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**ENDORSED
FILED**
Superior Court of California
County of San Francisco

MAY 05 2010

CLERK OF THE COURT
BY: CRAIG BLACKSTONE
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT NO. 305

PLANT INSULATION COMPANY,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
et al.,

Defendants.

Case No. CGC-06-448618

AND RELATED CROSS-ACTION.

**FINAL STATEMENT OF DECISION
ON PHASE II ISSUES**

1 This is a declaratory judgment action brought by Plant Insulation Company ("Plant").
2 Plant is a defendant in several thousand pending asbestos bodily injury and wrongful death
3 lawsuits. It was first sued for asbestos bodily injury or wrongful death in the late 1970s or the
4 early 1980s, and asbestos cases are filed against it regularly at a rate of approximately 40 to 50
5 per month. The defendants issued primary and excess liability insurance policies to Plant at
6 various times through 1985. The declarations sought by Plant in its Second Amended Complaint
7 ("complaint") involve the construction and interpretation of insurance policies issued by the
8 defendants as the policies may apply to asbestos cases pending against Plant and to be asserted
9 against Plant in the future.

10 Plant has stressed the fact that it does not seek rulings from the Court that any particular
11 asbestos case is actually covered under the defendants' insurance policies. To the contrary,
12 Plant's request in this action, as Plant has made clear to the Court, is limited to seeking
13 declarations interpreting the insurance policies that will enable the parties to determine whether,
14 and to what extent, insurance coverage is available for asbestos cases now pending, or to be
15 asserted, against Plant in the future. Thus, for example, Plant seeks declarations that, *as applied*
16 *to those situations where it is judicially determined in some other proceeding at some future date*
17 *that a particular insurer has a duty to defend and/or indemnify Plant with respect to an asbestos*
18 *claim*, the insurer having such duty or duties must defend and/or indemnify Plant "in full" against
19 the asbestos suits, that coverage is triggered "continuously" under the policies during all periods
20 in which a claimant suffers asbestos injury, and that the insurer is required to prove that an
21 asbestos claim falls within either the "products hazard" or "completed operations hazard"
22 provisions of the policies for an aggregate limit to apply to the claim.

23 This Court agrees that Plant's complaint seeks policy interpretation declarations intended
24 to bind the parties if a future dispute arises as to the availability and extent of coverage for
25 specific asbestos claims. It is true, as Plant has argued, that adjudication by this Court in this case
26 as to the application of insurance coverage to the thousands of pending and likely future claims
27 against Plant would be an impossible judicial task. Instead, what is sought by Plant's complaint
28 is interpretational ground rules that will guide and bind the parties in the event of future

1 disagreements. It is pursuant to Section 1060 of the Code of Civil Procedure that Plant seeks
2 declaratory relief, and the decision in *Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co.*
3 (1996) 45 Cal. App. 4th 1, is exemplary of the type of declaratory relief here sought.

4 Defendants raise numerous affirmative defenses to the complaint, including the equitable
5 defenses of unclean hands, waiver, and judicial estoppel. Those equitable defenses are claimed
6 by defendants to result in a total bar to Plant's maintenance of this action. In other words,
7 defendants contend that these defenses should be applied *en masse* as an equitable bar to coverage
8 for every present and future asbestos claim asserted against Plant, without need for judicial
9 analysis as to whether the facts of a particular asbestos case bring it within coverage under the
10 insurance policies. What is sought by defendants is a ruling from this Court, sitting in equity, that
11 because of Plant's past conduct claimed to constitute unclean hands, waiver and judicial estoppel,
12 the insurers have no obligation under their contracts with Plant to defend or indemnify it
13 regardless of the facts or circumstances of any particular asbestos claims. Under defendants'
14 view of the affirmative defenses, it would not matter whether an asbestos claim is actually
15 covered under the policies because Plant's conduct at issue has worked a loss of any coverage for
16 all cases for all time.

17 It is at defendants' request that this Court has bifurcated the trial so as to try in this Phase
18 II the three affirmative defenses of unclean hands, waiver, and judicial estoppel, and to do so
19 before addressing the issues of policy interpretation sought in Plant's complaint. Since these
20 three affirmative defenses would be irrelevant if there were no remaining extant coverage, this
21 Court is asked by all parties, solely for purposes of adjudicating the defenses, *to assume* that (but
22 not to decide whether) Plant's policies do include unexhausted coverage for the defense of, and
23 indemnification with respect to, the underlying asbestos lawsuits.

24 The Phase II issues arise against the following background. In a nutshell, all parties agree
25 that the aggregate limits applicable to the products and/or completed operations hazards under
26 each of Plant's primary and excess policies have been exhausted. However, Plant asserts, and
27 this Court is asked to *assume* correctly so, that the insurers have additional coverage obligations
28 with respect to pending and future asbestos claims notwithstanding the prior exhaustion of the

1 policies' aggregate limits. Thus, this Court is *to assume*, and does assume, for purposes only of
2 this phase of the case, that the Plant policies provide it with asbestos claims coverage that is
3 limited only by the policies' "per person" and "per occurrence" (or "per accident") limits, which
4 apply separately to each asbestos claim. This *assumed* additional coverage is sometimes referred
5 to as "non-products" or "operations" coverage and insures against claims arising from asbestos-
6 related operations, such as installing, repairing, removing, or displacing asbestos or asbestos-
7 containing products. In short, pursuant to the direction of all parties, this Court, for present
8 purposes only, *assumes* that Plant's policies include "operations" coverage and that therefore the
9 policy obligations and limits of the insurers' policies have not been satisfied or exhausted.

10 For analytical purposes, and at the risk of oversimplification, it can be said that the
11 essential issue in this Phase II is whether Plant is barred from obtaining its assumedly otherwise
12 available operations coverage by reason of the facts relating to its alleged conduct under
13 challenge. The Phase II trial commenced on June 2, 2009, and included 24 trial days, 3233 pages
14 of transcript, 28 witnesses (appearing either live, by deposition designation, or by trial testimony
15 in an earlier phase), and 573 admitted or judicially noticed exhibits. Closing arguments
16 concluded on December 9, 2009, and thereafter the parties presented written submissions,
17 including Proposed Statements of Decision, following which the Phase II issues were submitted.
18 On March 16, 2010, this Court issued its Proposed Statement of Decision.

19 Thereafter, on April 6, 2010, defendants filed their Objections to the Court's Proposed
20 Statement, and on April 16, 2010, Plant filed its Response thereto. Except to the extent that
21 changes have been made to the Court's Proposed Statement in this Final Statement, the Court
22 overrules defendants' objections and declines defendants' invitations to make other or further
23 findings and conclusions.

24 Having considered all the admitted evidence¹ and all the arguments of counsel presented
25 orally and in briefing, this Court now issues this Final Statement of Decision related to the Phase

26 ¹ Citations to record references in support of specific findings in this Final Statement of Decision are not intended to
27 suggest that other portions of the record do not also support those specific findings. The Court relies upon the
28 entirety of the admitted evidence, subject to the following qualification. Certain testimony and exhibits referenced in
this Final Statement of Decision were admitted into evidence for limited purposes. The Court relies on that
testimony and those exhibits only to the limited extent they were admitted.

1 II issues. The Court's holding is against the defendant insurers on each of the three Phase II
2 affirmative defenses.

3 **I. FINDINGS OF FACT**

4 To the extent that legal conclusions are stated under the heading "Findings of Fact" or
5 factual conclusions are stated under the heading "Conclusions of Law," no limitation is intended
6 by the headings. Under the heading "Findings of Fact," the Court first addresses some matters of
7 general background and thereafter areas of specific subject matter.

8 **BACKGROUND**

9 Plant is a Bay Area company that formerly distributed and installed asbestos-containing
10 products. (Ralston, Trial Tr. vol. 4, 493:3-494:11, 495:3-496:8.) Between 1948 and
11 approximately the end of 2000, Plant was the exclusive distributor and installer in Northern
12 California and parts of Nevada for certain insulation products manufactured by Fibreboard
13 Corporation ("Fibreboard"). (Ralston, Trial Tr. vol. 4, 495:28-496:8.) Until approximately 1971,
14 high-temperature insulation products manufactured by Fibreboard contained asbestos. (Ralston,
15 Trial Tr. vol. 4, 502:5-9.) Plant ceased installation and sales operations in 2001. (Ralston, Trial
16 Tr. vol. 4, 448:22-449:10.)

17 For the last three decades, Plant was run by a relatively small team of individuals. On the
18 executive side, Douglas Ralston was a Plant Director from 1980 to 2004 (Ralston, Trial Tr. vol. 4,
19 399:25-27) and became Plant's President in 1985. (Ralston, Trial Tr. vol. 4, 394:13-16.) He was
20 President and Chief Executive Officer of Plant from 1985 until approximately late 2007. (Ralston,
21 Trial Tr. vol. 4, 394:13-16, 440:28-441:8; Gregory, Trial Tr. vol. 5, 575:8-14.)

