a review of pertinent materials regarding this action. The materials reviewed will potentially include some or all of the

containing gaskets or packing, if any, associated with a Warren pump, were below the current and all historical, permissible exposure limits, excursions, and short-term limits and are therefore subject to the warning label exemption of OSHA.

f. She will testify about the historical literature and other applicable government regulations of asbestos and their importance to asbestos-containing products that may have been used with various types of equipment including pumps.

g. She will testify regard the historical literature and other applicable government regulations of asbestos and their importance to Defendants' products.

h. She will testify about current and past regulations concerning permissible exposure. The current OSHA permissible exposure level, published in 1994, is 0.1 fibers per cubic centimeter (f/cc), as an eight-hour time weighted average. The OSHA permissible level from 1986 to 1994 was 0.2 f/cc, as an eight-hour time weighted average. The OSHA permissible level from 1976 to 1986 was 2 f/cc, as an eight-hour time weighted average. The OSHA permissible level from 1971 to 1976 was 5 f/cc, as an eight-hour time weighted average.

Warren Pumps reserves the right to amend or supplement this designation based on newly discovered documents, records, or other materials relating to the Plaintiffs. A copy of Ms. Ringo's curriculum vitae will be made available upon request.

9. Marc Scarcella, MA, Bates White, LLC, 1300 Eye Street NW, Suite 600 Washington, DC 20005. Mr. Scarcella has several years experience providing economic analysis and consultative services in Chapter 11 bankruptcy proceedings involving the establishment of section 11 U.S.C. 524(g) asbestos trusts. He is familiar with asbestos claims processing, reporting, and quality control management, as well as the detailed provisions of various asbestos Trust Distribution Procedures. He will be prepared to testify concerning the likelihood of, basis for, and dollar amounts of recovery available to Mr. Lindenmayer and his estate from various asbestos bankruptcy trusts. Mr. Scarcella's testimony will be based on the discovery conducted in this case, the publicly available documentation produced by various trusts established pursuant to section 11 U.S.C.

524(g), and his experience and expertise evaluating the processes used by various trusts in paying claims for asbestos-related diseases. Mr. Scarcella's fees for deposition and trial testimony are $395 per hour.

10. David P. Sargent, Jr., SEI Associates, P.O. Box 1466, Great Falls, VA 22066-1466. David P. Sargent, Jr. is a retired Rear Admiral of the United States Navy. He began his Navy career in 1967, after receiving a Bachelor of Science degree in Mechanical Engineering from Cornell University. Upon commissioning in the Navy, Admiral Sargent attended the Pacific Fleet Chief Engineer School in a course focused on the maintenance of engineering plants of World War II era steam propulsion ships. Admiral Sargent also has a Master of Engineering degree from the Naval Postgraduate School, Monterey, California, in 1974. In addition, Admiral Sargent is a licensed Professional Engineer with extensive operational experience in ship engineering, ship maintenance, and at-sea operations.

Following twenty years of operational experience in warships, Admiral Sargent held a variety of program and technical management positions in the Naval Sea Systems Command program offices responsible for the design, construction, introduction, and support of new warships from 1988 until his retirement in 1999. Upon his selection to Rear Admiral in 1994, he was assigned as Commander, Naval Surface Warfare Center, a diverse organization of research laboratories and engineering stations responsible for research and development of all technical aspects of U.S. Navy surface ships and submarines. His final tour before retirement was Program Executive Officer (PEO) for Aircraft Carriers, Expeditionary Warfare and Auxiliary ships. In this position, he had the overall responsibility of all matters relating to both the technical and programmatic details of design, construction, delivery and support of both new and in-service aircraft carriers, expeditionary warfare, and auxiliary ships of the Navy.

Admiral Sargent is now President of Sargent Enterprises, Inc. Sargent Enterprises, Inc. includes two companies serving the marine industry: SEI Associates, a consulting business that provides technical and management advice to marine industries;

Dr. Sawyer may also offer opinions regarding the fact and reasonableness of industry's and specific companies' reliance upon the development of the scientific and medical literature regarding asbestos and disease.

Dr. Sawyer may also testify about the Navy's response to information about possible asbestos hazards based on his own training and experience in the Navy as a physician and officer 1960 and 1970s. He may testify about how the medical community actually responded to information in the published literature that related to possible health hazards of asbestos as opposed to people who were not there testifying about how people should have responded.

Dr. Sawyer may also offer testimony in response to any issue discussed by plaintiff's experts in reports or testimony. His testimony may also include specific opinions related to this defendant's state-of-the-art issues, including corporate documents. His fees to be determined at the time of deposition.

Defendant hereby reserves the right to supplement this expert list, if necessary, as a result of testimony or developments which expose the need for additional experts, as well as in response to the designation of experts by Plaintiff's and other Defendants to this action.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on this 2nd day of July, 2010 at San Francisco, California.

Susanne G. Arani

Exhibit 4

KRAMER LEVIN NAFTALIS & FRANKEL LLP

PHILIP BENTLEY
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September 20, 2010

VIA ECF AND HAND DELIVERY

The Honorable Robert E. Gerber
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, New York 10004-1408

Re: *Motors Liquidation Company, et al.*, Case No.: 09-50026

Dear Judge Gerber:

On behalf of the Official Committee of Unsecured Creditors (the "Creditors' Committee"), I write in response to the September 17, 2010 letter (the "ACC letter") of Trevor W. Swett, counsel for the Official Committee of Unsecured Creditors Holding Asbestos-Related Claims (the "ACC"), concerning a proposed "anonymity protocol" to govern the confidential claimant data to be produced pursuant to the Court's two August 24, 2010 Orders – namely, the Order Pursuant to Bankruptcy Rule 2004 (the "Rule 2004 Order") and the accompanying Confidentiality Agreement and Protective Order (the "Agreed Protective Order").

Over the six weeks that have elapsed since the Court's August 9 hearing on the Creditors' Committee's Rule 2004 motion, we have worked intensively with counsel for the ACC, the Trusts and the other parties to determine whether it may be possible, without undue harm to the estimation process, to devise a protocol that would accommodate the ACC's stated desire to render anonymous the claimant data to be produced by the Trusts. We have provided detailed substantive responses to each proposal advanced by the ACC, and have granted multiple extensions of the time frame set by the Court for the negotiation of the protocol. However, each proposal advanced by the ACC has proven unworkable. Most important, each proposal would significantly impair the ability of the Creditors' Committee's experts to conduct a rigorous analysis of the claimant data to be produced by the Trusts. By constraining the access of the Creditors' Committee's experts to the data needed for their analysis, the proposed protocol – in either of its proposes versions – could substantially bias the results of the estimation in an upward direction. In addition, either version of the proposed protocol would significantly increase the cost of these estimation proceedings and could cause significant delay.

Because an anonymity protocol, however devised, would involve very substantial cost, in terms of money, time and (most important) impairment of the effectiveness of the estimation process, we have repeatedly urged the ACC and the other parties to explain why an approach of this sort is needed – that is, why the Agreed Protective Order already entered by the Court, after having been heavily negotiated by the parties for almost two weeks, would not provide sufficient protection. Their responses have been entirely unpersuasive, as we explain in Point I below.

We have concluded, as a result, that an anonymity protocol would not serve any substantial purpose. Moreover, as we show in Point II, the protocol proposed by the ACC – in either its "strong" version or its "compromise" version – would cause substantial harm to these proceedings. The principal effect of such a protocol would be to impair Bates White's access to information that it considers vital to its estimation analysis, thereby skewing the results of the estimation in an upward direction. The imposition of a protocol would also significantly increase the cost and the length of these proceedings.

For all of these reasons, we respectfully request that the Court adhere to the customary and long-established practice, which courts have followed even in cases involving the highest degree of sensitivity, of presuming that the parties will honor their express obligations under a confidentiality order – in this case, the Agreed Protective Order over which the ACC and the Trusts labored for weeks, and which the Court entered last month. As the Court observed at the August 9 hearing, experience demonstrates that confidentiality agreements and orders "do just fine, assuming that they're appropriately drafted." (Tr. of Aug. 9, 2010 hearing at 102; *see also id.* at 103: "I'm not going to presume or assume noncompliance with a confidentiality order. In ten years on the bench, I've never had any such noncompliance.") Nothing in the present case requires a departure from this settled practice.