22 Plant has been represented primarily by its General Counsel, John M. Gregory, and since
23 1994, also by its outside counsel, Monte S. Travis. (Gregory, Trial Tr. vol. 2, 126:14-22; Trial
24 Exh. 4516, Travis Depo. at 177:13-15.) Gregory began legal work for Plant in 1981, becoming
25 General Counsel in 1985 and a minority stakeholder in the company in early 1997. (Gregory,
26 Trial Tr. vol. 2, 126:14-18; Ralston, Trial Tr. vol. 4, 396:26-397:12; Trial Exh. 3230.) Ralston
27 was the primary shareholder in the company in the 1990s through 2004, when Plant's lawyers,
28 Gregory and Travis, acquired 100% ownership of Plant through a holding company named Plant

1 Equitable and Asbestos Claims Enterprises, LLC (“PEACE”), of which Gregory and Travis were
2 the sole owners and which had no purpose other than to act as a holding company for Plant. (Trial
3 Exh. 3589; trial Exh. 4516, Travis Depo. at 31:9-11; Ralston, Trial Tr. vol. 4, 434:1-14; Gregory,
4 Trial Tr. vol. 2, 123:5-124:16.) PEACE held all of the stock of Plant from 2004 until February
5 2009. (Gregory, Trial Tr. vol. 2, 123:16-21.) Since February 2009, all of Plant’s stock has been
6 owned by a charitable trust for the benefit of the Pulmonary and Critical Care Division of the
7 University of California, San Francisco Medical Center. (Trial Exh. 4117, at p. 1; Travis, Trial
8 Tr. vol. 15, 1841:11-24; Gregory, Trial Tri. vol. 2, 124:9-12.) The trustee of that trust is David
9 Gordon. (Trial Exh. 4117, at p. 1.) Currently, Plant is managed by Gordon, pursuant to an
10 Executive Consulting Agreement that Plant entered into with Flintkote Corporation (“Flintkote”)
11 on January 16, 2008. (Trial Exh. 4019.) Gordon is an executive employed by Flintkote. (Travis,
12 Trial Tr. vol. 14, 1713:12-20.)

13 On May 20, 2009, Plant filed a voluntary petition for reorganization under Chapter 11 of
14 the United States Code in the United States Bankruptcy Court for the Northern District of
15 California (the “Bankruptcy Case”). (Trial Exh. 5700.) Gordon is designated in the Bankruptcy
16 Court as Plant’s “Responsible Person.” (Trial Exh. 5703.) By Order of June 1, 2009, as corrected
17 and re-filed on July 24, 2009, the Bankruptcy Court ordered that, as applied to the case at bar,
18 “[t]he automatic stay” under bankruptcy law is modified “only to the extent necessary to permit”
19 trial and resolution of these Phase II issues. (Trial Exh. 6010.)

20 Lawsuits seeking damages for injuries allegedly caused by exposure to asbestos were
21 filed against Plant beginning at least as early as the late 1970s or early 1980s. (Ralston, Trial Tr.
22 vol. 4, 512:12-16; McClain, Trial Tr. vol. 7, 966:9-12.) Many of those cases involved claims that
23 the plaintiff had been exposed to asbestos during the course and because of Plant’s work with
24 asbestos-containing products such as insulation. (Brayton, Trial Tr. vol. 7, 878:28-879:20;
25 McClain, Trial Tr. vol. 8, 1064:21-1065:11.) Legal theories of recovery typically asserted against
26 Plant in these cases included negligence and strict or product liability. (Gregory, Trial Tr. vol. 2,
27 132:12-133:6; Ralston, Trial Tr. vol. 4, 506:28-507:7; Brayton, Trial Tr. vol. 7, 876:22-877:12;
28 McClain, Trial Tr. vol. 8, 1064:10-20.) In other words, the asbestos personal injury suits brought

1 against Plant frequently sought liability on theories of strict liability and negligence as supported
2 by allegations that during contracting operations Plant negligently installed, removed, repaired, or
3 otherwise manipulated asbestos-containing products. (Gregory, Trial Tr. vol. 2, 133:1-6; Brayton,
4 Trial Tr. vol. 7, 877:7-24.)

5 Plant's insurers paid collectively at least \$125 million defending and indemnifying Plant
6 against the asbestos suits between 1987 and 2001. (Trial Exh. 1122; Gregory, Trial Tr. vol. 2,
7 119:13-23.) Consequently, the persuasive inference is that the insurers knew of the factual and
8 legal allegations advanced in support of the asbestos claims asserted against Plant, and the
9 insurers ultimately conceded in oral argument that each insurer was aware of the nature of the
10 asbestos cases filed against Plant during the period in which that insurer was defending and/or
11 indemnifying Plant through the time it notified Plant of the exhaustion of its policies.
12 (Defendants' Closing Argument, Trial Tr. vol. 24, 3177:4-17.)

13 One of Plant's insurers, Fireman's Fund Insurance Company ("Fireman's Fund")
14 launched a "full scale" investigation into insurance coverage issues arising from Plant's asbestos
15 suits in 1981. (Trial Exh. 35, at p. 1.) Fireman's Fund understood by no later than 1981 that
16 "Plant's function primarily is that of an installer rather than a distributor." (*Id.*, at p. 3.)

17 Another of Plant's insurers, OneBeacon Insurance Company ("OneBeacon"), has known
18 since 1979 (at the latest) that Plant was sued in asbestos cases (Trial Exh. 5056, at pp. 19-20), and
19 OneBeacon has known since at least the 1980s that Plant was at least sometimes so sued as an
20 installer of asbestos-containing insulation products. (Trial Exh. 5975 (Perkins Depo. at 102:8-17,
21 137:5-18, 137:21-22).) OneBeacon's claims handler typically read defense counsel summaries of
22 asbestos cases against Plant. (*Id.*, at 120:20-121:7.) For example, OneBeacon and Fireman's
23 Fund were both aware of a serious asbestos case against Plant in the early 1990s, filed by William
24 Cardia. (Trial Exh. 5057A.) Defense counsel summaries provided to at least OneBeacon and
25 Fireman's Fund discussed that Cardia alleged injurious exposure to asbestos while working as a
26 plumber at Foothill College, Carlmont High School, and The Sequoias Retirement Home, in the
27 vicinity of Plant workers who were installing insulation products. (*Id.*, at FFIC0089265; Trial
28 Exh. 5975 (Perkins Depo. at 154:6-155:4, 156:4-157:2); Trial Exh. 5981 (Solano Depo. at

1 246:23-247:24.)

2 Plant was insured by the Mission Insurance Companies (“Mission”), which have become
3 insolvent. (Gregory, Trial Tr. vol. 2, 196:14-21.) In 1995, Plant submitted an amended
4 contingent claim to the California Insurance Guaranty Association (“CIGA”) to preserve its rights
5 under excess insurance policies issued by Mission. (Trial Exh. 3205.)

6 By 2002, each of Plant’s primary and excess insurers had taken the position that its
7 aggregate limits of liability had been exhausted by payments made on behalf of Plant in the
8 asbestos cases. (Gregory, Trial Tr. vol. 4, 384:28-385:28.) Between 2002 and January 2006,
9 Plant did not tender the defense of newly filed asbestos cases to its primary insurers, nor did it
10 notify its excess insurers that cases were still being filed against it. (Trial Exhs. 3949, 3949A;
11 Gregory, Trial Tr. vol. 6, 734:16-735:1; Travis, Trial Tr. vol. 13, 1609:19-1610:16.) As of
12 January 2006, there were approximately 3,800 asbestos cases pending against Plant in California.
13 (Trial Exhs. 3949, 3949A; Gregory, Trial Tr. vol. 6, 734:16-735:1.) During the period of time
14 from January 31, 2001 through mid-January 2006, cases were filed against, and were served on,
15 Plant at the rate of about 58 cases per month. (Trial Exh. 5960.) Since mid-January 2006, the
16 rate of filing of new cases has been fairly consistent, averaging about 43 cases per month. (*Id.*)

17 Beginning in 2001, Plant ceased actively defending the asbestos lawsuits filed against it.
18 (Gregory, Trial Tr. vol. 3, 370:11-27.) Plant entered into “standstill” agreements negotiated by its
19 insurer-appointed defense counsel, pursuant to which it generally did not file answers or appear in
20 the asbestos cases. (Trial Exh. 5982 (Wallace Depo. at 104:1-105:5, 124:15-125:8, 129:1-130:7);
21 McClain, Trial Tr. vol. 8, 1128:15-1129:17, 1131:17-1132:13.) Discovery went forward, and the
22 cases proceeded against other defendants. (McClain, Trial Tr. vol. 9, 1198:23-1199:8.) At
23 various times after January 2006, previously filed asbestos cases subject to the prior “standstill”
24 arrangements were “activated” or “reactivated” with respect to Plant. (McClain, Trial Tr. vol. 8,
25 1049:13-18; Trial Exh. 6015 (Harley Depo. at 87:20-88:1, 89:20-91:7); Trial Exh. 5972 (McNeil
26 Depo. at 33:4-17, 64:25-65:14, 65:22-66:2, 66:24-67:19, 68:11-69:10); Trial Exh. 5968 (Haas
27 Depo. at 104:22-105:25).)

28 In October 2005 Plant executed a document generally referred to as the “Plant Matrix” or

1 the "Matrix," which was designed to distribute \$35 million that CIGA made available in 2001
2 under the Mission policies to pay asbestos cases against Plant. (Trial Exh. 3758, at
3 TPE00114157.) Certain lawyers representing plaintiffs who had asserted asbestos claims against
4 Plant ("Plaintiff Lawyers")² also executed the Matrix. (*Id.*, at TPE00114158-159.) The Matrix
5 established, among other things, a mechanism for making payments of the CIGA funds to those
6 who submitted claims. (*Id.*, at TPE00114125-126.) As of February 1, 2006, Plant and certain
7 Plaintiff Lawyers executed the First Amendment of the Matrix (the "First Amendment"). (Trial
8 Exh. 3793.) The parties dispute the purpose, intent, interpretation and enforceability of the
9 Matrix and the First Amendment in several particulars, all as reviewed and analyzed more fully
10 below.

11 It was on January 17, 2006, that Plant filed this coverage action against solvent primary
12 and excess insurers. (Gregory, Trial Tr. vol. 6, 747:16-17.) On January 18, 2006, one day after
13 filing this action, Plant notified defendants that there were "more than 3,800 asbestos bodily
14 injury lawsuits and claims presently pending against Plant" and tendered those approximately
15 3,800 claims and lawsuits to defendants, demanding that defendants defend and indemnify Plant.
16 (Trial Exh. 3949, at TPE00135322 and TPE 00135329.) Plant's primary insurers defended cases
17 being prosecuted against Plant beginning in the summer of 2006 and ending with Plant's
18 bankruptcy filing. (Gregory, Trial Tr. vol. 6, 760:11-14; Travis, Trial Tr. vol. 12, 1483:28-
19 1484:2; Travis, Trial Tr. vol. 16, 1927:25-1928:8, 1944:16-1945:1.)

20 **THE 1987 DEFENSE AGREEMENT**

21 In March 1987, Plant entered a Defense Agreement with American Employers Insurance
22 Company ("American Employers"), Fireman's Fund, and the Insurance Company of North
23 America ("INA"). (Trial Exh. 57.) OneBeacon is the successor-in-interest under liability
24 insurance policies issued by American Employers to Plant. (Trial Exh. 4559.) OneBeacon was
25 known previously as Commercial Union Insurance Company ("Commercial Union"). (Trial Exh.
26 5975 (Perkins Depo. at 19:12-25); Allyn, Trial Tr. vol. 10, 1285:9-10.) ACE Fire Underwriters

27 _____
28 ² The term "Plaintiff Lawyers," as used herein, refers to any group of lawyers representing any plaintiffs in
underlying asbestos cases.

1 Insurance Company is alleged to be responsible now for the liability insurance policy
2 administered by INA as respects the Defense Agreement. (Trial Exh. 4443, at p. 4 (¶ 15), p. 9 (¶
3 24); Trial Exh. 57, at UN000437; Trial Exh. 5249A.)

4 The 1987 Defense Agreement states that Plant had “been named as a defendant in various
5 Asbestos-Related Cases,” and that Plant and the three signatory insurers had “reached an
6 agreement regarding the INSURERS’ defense of Plant in relation to the Asbestos-Related Cases”
7 as described in the Defense Agreement. (Trial Exh. 57, at p. 2.) That agreement further provides
8 that “[e]ach Party to this Agreement expressly reserves any rights and defenses which it may have
9 against any person or entity, including parties to this Agreement, to assert any theory of coverage
10 and to interpret any policy of insurance in any manner deemed proper by the interpreting party,
11 even if it is inconsistent with this Agreement.” (Trial Exh. 57, at p. 5.)

12 **THE 1989 DEFENSE AND INDEMNITY AGREEMENT**

13 In October 1989, Plant and several of its primary insurance companies -- American
14 Employers, Fireman’s Fund, Yasuda Fire & Marine Insurance Company (“Yasuda”), United
15 States Fidelity & Guaranty Company (“USF&G”), Royal Insurance Company (“Royal”), United
16 National Insurance Company (“United National”), and INA -- entered an Interim Defense and
17 Indemnity Agreement. (Trial Exh. 62.) That agreement states that its purpose was to resolve and
18 compromise, on an interim basis, disputes that existed between Plant and the signatory insurers as
19 respects the “administration, defense and disposition of the Asbestos-Related Cases.” (Trial Exh.
20 62, at p. 2.)

21 The Interim Defense and Indemnity Agreement provides that “[e]ach Party to this
22 Agreement expressly reserves any rights and defenses which it may have against any person or
23 entity, including Parties to this Agreement, to assert any theory of coverage and to interpret any
24 policy of insurance in any manner deemed proper by the interpreting party, even if inconsistent
25 with this Agreement.” (Trial Exh. 62, at pp. 4-5.) By its terms, the agreement “will continue in
26 full force and effect indefinitely, until one of the Parties chooses to withdraw from the
27 Agreement” in a specified manner. (Trial Exh. 62, at pp. 2-3.) No evidence was presented at trial
28 that any party ever withdrew from the agreement in the specified manner.

1 The primary insurers who defended and settled the asbestos claims against Plant through
2 approximately August 1993 were the insurers who were parties to the Interim Defense and
3 Indemnity Agreement, plus Industrial Indemnity Company (“Industrial Indemnity”). (Trial Exh.
4 3175.) It is a reasonable inference, and the Court so finds, that these primary insurers were aware
5 that Plant’s business included working with asbestos products, and that lawsuits prosecuted
6 against Plant included allegations and claims that asbestos exposure during Plant’s work
7 contributed to injure the asbestos plaintiffs.

8 **ALLEGED “EXHAUSTION” OF THE PRIMARY COVERAGE**

9 Between August of 1991 and August of 1993, Plant’s primary insurers formally advised
10 Plant that its primary coverage under their respective policies had been exhausted. These
11 statements were tantamount to advising Plant, and thereby affirmatively representing to Plant,
12 that its coverage for products and/or completed operations hazards was exhausted and that there
13 was no other coverage under the policies, including non-products or operations coverage. That
14 message was repeatedly delivered, as follows.

15 On August 5, 1991, USF&G advised Plant by letter that “the aggregate limits of liability
16 payable under USF&G Policy No. ICCB 1435 for the policy period 1/1/80 - 1/1/81 and Policy
17 No. ICCB 83425 for the policy period 1/1/81 - 1/1/82 will soon be exhausted Please be
18 advised that USF&G will not pay any sums in excess of its aggregate policy limits.” (Trial Exh.
19 3085.)

20 On August 20, 1991, United National advised Plant by letter that it had “exhausted the
21 \$500,000.00 aggregate limit of liability of its policy under which it participated in the defense of
22 the Plant Insulation Company relative to the asbestos cases.” (Trial Exh. 3091.)

23 On August 29, 1991, Yasuda advised Plant by letter that its payment of a portion of a then
24 pending asbestos claim asserted on behalf of Plant “will exhaust Yasuda’s \$500,000 limits.”
25 (Trial Exh. 3093.)

26 On October 2, 1991, by letter to John R. Wallace, a lawyer engaged by certain of Plant’s
27 insurers to defend asbestos cases prosecuted against Plant (Trial Exh. 5982 (Wallace Depo. at
28 12:9-11); Gregory, Trial Tr. vol. 2, 126:1-3.), USF&G advised Plant that USF&G had “exhausted

1 its aggregate limits of liability payable under Plant Insulation's policies By copy of this
2 letter, we are advising Plant Insulation and all interested parties that USF&G owes no further
3 defense to Plant Insulation as its aggregate limits have now been exhausted." (Trial Exh. 3098.)

4 On November 12, 1991, Royal sent a letter to Wallace "Re: Plant Insulation Exhaustion
5 of Policy Limits." Royal stated in its letter that "our policy limit has been exhausted By
6 copy of this letter, we are advising Plant Insulation and all other interested parties that Royal
7 Insurance owes no further defense to Plant Insulation as its aggregate limit has now been
8 exhausted." (Trial Exh. 3101.)