I. There is No Reason to Believe that Bates White or the Other Parties' Estimation Experts Will Not Comply Fully With the Agreed Protective Order

The Creditors' Committee's expert, Bates White, LLC ("Bates White"), is a leading consulting firm with a stellar reputation, which is entrusted routinely with highly sensitive data. Within the context of asbestos litigation, Bates White regularly receives confidential data from active tort defendants, debtors, unsecured creditors, insurers, and prospective buyers of companies with asbestos-related litigation. Outside of the asbestos context, Bates White has worked with highly sensitive data of a variety of sorts, including tax returns, individual-level transactions on credit cards, individual-level purchases of prescription drugs, and diacetyl claims. In each of these situations, Bates White has strictly adhered to the terms of the governing confidentiality agreement and data security protocols. Neither the ACC nor any of the other parties has suggested otherwise.

Nor have the parties advanced any reason why Bates White might have the slightest interest in disclosing the data that the ACC seeks to render anonymous – namely, the names and social security numbers of *individual* asbestos claimants. As the Court is aware (and the ACC itself observes), Bates White's focus, like that of the other estimation experts, is on aggregate, not individual, matters – that is, on what conclusions can be drawn from the claimant data as to GM's aggregate asbestos liability. No possible scenario has been suggested in which Bates White would even have an interest that would be furthered by the improper disclosure of individual claimant information in violation of the Agreed Protective Order.

The ACC contends that Bates White is not a "dispassionate expert" (ACC letter at 2) but, instead, is a passionate advocate in asbestos estimation matters with a professional stake in being known as such – and, to that end, recently filed an amicus brief in a California asbestos-related appeal.[1] In this respect, however, Bates White is hardly different from other professionals in this case. The ACC's professionals, for example, are widely known (and highly regarded) as staunch plaintiff-side estimation advocates and have repeatedly taken public positions concerning asbestos matters. The ACC's estimation expert, Mark Peterson of Legal Analysis Systems, Inc., has testified at least three times before the Judiciary Committee of the United States Senate on asbestos matters. This does not mean, of course, that either the ACC's professionals or the Creditors' Committee's professionals cannot be trusted to honor the terms of the Agreed Protective Order.

The ACC also notes that a Bates White employee, Marc Scarcella, sometimes offers testimony concerning the amounts that individual claimants are likely to be paid by Trusts, "based on information that it has obtained through bankruptcy cases." (ACC letter at 2.) The suggestion appears to be that information that Bates White obtains in the present case might

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[1] In a similar vein, the ACC attempts to portray the Creditors' Committee and its counsel as engaged in a zealous campaign to alter the existing tort environment. *See* ACC letter at 1, contending that the discovery the Creditors' Committee seeks from the Trusts is "part of a litigation strategy calculated to affect individual claims against solvent defendants unrelated to [this] bankruptcy." Regrettably, the quotation from the August 9 hearing that the ACC offers in support of this proposition is taken out of context. A review of the transcript makes clear that Committee counsel was not describing his client's litigation strategy, but instead was explaining the apparent motivation behind the vigorous opposition by the Trusts and the ACC to the Committee's Rule 2004 motion: "[S]ome of the concerns you may hear expressed about burden really are masking the fact" that the plaintiffs' bar does not want its practice of "double-dipping, triple, quadruple-dipping" to be publicly examined by this Court or other courts. (Aug. 9, 2010 Tr. at 18-19; *see also id.* at 19: "that may stand behind the position they're taking[,] why they're making such a big deal about the burden.")

conceivably be used by Mr. Scarcella. What the ACC fails to mention is that Mr. Scarcella only uses public data and case-specific data, never data supplied to Bates White confidentially for other purposes. In this respect, he is no different from the experts hired by the ACC and the FCR, who regularly have access to trust data as part of their work (and who presumably adhere to the confidentiality conditions under which they received those data). Information obtained by Bates White in connection with the present case would not in any circumstances be part of any of Mr. Scarcella's analyses. In any event, if the Court wishes, Bates White is prepared to implement an "ethical wall" that would ensure that Mr. Scarcella (and any other employee who might subsequently undertake similar work)[2] has no access to any information obtained in connection with this case.