9 On January 13, 1992, Commercial Union advised Plant by letter that it had "exhausted its
10 \$9,500,000 aggregate limits of liability payable under Plant Insulation's policies with
11 Commercial Union effective 1/1/62 and expiring 1/1/76. Commercial Union no longer has any
12 obligation to defend or indemnify Plant Insulation Company." (Trial Exh. 3106.) About two
13 months later, on March 8, 1993, Commercial Union advised Plant by letter that \$9,500,001 had
14 been "paid on Plant Insulation cases. This amount paid exhausted all of Plant's aggregate
15 coverage with Commercial Union Insurance Company." (Trial Exh. 3152; Gregory, Trial Tr. vol.
16 2, 184:4-185:1.)

17 On January 22, 1992, the CIGNA Property and Casualty Companies told Wallace by letter
18 that "INA has exhausted its aggregate limits of liability payable under the policy issued to Plant
19 Insulation Company. By copy of this letter we are advising Plant Insulation and interested parties
20 that INA owes no further defense or indemnity to Plant Insulation as its aggregate limits have
21 now been exhausted." (Trial Exh. 3108.)

22 On February 19, 1992, Fireman's Fund advised Plant by letter that "it is expected that
23 settlements being processed by [Wallace's] office will exhaust [the Fireman's Fund] limits within
24 the next several days. By copy of this letter we are notifying all interested parties that FFIC will
25 owe no further defense or indemnity to Plant Insulation once its aggregate limits have been
26 exhausted." (Trial Exh. 3112.)

27 On February 26, 1992, Fireman's Fund advised Plant by letter that the payments it made
28 to settle asbestos cases filed against Plant by two individuals "exhaust[s] FFIC's limits of

1 \$4,100,000.” (Trial Exh. 3116.)

2 On August 6, 1993, Industrial Indemnity advised Plant by letter that Industrial had
3 “exhausted its policy limits and, in turn, its defense obligation to Plant Insulation Company
4 By copy of this letter to Robin Cooper of AIAC, I am advising her of this development and that
5 Plant Insulation Company will now be looking towards its excess carriers to carry on the
6 continued handling of these lawsuits.” (Trial Exh. 3175.) United States Fire Insurance Company
7 (“U.S. Fire”) is allegedly now responsible for the Industrial policies. (Trial Exh. 4443, at p.5, ¶
8 25.)

9 Following the asserted exhaustion of its primary insurance coverage for the asbestos suits,
10 some of Plant’s excess insurers began defending and indemnifying Plant against the asbestos
11 lawsuits. (Gregory, Trial Tr. vol. 3, 266:24-267:4.) One of those excess insurers, Westport,
12 refused to defend or indemnify Plant against the asbestos lawsuits. (Gregory, Trial Tr. vol. 2,
13 189:4-16.)

14 THE WESTPORT LAWSUIT

15 On May 17, 1995, Plant sued Westport and various professionals in the Alameda County
16 Superior Court (the “Westport Lawsuit”). (Trial Exh. 4260.) In its complaint, Plant alleged that
17 Westport was responsible for a \$10,000,000 excess insurance policy that Plant had obtained in
18 1979 from Puritan Insurance Company (“Puritan”), but that Westport had asserted that the policy
19 was “void ab initio or voidable by reason of alleged nondisclosure of material facts in the
20 application for said policy.” (*Id.*, at ¶¶ 6, 11.) Plant also alleged that “[t]he last of Plant’s
21 primary insurance policies was exhausted on August 6, 1993.” (*Id.*, at ¶ 9.) In so alleging, Plant
22 was merely repeating what it had been told by its primary insurers.

23 Among other things, Plant sought declaratory relief that “Westport is under a duty to
24 defend all asbestos-related personal injury and wrongful death cases which were pending against
25 Plant on August 6, 1993 or which have been served on Plant subsequent to that date and in which
26 the claimant alleges that he or she or the claimant’s decedent was exposed prior to July 1, 1979 to
27 asbestos-containing insulation products sold by Plant and to indemnify Plant against such
28 actions.” (*Id.*, at ¶ 11.) There is no evidence in the record that Westport ever responded to the

1 Westport Lawsuit, that action was ever assigned to a judge, or that there was any contested
2 proceeding in the action. Instead, Plant and Westport entered into a tolling agreement shortly
3 after commencement of the action (Gregory, Trial Tr. vol. 3, 276:22-277:1.), and in connection
4 with that tolling agreement, Plant dismissed the Westport Lawsuit without prejudice (Gregory,
5 Trial Tr. vol. 2, 195:10-20.).

6 Plant and Westport thereafter entered into a confidential settlement agreement called
7 "Agreement of Complete Policy Release and Buyback" on September 25, 1995 (the "Westport
8 Complete Release"). (Trial Exh. 4528.) Under the Westport Complete Release, Westport agreed
9 to pay Plant \$6,000,000 in exchange for Plant's release of Westport (a) from all of the latter's
10 obligations under the \$10,000,000 Puritan policy, and (b) from all present and future claims and
11 causes of action under the Puritan policy. (*Id.*, at ¶¶ 7, 24-30.) Plant also agreed that it "intends
12 to forever and fully discharge and release WESTPORT from, and to irrevocably waive, all such
13 claims and causes of action, even if hereafter discovered or brought to its attention. Accordingly,
14 PLANT specifically waives any benefit of any principle that releases are to be narrowly
15 construed, and instead intends that the releases herein are to be broadly construed, and further
16 expressly waives any benefit of California Civil Code, Section 1542." (*Id.*, at ¶ 31.) The
17 settlement occurred following the dismissal without prejudice of a lawsuit filed by Plant against
18 Westport (Trial Exh. 4260, at p. 1; Gregory, Trial Tr. vol. 2, 195:5-24), but there was no evidence
19 of any judicial involvement in the Westport Complete Release.

20 There is no evidence in the record that the defendants in this case (a) were aware of the
21 Westport Lawsuit at any time before the commencement of the instant action, or (b) took any
22 action based on anything that occurred in the Westport Lawsuit. More specifically, there is no
23 evidence that the defendants in this case relied in any way on Plant's allegation in the Westport
24 Lawsuit that its primary coverage had been "exhausted" as of August 6, 1993. Indeed, as
25 previously noted, Plant was merely repeating the position made clear to it by the primary insurers.

26 **THE 1997 CLAIMS HANDLING AGREEMENT**

27 Effective November 1, 1997, Plant and some of its first-tier excess insurance companies --
28 Granite State Insurance Company ("Granite State"), Insurance Company of the West ("ICW"),

1 Insurance Company of the State of Pennsylvania (“ISCOP”), American Home Assurance
2 Company (“American Home”), and CIGNA Property and Casualty Insurance Company (“CIGNA
3 P&C”) -- entered into a Claims Handling Agreement. (Trial Exh. 6008.) ACE Property &
4 Casualty Insurance Company (“ACE P&C”) is alleged to be responsible now for the CIGNA
5 P&C (formerly known as Aetna Insurance Company) policy. (Trial Exh. 4443, at p. 5 (¶ 21), p.
6 10 (¶ 40); Trial Exh. 5250; Trial Exh. 4559, tab 14.) The Claims Handling Agreement referred to
7 IS COP, American Home and Granite State as “AIG.” (Trial Exh. 6008.)

8 This agreement states that its purpose is to “set forth the rights and duties of the parties
9 with respect to the handling of asbestos-related bodily injury and death claims against PLANT
10 during the life of this agreement.” (Trial Exh. 6008, at p. 1.) It provides as follows:

- 11 • “[a]ll parties, including PLANT, hereby reserve all of their rights under all policies of
12 insurance issued by Signatory Insurers to PLANT.” (Trial Exh. 6008, at ¶ 12.)
- 13 • “[e]xhaustion of all of a Signatory Insurer’s policies issued to PLANT during the life
14 of this Agreement *shall release the exhausting Signatory Insurer from any further*
15 *obligations under this Agreement.*” (Trial Exh. 6008, at ¶ 13 (emphasis added).)
- 16 • the agreement “shall be automatically renewed on the anniversary of the Effective
17 Date . . . unless PLANT or a Signatory Insurer gives notice in writing to all other
18 parties not less than sixty (60) days prior to the anniversary date of its intention not to
19 renew, in which event this Agreement shall expire at 11:59 p.m. on October 31 of that
20 year.” (Trial Exh. 6008, at ¶ 1.)

21 No evidence was presented at trial that any party to the Claims Handling Agreement
22 effective November 1, 1997, ever provided notice of its intent not to renew the agreement.

23 **ALLEGED “EXHAUSTION” OF THE FIRST-TIER EXCESS COVERAGE**

24 On February 19, 1998, ICW’s counsel informed Plant by letter that “ICW exhausted its
25 \$5,000,000 limits on January 27, 1998 . . . Pursuant to the limits of liability on the policy, no
26 further defense obligation exists from January 28, 1998 forward.” (Trial Exh. 3268.)

27 On May 30, 2000, a representative of AIG informed Plant, the other Signatory Insurers to
28 the Claims Handling Agreement, and Safety National Casualty Company (“Safety National”) that

1 “the AIG member company first layer excess coverage will exhaust with payments I will be
2 making this week.” (Trial Exh. 5431.)

3 Taken together, these representations to Plant that its only coverage was exhausted
4 necessarily conveyed to Plant that, at least so far as the insurers were concerned, there was no
5 pertinent coverage except that which was subject to the policy limits applicable to products and/or
6 completed operations hazards. Putting it differently, the message to Plant was that it had no other
7 coverage, such as what is now assumed to be operations coverage.

8 Either before or during 2001 Safety National paid the \$5,000,000 aggregate limit on its
9 policy. (Travis, Trial Tr. vol. 9, 1232:4-11.)

10 **THE 2000 CLAIMS HANDLING AGREEMENT**

11 On August 25, 2000, Plant and its second-tier excess insurers -- Granite State, Transport
12 Indemnity Company (“Transport”) and Gibraltar Casualty Company (“Gibraltar”) -- entered into
13 a Claims Handling Agreement. (Trial Exh. 3303.) Gibraltar is now known as Mt. McKinley
14 Insurance Company (“Mt. McKinley”). (Stipulation on Record, Trial Tr. vol. 9, 1218:12-21.)

15 Under the Claims Handling Agreement of August 25, 2000, Granite State agreed to
16 defend and indemnify Plant against “asbestos-related claims.” (Trial Exh. 3303, at ¶ 2.)
17 Transport and Gibraltar agreed to indemnify Plant “for settlements or verdicts arising out of
18 asbestos-related claims covered under this Agreement.” (*Id.*)

19 This Claims Handling Agreement states that “[a]ll parties, including PLANT, hereby
20 reserve all of their rights under all policies of insurance issued by Signatory Insurers to PLANT.”
21 (Trial Exh. 3303, at ¶ 11.) The Agreement further provides that “[e]xhaustion of a Signatory
22 Insurer’s policy issued to PLANT during the life of this Agreement *shall release the exhausting*
23 *Signatory Insurer from any further obligations under this Agreement, to PLANT or to any other*
24 *Signatory Insurer.*” (Trial Exh. 3303, at ¶ 12 (emphasis added).)

25 **IMPENDING “EXHAUSTION” OF THE SECOND-TIER EXCESS COVERAGE**

26 By the end of 2000, Plant learned that Wallace anticipated committing sufficient funds to
27 settlements of asbestos lawsuits by March 2001 to purportedly “exhaust” the coverage issued to
28 Plant by the second-tier excess insurers. (Trial Exh. 1199, at p. 5 (CIGA 1963).) Plant updated

1 its prior submission to CIGA, informing CIGA that it believed that it would soon have no
2 insurance “available” to cover the asbestos lawsuits, thus triggering CIGA’s obligation to make
3 coverage available under the policies issued by the insolvent Mission Insurance Company. (Trial
4 Exh. 1199, at pp. 1, 5 (CIGA 1959 and CIGA 1963).) Gregory understood that, by statute, CIGA
5 could only make funds available in place of insurance coverage issued by an insolvent insurer if
6 no other insurance was “available” to Plant. (Gregory, Trial Tr. vol. 2, 219:20-23.)³ On January
7 22, 2001, Gregory told CIGA’s counsel, Guerry Collins of Lord Bissel & Brook, that Wallace
8 believed that all of Plant’s remaining insurance “will exhaust” in March 2001. (Trial Exh. 3313.)

9 **GREGORY’S ANALYSIS OF THE AVAILABILITY OF ADDITIONAL COVERAGE**

10 In early February 2001, Collins told Gregory that Plant might have additional coverage
11 available under its “pre-1980” primary insurance policies based “on the theory” that the asbestos
12 lawsuits are covered “under the premises-operations provisions of those policies.” (Trial Exh.
13 3317.) On February 8, 2001, Gregory wrote to Collins and said that he was “dubious” that Plant
14 had additional coverage available under its “pre-1980” primary insurance policies, which he said
15 had “long since paid out their personal injury policy limits.” (Trial Exh. 3319.) Gregory stated
16 that “the gravamen of the cases against Plant is and always has been that of strict products
17 liability, not negligence,” as Plant had asserted in the “strongest possible” manner in its indemnity
18 litigation against Fibreboard. (*Id.*) Gregory also stated that “the negligence case against Plant is
19 wholly meritless and has never been successfully argued to a jury.” (*Id.*) He said that he believed
20 that “if asserted such a theory will be met with furious resistance as the insurers in question
21 contemplate additional billions in liability on policies they had legitimately thought were
22 exhausted.” (*Id.*) And, he noted that Plant lacked the money “to finance the inevitable bitter
23 litigation that will ensue” if Plant sought additional coverage from its “pre-1980” primary
24 insurers. (*Id.*)

25 On February 13, 2001, Collins told Gregory to “look at” a case from Maryland
26 (*Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167 (Md. Ct. Spec. App. 1997)),

27 ³ By statute, CIGA acts as a payor of last resort, and may only pay “covered claims” as that term is defined in
28 California Insurance Code § 1063.1(c)(9). Cal. Ins. Code § 1063.2(a). A claim is not a “covered claim” if “it is
covered by any other insurance . . . available to the claimant or insured.” (Cal. Ins. Code § 1063.1(c)(9).

1 and a case from New York (*Frontier Insulation Contractors v. Merchants Mut. Ins. Co.*, 91
2 N.Y.2d 169 (1997)). (Trial Exh. 3321.) Gregory obtained those decisions from the San Mateo
3 County Law Library. (Gregory, Trial Tr. vol. 2, 138:12-17; 203:28-204:6, 233:7-12; Gregory,
4 Trial Tr. vol. 3, 290:26-291:17, 295:2-15.)

5 In an e-mail to Travis dated February 14, 2001, Gregory stated that he had “retrieved the
6 two cases” identified by Collins. He said he thought that “Frontier Insulation was obviously
7 distinguishable on at least two grounds: (1) none of Plant’s pre-1980 CGL primary policies
8 contained ‘products hazard’ exclusions and (2) no issue of late notice was presented, whereas
9 here the primary insurers could and would point out that Plant has delayed 8 years in giving
10 notice that asbestos claims might be covered under their policies notwithstanding exhaustion of
11 the aggregate p.i. limits, and in the interim a very important witness (Perry Holmes) has died.
12 The Commercial Union case is longer and more complex and I’m studying it now.” (Trial Exh.
13 3321.)

14 Thereafter, on February 20, 2001, Gregory wrote to Collins, stating that Gregory did not
15 believe that the *Frontier Insulation* or *Porter Hayden* cases supported “the proposition that
16 Plant’s pre-1980 CGL primary insurers are now obliged under California law and the terms of
17 their policies to defend and/or indemnify Plant against asbestos-related actions for personal
18 injury, wrongful death and/or loss of consortium.” (Trial Exh. 3322.) Gregory also stated that he
19 believed that a declaratory relief claim “at this juncture . . . would be held barred by the statute of
20 limitations.” (*Id.*) Further, Gregory stated that Plant’s accountants were including a “going
21 concern” footnote in their review of Plant’s financial statements for the period ended December
22 17, 2000 and Plant therefore did not have the “financial resources” necessary to prosecute a
23 lawsuit against its “CGL insurers.” (*Id.*)

24 There is no evidence that the defendants in this case were aware before the filing of this
25 lawsuit of Gregory’s correspondence with Collins concerning the possibility that additional
26 coverage might be available under their policies. Thus, there is no evidence that any of the
27 defendants in this case read Gregory’s correspondence with Collins, took any action based on the
28 correspondence, or relied in any way on Gregory’s statements in the correspondence that he did

1 not think Plant was entitled to additional coverage under Plant’s “pre-1980 CGL primary
2 policies.”

3 **APPARENT “PER OCCURRENCE” AND “AGGREGATE” LIMITS IN THE POLICIES**

4 This Court is not asked to determine coverage obligations under the insurance policies in
5 this Phase II, and this Court does not purport to do so. However, all parties have agreed that
6 Plant’s state of mind as to its available coverage is an issue to be addressed at this time. In that
7 connection, and not by way of interpreting the policies, the Court finds that from the mere reading
8 of the then-available policy texts, and without any further information, Mr. Gregory would have
9 seen what follows and would have derived the understandings as next set forth.