The ACC asserts, finally, that that the information sought in the Creditors' Committee's subpoenas goes "well beyond the scope of what defendants are ordinarily entitled to in the tort system." (ACC letter at 1.) This is simply untrue. State courts regularly require asbestos plaintiffs to disclose the amounts they have recovered from settled co-defendants, including trusts. *See generally* Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. of Litig. 501, 550-553 (Spring 2009) (describing tort system trend toward permitting discovery of plaintiffs' trust claims); William P. Shelley, Jacob C. Cohn, and Joseph A. Arnold, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts,* 17 J. Bankr. L. & Prac. 2, Art. 3, at 272-276 (April 2008) (same); *see also, e.g., In re Asbestos Personal Injury Litigation,* Civil Action No. 03-C-9600 (W. Va. Cir. Ct. Mar. 3, 2010) (case management order requiring claimants to disclose, among other things, all claims filed against asbestos trusts, including proofs of claim and supporting materials). Even in the absence of case management orders mandating such disclosure, tort defendants are free to inquire about such subjects at deposition or through document discovery, in keeping with the bedrock principle permitting discovery on all relevant issues.

II. In Addition to Being Unnecessary, the ACC's Proposed Protocol Would Impair the Accuracy of the Estimation Process, Increase Costs and Delay These Proceedings

A. The ACC's "strong anonymity protocol" is deeply flawed

Under the ACC's "strong" proposal, the Trusts and the Creditors' Committee's estimation expert would each provide their data sets to a third-party neutral. The neutral would then combine the data sets and maintain a master database on its own servers to which the Creditors' Committee's estimation expert could submit one-off queries. Rather than the

[2] Mr. Scarcella is the only Bates White employee engaged in the sort of work described by the ACC.

Creditors' Committee's expert having direct access to the database, each time that the expert wanted to query the data, it would have to send its requests to the neutral.

This approach – under which the third-party neutral would have sole access to the master database, and each expert's only access would be via "queries" made to the neutral – would be unworkable. The approach would fundamentally alter the usual process by which the parties' experts analyze asbestos claims data, replacing it with a process that would be much more expensive (increasing expense several-fold) and much slower (adding weeks or months to the data analysis process), that would result in substantially lower quality analysis by the experts, and that would raise significant issues concerning preservation of the confidentiality of each expert's analyses of the GM claims data *and* each expert's proprietary data analysis procedures.

When experts possess the data themselves, they can explore the relationships in that data quickly and cost effectively. Bates White typically performs hundred of queries on the data every day during the early stages of its analysis. The specification of each set of queries is informed by the previous set of queries in a naturally iterative process. Under the ACC's "strong" proposal, Bates White and other experts would submit queries to the third party neutral and wait for them to run the queries and return the results. Instead of getting back results virtually instantaneously, experts would have to wait to get back results for each query, which would dramatically slow down the data analysis process and increase its cost.

Even more important, depriving experts of the ability to explore claimant-level data would severely hamper the types of analysis that could be performed. Bates White's normal methodology is to perform an in-depth analysis of micro-level data in order to determine macro-level trends. The ACC's "strong" proposal would foreclose Bates White's ability to perform this sort of analysis, which would bias the resultant estimate in an upward direction, *i.e.*, in favor of the ACC. For example:

- Bates White typically begins analysis by plotting various cuts of the raw data. These plots can be extremely helpful at identifying patterns in the data that merit additional research. The new proposal would not allow for this type of analysis.

- Many forms of analysis require the removal of outliers. By definition, outliers are individual claims and must be identified at that level, which would not be possible under this proposal.

- Case studies of individual claimants -- particularly those with high-value claims -- are extremely useful to improve understanding of the data, formulate and test hypotheses, and arrive at macro-level trends. Experts' ability to perform these sorts of analyses would be substantially impaired under the proposed approach.

- All of these problems would be compounded if the third party neutral were not well-versed in all of the necessary programming languages (SAS, Stata, C++, MatLab, SQL, Python, and Excel), or if it did not have the ability to port data at low cost between platforms and to run code that called upon multiple languages at once.

Yet another complication raised by the ACC's "strong" proposal is that experts would need to have an ability to audit the work being performed by the third party. Initially, Bates White would want to ensure that the data had been properly merged and de-duplicated. In many previous asbestos litigations, Bates White and other experts have disagreed on the proper methodology both for merging and de-duplicating the data. Bates White believes that its procedures in this regard are more rigorous than those employed by most other estimation experts. Subsequently, Bates White would want to be able to audit the implementation of the code that was executed by the third party. Quality control is a critical component of expert work; it entails critiquing both the methodology being employed and the execution of that methodology. In the absence of audit provisions, Bates White and other experts might lack proper foundation for their testimony.

The ACC's "strong" proposal also raises very serious confidentiality concerns of two distinct sorts. First, the third-party neutral would be aware of the analyses being performed by each expert. In no other litigation in which Bates White has participated has there been a party in possession of such knowledge. Ensuring that the analyses of each expert remain confidential until expert reports are filed would be of utmost concern. This might require the third party neutral to have a distinct walled-off individual assigned to each expert, with access only to that expert's analysis database.

A second confidentiality concern relates to the protection of the proprietary data analysis procedures of Bates White and the other experts. Bates White (and presumably each of the other experts) has invested heavily in the development of sophisticated claims data analysis procedures and considers these procedures to be part of its intellectual property. Under the new proposal, the third party neutral would run Bates White's code and would otherwise become privy to Bates White's analytical procedures. This would enable the third party to become a competitor, and would provide it with an unfair advantage if it were to be retained in a future case in which Bates White were involved. This is a significant concern that would need to be addressed.

B. The ACC's "compromise anonymity protocol" is unworkable and provides no conceivable confidentiality benefit

Under the ACC's "compromise" proposal, the third party neutral would not itself maintain the database, but instead would merge the data sets of the Trusts and the Creditors' Committee's expert, would redact certain information fields, and would provide the merged and redacted database to the parties' experts.

This proposal, too, would be unworkable. As with the "strong" version of the protocol, this alternative version would limit the analysis Bates White could do in a way that

would bias the results in favor of the ACC. This version, too, would increase the cost and delay the proceedings. In addition, this alternative version – in contrast to the "strong" version – would not even arguably provide a confidentiality benefit: It would provide no confidentiality protection whatsoever beyond that already provided by the Agreed Protective Order.

The problem with this alternative proposal, from the standpoint of permitting a robust estimation analysis, is that a number of the fields that the ACC proposes to redact are essential to an accurate estimation analysis. In general, more detailed information allows the parties' experts to more fully characterize the attributes that result in a high-value claim. Once identified, those attributes can be identified on a macro level within the respective pools of settled claims, pending claims and projected future claims to produce a more accurate liability estimate. Failing to control for these characteristics yields a less accurate estimate – and one that, typically, is biased in an upward direction. Again, we provide a few examples:

- Identification of each claimant's law firm is critical on many levels. After disease, the identity of the law firm is typically the next most important variable in estimating settlement values and dismissal rates. As such, it is unacceptable to redact the law firm information field. For one thing, law firm serves as a proxy for unobservable claimants' characteristics. For example, some law firms only take on strong cases with substantial litigation risk. Without knowing plaintiff's legal representation, Bates White would not be able to accurately value these high-litigation-risk claims. Further, the most successful plaintiff attorneys tend to get their claims resolved faster, which results in the pending claims being of disproportionately lower value. Redacting law firm would prevent an assessment of this issue and likely bias the resultant estimate high.

- Date of filing is essential for Bates White's analysis and cannot be replaced with the year of filing. Imagine two scenarios: Plaintiff A filed a claim with the trusts in January of 2008; in December of the same year, this plaintiff settled his claim with GM, after disclosing the amounts he received from the trusts. Another claimant, Plaintiff B, settled his claim with GM in February of 2008 and only after that, in the fall of 2008, filed a claim with the trusts. One may expect that the settlement amounts of Plaintiff A and Plaintiff B would be different, holding all else constant. However, in the dataset that the ACC is proposing to turn over, these two claimants would be undistinguishable.