10 The insurance policies generally contain two separate types of limits for the payment of
11 damages resulting from claims of “bodily injury”: (1) “per occurrence” limits that are available
12 for each covered “occurrence,” and (2) “aggregate” limits that constitute that total amount of
13 money that the insurance company will pay for “bodily injury” damages subject to the
14 “aggregate” limits in the policy. (*See, e.g.*, Trial Exh. 2037, at CMB-R0000030 (Item 4 of
15 Declarations).) The “aggregate” limits apply only to “bodily injury” damages that fall within
16 either the “products hazard” or the “completed operations hazard,” as those terms are defined in
17 the policies. (*See, e.g.*, Trial Exh. 2037, at CMB-R0000030 (Item 4 of Declarations).)

18 The policies do not define “products hazard” or “completed operations hazard” based
19 upon whether the plaintiff has sued Plant for “negligence” or “strict liability.” (*See, e.g.*, Trial
20 Exh. 2037, at CMB-R0000032 (Definitions of “Products Hazard” and “Completed Operations
21 Hazard”).) Instead, “bodily injury” damages are said to fall within the “products hazard” or the
22 “completed operations hazard” provisions of the policies based upon the place and time of the
23 plaintiff’s injury. (*Id.*) “Bodily injury” damages are said to be within the “products hazard” of
24 the policies if the asbestos plaintiff’s injury occurred away from premises owned or rented by
25 Plant and after Plant relinquished possession of the product that caused injury. (*See, e.g.*, Trial
26 Exh. 2037, at CMB-R0000032 (Definition of “Products Hazard”).) “Bodily injury” damages are
27 said to be within the “completed operations hazard” of the insurance policies at issue in this case
28 if the plaintiff’s injury occurred away from premises owned or rented by Plant and after Plant

1 completed its work at a jobsite. (*See, e.g.*, Trial Exh. 2037, at CMB-R0000032 (Definition of
2 “Completed Operations Hazard”).) The policies also remove certain “operations” from the
3 definition of “completed operations,” including “the existence of tools, uninstalled equipment and
4 abandoned or unused materials” and “operations for which the classification stated in the
5 company’s manual or rules and rates specifically includes completed operations.” (*Id.*)

6 For any single “occurrence” covered under the policies at issue in this case, it would
7 appear that the insurers are not to be required to pay more than the “per occurrence” limit stated
8 in the policy. (*See, e.g.*, Trial Exh. 2037, at CMB-R0000033 (“Limit of Liability – Coverages A
9 and B”).) For claims of “bodily injury” damages arising from multiple “occurrences” that are
10 within either the “products hazard” or the “completed operations hazard” provisions of the
11 policies, it would appear that the most that the insurer has to pay on behalf of Plant is the
12 “aggregate” limit stated in the policy. (*See, e.g.*, Trial Exh. 2037, at CMB-R0000034 (“Limits of
13 Liability – Products – Coverages B and D”).) Once the “aggregate” limit for “bodily injury”
14 damages is reached, it would appear the policy no longer will indemnify the insured for damages
15 that are within either the “products hazard” or the “completed operations hazard,” regardless of
16 any additional “occurrences.” (*Id.*) Finally, it would appear that for claims of “bodily injury”
17 damages arising from multiple “occurrences” that are not within either the “products hazard” or
18 the “completed operations hazard” of the policies, the insurers are responsible for the payment of
19 as many “per occurrence” limits on behalf of Plant as there are covered “occurrences.” (*See, e.g.*,
20 Trial Exh. 2037, at CMB-R0000033 (“Limit of Liability – Coverages A and B”).)

21 For purposes of the issues involved in the Phase II trial *only*, there is no apparent material
22 difference between the policy terms reviewed in the immediately preceding four paragraphs and
23 the similar policy provisions in the other policies admitted into evidence.

24 **THE “CHANGES” PROVISION IN THE POLICIES**

25 The policies contain a non-waiver provision in the following form, or in substantially
26 equivalent form: “Changes: Notice of any agent or knowledge possessed by any agent or by any
27 other person shall not effect a waiver or a change in any part of this policy or estop the company
28 from asserting any right under the terms of this policy; nor shall the terms of this policy be

1 waived or changed, except by endorsement issued to or from a part of this policy.” (Trial Exh.
2 2037, at CMB-R0000004, CMB-R0000034, CMB-R0000060, CMB-R0000096, CMB-
3 R0000136, CMB-R0000178, CMB-R0000245; Trial Exh. 4509A, at JG0048524; Trial Exh.
4 5249A, at JG0048772, JG0048819; Trial Exh. 5250, at JG0051390; Trial Exh. 5251, at
5 JTT00004, JTT00015, JTT00039; Trial Exh. 5252, at JG0051632; Trial Exh. 5254, at
6 TP0204977; Trial Exh. 5255, at TP0204996; Trial Exh. 5256A, at TP0204865; Trial Exh. 5257A,
7 at JG0051588; Trial Exh. 5258, at TP0204803; Trial Exh. 5259, at JG0051484; Trial Exh. 5267,
8 at PIC0000569, PIC0000614; Trial Exh. 5268A, at SNC000015; Trial Exh. 5272, at TP0124556;
9 Trial Exh. 5273A, at PIC0213548; Trial Exh. 5274, at PIPOL000149, PIPOL000159,
10 PIPOL000173.)

11 **FIREMAN’S FUND’S ANALYSIS OF “OPERATIONS” COVERAGE**

12 A Fireman’s Fund claims manual dated July 18, 1973, defined the “premises/operations”
13 hazard to cover “legal liability arising out of the ownership, maintenance or use of the insured’s
14 premises and operations necessary or incidental thereto. The hazard covers operations in
15 progress. A typical ‘premises’ exposure is a fall down in an apartment building. A typical
16 ‘operations’ exposure is a contractor’s employee dropping a board on a passerby when a building
17 is under construction.” (Trial Exh. 5036A, at FFP 005227.)

18 A Fireman’s Fund internal memorandum dated August 10, 1981, noted that “cumulative
19 trauma” losses could arise out of three different “hazards” covered under the policies: operations,
20 completed operations, and premises hazards. (Trial Exh. 5042, at FFP 003034.) The Fireman’s
21 Fund “cumulative trauma unit” addressed claims for coverage arising where bodily injury,
22 disease, or property damages may develop progressively over periods of time, such as asbestos
23 exposure and environmental property damage cases. (Trial Exh. 5003, at FFP 013524; Trial Exh.
24 5039, at FFP 002861; Trial Exh. 5028, at FFP007749-7751; Trial Exh. 5967 (Frazier Depo. at
25 84:9-85:10).) The August 10, 1981 memorandum defined “operations hazard” to include “bodily
26 injury and property damage arising from work activity in progress, or reliance upon a
27 representation or warranty made at any time thereto as to that work activity in progress,
28 performed by or on behalf of the named insured.” (Trial Exh. 5042, at FFP 003035.) The

1 memorandum defined “completed operations hazard” to include “bodily injury and property
2 damage arising out of operations, or reliance upon a representation or warranty made at any time
3 thereto, but only if the bodily injury or property damage occurs after such operations have been
4 completed or abandoned and occurs away from premises owned by or rented to the named
5 insured.” (*Id.*)

6 An internal Fireman’s Fund memorandum dated January 18, 1983, noted that the “current
7 legal environment is such that the distributor of asbestos-containing products may have exposure
8 equal to, if not greater than, the manufacturer.” (Trial Exh. 5046, at FFP 001554.)

9 An internal Fireman’s Fund memorandum dated March 21, 1983, stated that “[w]hile it is
10 common to think of both manufacturer and distributor liability as arising out of
11 product/completed operations hazard, operations may also generate potential liability. For
12 example, the policyholders [sic] manufacture, transportation, or installation of asbestos-
13 containing products could expose neighboring residents or bystanders to asbestos dust. It follows
14 that simply excluding products in completed operations coverage may not assure an elimination
15 of future asbestos claims.” (Trial Exh. 5047, at FFP 001557.) The memorandum continued by
16 noting that “if the manufacturer or distributor does not have products/completed operations
17 coverage, premises/operations coverage may provide the policyholder with the only potential
18 insurance for asbestos-related liability. While the claims may most appropriately be linked to a
19 products hazard, a dispute may arise resulting in litigation.” (*Id.*) This was a “red flag”
20 memorandum that was distributed internally to all commercial risk managers at Fireman’s Fund.
21 (Trial Exh. 5967 (Frazier Depo. at 198:9-18, 198:24-199:24).)