- Replacement of job sites with the state of exposure is also unacceptable. This introduces a substantial lack of granularity and prohibits detailed analysis of exposure profiles. For example, it is very possible that brake mechanics have been receiving substantially higher settlement amounts from GM than non-mechanics. This hypothesis can only be tested using claimants' occupation description. The knowledge of the occupation is therefore essential for the proper, macro-level valuation of the future and pending stock of claims.

As with the ACC's "strong" proposal, experts would need to have an ability to audit the work being performed by the third party. Each of the audit issues discussed above applies to this alternative proposal as well.

Not only does the ACC proposal impair Bates White's ability to accurately estimate liability; it also fails in its objective to create anonymity. This is the case whether the objective is to prevent an intentional violation of the Agreed Protective Order or to prevent an inadvertent violation.

If the ACC's goal is to prevent Bates White or other experts from *deliberately* violating the confidentiality order – something none of the experts retained in this case would ever do[3] – the proposal is no more effective than the Agreed Protective Order at accomplishing this goal. The information in the database produced by the third party neutral would be sufficient to uniquely identify the vast majority of claimants for any expert who desired to do so. In fact, *any expert could recover the personal identifying information within hours* of receiving the data from the third party.

Alternatively, if the ACC's "compromise" proposal is intended to protect against the *inadvertent* disclosure of confidential claimant information, that objective can readily be accomplished through much simpler means, involving none of the complications or adverse consequences of this proposal. During the course of the recent protocol negotiations, Bates White proposed such a protocol (which was received with resounding indifference from the other parties).

The terms of the alternative – and vastly simplified – protocol proposed by Bates White are straightforward. This protocol differs from both ACC proposals in that it calls for the Trusts to comply, without modification, with their obligations under the Rule 2004 Order, that is, to produce directly to the parties' experts the data subpoenaed by the Creditors' Committee. The one key modification this simple protocol would make is that Bates White and the other experts would agree to use claimants' names and social security numbers *for matching purposes only.* Specifically, once having matched the data from the Trusts with its own data, Bates White would create a separate database that replaced names and social security numbers with a unique identifier. Bates White would then conduct all of its analyses only in this new, redacted

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[3] The ACC's suggestion (ACC letter at 6 -7) that the Creditors' Committee and Bates White have been less than completely clear in stating their intention to comply with the Agreed Protective Order is regrettable and false. Throughout the course of the recent negotiations, the Committee's counsel stated repeatedly that all Creditors' Committee representatives, including Bates White, will of course comply in every respect with their obligations under the Agreed Protective Order.

database. The source datasets would be taken off the network, put on an external storage device, and kept in a secured location.[4]

Segregation of the unredacted trust and GM data in this fashion would ensure that no inadvertent disclosure of any personally identifiable information could possibly occur. Consequently, the ACC's "compromise" proposal – with its very substantial attendant costs – would serve no possible confidentiality objective that could not be achieved in this much simpler and less costly fashion.

* * *

The Creditors' Committee appreciates that the issues raised by this letter are intensely factual. In the event the Court believes that testimony on these issues would assist its resolution of this procedural dispute, the Creditors' Committee is prepared to offer the testimony of Charles Mullin of Bates White – either at the scheduled September 24 hearing or, if the Court prefers, at a later hearing.

Respectfully submitted,

Philip Bentley

[4] In addition, the Creditors' Committee would be prepared to let each Trust redact a majority of the information fields to be produced by the Trusts. Specifically, the Creditors' Committee would have no objection to redaction of the following fields, which Bates White does not need for its estimation analysis:

- Claimant address, phone, fax, email (except state)
- Personal Representative name, SSN, address, phone, fax, email
- Contact name, address, phone, fax, email
- Occupationally exposed person address, phone, fax, email (except state)
- Dependant name (except number of dependents)
- Dependant date of birth (except year)
- Attorney address

No third party's involvement would be needed to implement these redactions, which would further narrow the issues as to which the ACC and the Trusts have expressed confidentiality concerns.

cc (by email):

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