22 **ABSENCE OF INSURER EXPLANATION OF POSITIONS**

23 No defendant offered evidence of any explanation based on perceived law, policy
24 language, or other rationale, as to why, in the course of telling Plant that its policy was exhausted,
25 it had concluded that it was speaking accurately. Indeed, no defendant offered any evidence to
26 establish that it actually held the belief that it owed Plant no duties of defense or indemnity when
27 it took the position that aggregate limits, or its “policies,” were exhausted. In other words, in
28 advising Plant that their policies were exhausted, the insurers were, in effect, telling Plant that it

1 would not be entitled to defense or indemnity under provisions of their policies that were not
2 subject to aggregate limits, and yet they presented no evidence at trial that this was a justifiably
3 held belief, or even a belief at all.

4 This lack of evidence is more poignant when viewed against the background of the
5 insurers' invitation to this Court that, for purposes of Phase II, the Court could "assume" that
6 Plant had additional rights to coverage notwithstanding the insurers' prior assertions of
7 "exhaustion." *See, e.g.*, Defendants' Phase II Trial Brief at page 5, note 3. If the assumed fact
8 should prove to be an actual fact, the inexorable conclusion would be that the insurers
9 erroneously stated their coverage obligations to Plant when they advised of exhaustion, and issue
10 might then arise as to whether the erroneous statements were based on well-founded and honest
11 beliefs when made. In this connection, and without making any finding based thereon, it is
12 observable that the internal Fireman's Fund documentation outlined above may well raise
13 question as to whether Fireman's Fund knew of the existence of coverage in the policies that
14 *potentially* covered Plant against at least some of the asbestos cases without regard to aggregate
15 limits of liability.

16 All of this being said, the insurers, of course, remain free, in subsequent phases of this
17 case, to seek policy interpretations that would limit their responsibility to Plant to the aggregate
18 limits of liability in Plant's policies. Also, if any such issue should be pertinent in any future
19 phase of this case, the insurers remain free to contend that there was no bad faith on their part in
20 connection with assertions to Plant relating to exhaustion.

21 THE CIGA LAWSUIT

22 On February 27, 2001, based on the insolvency of its Mission insurers, Plant sued CIGA
23 for declaratory relief in the Alameda County Superior Court (the "CIGA Lawsuit"). (Trial Exh.
24 3325.) Plant alleged that its "primary liability insurance was exhausted in August 1993.
25 Exhaustion of Plant's excess liability insurance issued by solvent insurers is imminent." (*Id.*, at p.
26 2.) Plant therefore sought a declaration from the Court that all pending and future asbestos claims
27 against Plant were "covered claims" within the meaning of Insurance Code Section 1063.1(c)(1),
28 thus obligating CIGA to defend and indemnify Plant under the policies issued by Mission (*Id.*, at

1 p. 4.)

2 There is no evidence in the record that CIGA ever responded to the CIGA Lawsuit, that
3 the CIGA Lawsuit was ever assigned to a judge, or that there was any contested proceeding in the
4 CIGA Lawsuit. Nevertheless, on June 14, 2001, Plant and CIGA settled the CIGA Lawsuit (the
5 “CIGA Settlement”). (Trial Ex. 3373.) The CIGA settlement agreement states that “Plant
6 represents that settlements, judgments and defense costs incurred in the Asbestos Claims have
7 exhausted the coverage provided by all applicable general liability insurance policies issued to
8 Plant by insurance companies which are not insolvent or in liquidation or receivership and it
9 reasonably appears to CIGA that said representation is accurate.” (*Id.*, at p. 2, ¶ 1.6.) CIGA
10 therefore agreed to defend and indemnify Plant against asbestos suits that qualified as “covered
11 claims” under Insurance Code Section 1063, *et seq.*, subject to the terms of the policies issued by
12 the Mission Insurance Companies until the policies were “exhausted.” (*Id.*, at p. 3, ¶ 4.) The
13 settlement agreement recites that the policies issued by the insolvent Mission provided
14 \$35,000,000 in “policy limits.” (*Id.*, at pp. 1-2, ¶ 1.3.)

15 The CIGA Lawsuit was dismissed with prejudice on June 28, 2001. (Trial Ex. 3378.)
16 There is no evidence in the record of any judicial involvement in the CIGA Settlement. Also,
17 there is no record evidence (a) that any of Plant’s insurance companies were aware of the CIGA
18 Lawsuit or the CIGA Settlement at any time before the commencement of the case here at bar, or
19 (b) that any of the defendants in this case read the CIGA Lawsuit or the CIGA Settlement, took
20 any action based on the statements contained in the CIGA Lawsuit or the CIGA Settlement, or
21 relied in any way on Plant’s statements in the CIGA Lawsuit that its primary coverage had been
22 “exhausted” in August 1993, and that the exhaustion of Plant’s excess coverage was “imminent.”
23 Once again Plant’s representations about exhaustion were a repetition of what it had been told by
24 the insurers.

25 **CONFIRMED SO-CALLED “EXHAUSTION” OF THE EXCESS COVERAGE**

26 A representative of Mt. McKinley Insurance Company wrote to Collins, counsel to CIGA,
27 on April 5, 2001, stating that Mt. McKinley had “paid or has committed to pay it’s [sic]
28 \$5,000,000 policy limits for settlements reached by Plant Insulations. [sic]. This commitment to

1 pay exhausts the contractual obligations between Mt. McKinley and Plant Insulations.” (Trial
2 Exh. 3338.)

3 A representative of Transport wrote to Collins on November 21, 2001, stating “[p]lease be
4 advised that the policy limits of \$5 million provided to Plant Insulation have been exhausted
5 through payments of asbestos losses Now that Plant Insulation’s limits have been exhausted
6 Transport has no further obligations to Plant Insulation and will proceed to close our file.” (Trial
7 Exh. 3420.)

8 By the end of 2001, each of Plant’s “second-tier” excess insurers -- Transport, Mt.
9 McKinley, and Granite State -- stated that it had, in fact, paid the aggregate limits under its
10 policies defending and indemnifying Plant against the asbestos lawsuits. (Trial Exhs. 3415, 3420,
11 3431, 3432, 3433; Gregory, Trial Tr. vol. 2, 125:18-28; Gregory, Trial Tr. vol. 3, 270:28-272:10.)

12 It is a reasonable inference, and the Court finds, that each of Plant’s excess insurers (AIG,
13 ICW, ACE P&C, Safety National, Transport and Mt. McKinley) was aware, during the period in
14 which each such insurer was defending and/or indemnifying Plant through the time it notified
15 Plant of the so-called exhaustion of its policies, that Plant’s business included working with
16 asbestos products, and further that lawsuits prosecuted against Plant included allegations and
17 claims that asbestos exposure during Plant’s work contributed to injure the asbestos plaintiffs.

18 **ABSENCE OF EVIDENCE OF INSURER INVESTIGATION INTO POTENTIAL PLANT**

19 **“OPERATIONS” COVERAGE**

20 There is no evidence in the record that any of the defendants investigated or analyzed even
21 a single asbestos lawsuit against Plant to determine any of the following: (a) whether it, in fact,
22 fell within the “products hazard” or “completed operations hazard” of the policies; (b) whether it,
23 in fact, was subject to the “aggregate” limits of the policies; or (c) whether it, in fact, was subject
24 only to “per occurrence” (or “per accident”) limits in the policies. Similarly lacking is any record
25 evidence of any discussions or written communications between any of the defendants and Plant
26 concerning the characterization of asbestos suits as involving either the “products hazard,” the
27 “completed operations hazard,” “premises” exposure or “operations” exposure.

28 There is no evidence in the record of any defendants offering to make available to Plant

1 on any basis, before 2006, coverage under its policy or policies for the defense or settlement of
2 asbestos lawsuits other than the “aggregate” limits of liability in its policy or policies. The Court
3 finds that there was no such offer.

4 FIBREBOARD BANKRUPTCY CLAIMS

5 Plant has pursued indemnity claims against Fibreboard in several different forums since
6 the late 1980s. (Gregory, Trial Tr. vol. 2, 143:10-27.) Most of Plant’s primary insurers financed
7 Plant’s indemnity litigation against Fibreboard in the early 1990s. (Trial Exh. 5218.) All of
8 Plant’s excess insurers except Safety National assigned their equitable subrogation rights to Plant
9 in the late 1990s in support of Plant’s indemnity claims against Fibreboard. (Trial Exh. 6008
10 (“Agreement Re Assignment of Subrogation and Reimbursement Claims”); Trial Exh. 3303,
11 Exhibit “A”.)

12 Fibreboard filed for bankruptcy on or about October 5, 2000. (Gregory, Trial Tr. vol. 5,
13 621:6-15.) That bankruptcy proceeding was consolidated with the Owens-Corning Fiberglass
14 (“OCF”) bankruptcy. (Gregory, Trial Tr. vol. 5, 608:16-22.)

15 Plant filed more than 2,000 “proof of claim” forms in Fibreboard’s bankruptcy case
16 evidencing Plant’s claims for equitable indemnity against the Fibreboard estate. (Trial Exhs.
17 3460-3463; Gregory, Trial Tr. vol. 5, 604:25-605:9, 609:11-610:1.) Plant considered its claims
18 against Fibreboard to be “derivative asbestos claim[s].” (Trial Exh. 3460, at p. 1.)

19 The “proof of claim” forms filed by Plant stated that Plant sought indemnity from
20 Fibreboard related to (1) the defense costs and settlement payments of each asbestos personal
21 injury or wrongful death claim resolved by excess insurers from August 21, 1995 through
22 December 2001, and (2) the \$35 million in coverage under the Mission policies that CIGA agreed
23 to make available in the CIGA Settlement. (Trial Exh. 3460, at p. 2.)

24 The summary attached to each of the “proof of claim” forms that Plant submitted in the
25 Fibreboard bankruptcy case states that “Plant was the exclusive Northern California distributor of
26 Fibreboard’s high-temperature pipe and block insulation from 1948 until 1990. From 1948 until
27 1971 these products contained asbestos. Throughout this period, Fibreboard continuously urged
28 Plant to sell ever greater quantities of its asbestos-containing products. Plant performed

1 insulation jobs using Fibreboard asbestos-containing insulation and also sold these products at
2 retail prices from its warehouse.” (See, e.g., Trial Exh. 3460, at p. 2.) The “proof of claim”
3 summary also states the following: “Plant was entirely dependent upon Fibreboard to advise it as
4 to any medical hazards associated with Fibreboard’s asbestos-containing products. Plant was
5 justifiably ignorant of such hazards inasmuch as none of its officers, employees, or directors had
6 any medical or epidemiological experience or training. Plant never altered, abused, or misused
7 any of the Fibreboard-manufactured asbestos-containing products it sold or installed. Plant’s
8 liability in the underlying cases arose exclusively from the fact that it was in the chain of
9 distribution of a defective asbestos-containing product manufactured by Fibreboard, and not
10 because of any negligence of its own.” (See, e.g., Trial Exh. 3460, at p. 2.) Further included in
11 the “proof of claim” summary was Plant’s statement that “[a]ll of Plant’s non-CIGA insurance
12 resources were exhausted in 2001.” (See, e.g., Trial Exh. 3460, at p. 2.) This latter statement, like
13 other similar statements made by Plant in judicial proceedings, reflect what Plant had been told
14 by the insurers.

15 Plant’s indemnity claims against Fibreboard were assigned a “value” of \$20 million for
16 voting purposes in the OCF bankruptcy. (Gregory, Trial Tr. vol. 5, 622:26-623:18.) There is no
17 evidence in the record as to the value, for voting purposes, assigned to other claims (or to all of
18 the claims) submitted in the OCF bankruptcy case. The record does include evidence that the
19 assigned value of Plant’s claims, for voting purposes, was “worthless” to Plant, that is, it had no
20 real value. (*Id.*, at 623:10-18.)

21 There is no evidence as to whether Plant voted on any aspect of the Fibreboard or OCF
22 bankruptcy plans or, if Plant voted, the effect that Plant’s vote might have had on the outcome of
23 the vote. The insurers failed to establish that any influence that Plant obtained in the OCF
24 bankruptcy for voting purposes, as a result of Plant’s claims, was of any appreciable value to
25 Plant, and the Court finds that the voting rights had no such appreciable value.

26 Plant has not submitted a claim to the trust established by the Fibreboard and OCF
27 bankruptcy to resolve the asbestos liabilities of these two companies. (Gregory, Trial Tr. vol. 5,
28 619:20-620:6.) It follows that Plant has not recovered any money from the Fibreboard and OCF

1 bankruptcy. (Gregory, Trial Tr. vol. 5, 620:7-24, 622:18-24.) Nor has Plant recovered any
2 money from any of its litigation against Fibreboard, or from any claims it has asserted against
3 Fibreboard in any forum.

4 There is no evidence that any of the defendants in this case were aware before the filing of
5 this lawsuit of the contents of the “proof of claim” forms Plant filed in the Fibreboard and OCF
6 bankruptcy. Similarly lacking is any evidence that any of the defendants in this case read Plant’s
7 “proof of claim” forms filed in the Fibreboard and OCF bankruptcy, took any action based on the
8 contents of those forms, or relied in any way on the statements Plant made in the bankruptcy case.

9 **PLANT’S CONDUCT AFTER THE CIGA SETTLEMENT RELATIVE TO THE**
10 **POSSIBILITY OF SEEKING “ADDITIONAL” COVERAGE FOR “OPERATIONS”**

11 In 1994, Plant was alerted to the possibility that its policies might provide coverage for
12 certain asbestos claims without aggregate limits. (Trial Exh. 4172; Gregory, Trial Tr. vol. 2,
13 171:8-14.) That subject re-surfaced in 1999, when Travis received a phone call from counsel for
14 Safety National, one of Plant’s first level excess insurers, apparently to discuss settlement of the
15 Safety National policy issued to Plant, during which phone conversation Safety National’s
16 counsel mentioned a “new theory” under which some asbestos defendants were seeking to obtain
17 coverage from their insurers without aggregate limits for certain asbestos claims. (Trial Exh.
18 3287; Travis, Trial Tr. vol. 9, 1223:1-26.) Safety National’s counsel noted that Plant also may
19 have been in a position to seek additional coverage from its primary insurers. (Trial Exh. 3287.)
20 Plant’s primary insurers had asserted no later than August 6, 1993, that their coverage was
21 exhausted. (Gregory, Trial Tr. vol. 2, 183:8-26, 185:2-9.) Plant was being defended and
22 indemnified by its first-level excess insurers in 1999, including Safety National. (Gregory, Trial
23 Tr. vol. 3, 266:24-267:4, 267:16-19.) Counsel also told Travis that Safety National would like
24 Plant “to succeed” in an effort to obtain additional coverage from its primary insurers. (Trial
25 Exh. 3287.)

26 As previously noted, the June 14, 2001 CIGA Settlement was premised upon the lack of
27 any additional insurance coverage being then “available” to defend or indemnify Plant against the
28 asbestos lawsuits, and CIGA’s acceptance of Plant’s representation that all of its solvent

1 insurance assets responsive to the asbestos litigation were “exhausted.” (Trial Exh. 3373, at p. 2.)
2 Putting that premise in context, by the end of 2001, all of Plant’s solvent primary and excess
3 insurance companies had asserted, in some manner, that their coverage was “exhausted” and was
4 no longer available to defend or indemnify Plant against the asbestos lawsuits. (Trial Exhs. 3420,
5 3431, 3432, 3433; Gregory Trial Tr. vol. 2, 125:18-28; Gregory Trial Tr. vol. 3, 270:28-272:10.)

6 In late 2002, Travis sent an article to Gregory entitled “Asbestos: Insurance Coverage
7 Issues On A Changing Landscape.” (Trial Exh. 4439; Gregory, Trial Tr. vol. 3, 317:25-318:2.)
8 One of the sections in the article was captioned “The Operations Buzz.” (Trial Exh. 4439, at p.
9 39.) In his cover letter accompanying the article, Travis stated the following: “Check out the
10 article on insurance which starts at page 34. We really do need to nail down the situation as to
11 Plant. And I don’t mean figuring out for certain whether there is ‘operations’ coverage, but at
12 least organizing and cataloging the respective policies, their language, and the potentially
13 applicable releases. I suspect that others may do the heavy lifting of establishing the case law on
14 these subjects, but I think we should get ourselves in position to know whether we have a shot at
15 additional insurance coverage if developing case law goes that direction.” (Trial Exh. 4439.)

16 In February of 2003, Travis received briefs filed by J.T. Thorpe & Sons, Inc., an insured
17 in a coverage lawsuit brought by it. (Trial Exhs. 3532, 4220; Travis, Trial Tr. vol. 9, 1244:5-12.)
18 The briefs asserted that policies issued to J.T. Thorpe provided “operations” coverage. (Trial
19 Exh. 4220, at PICX00008945-8947.) Travis annotated one of the briefs with questions that arose
20 in his mind when reading the briefs. (Trial Exh. 4220.) He wondered about the “interplay
21 between products coverage and strict liability for product defect -- what theory is being asserted
22 against J.T. Thorpe? Must it be negligence? Or does the ‘completed operations’ language make
23 it irrelevant? Can a subcontractor be sued in strict products liability? Tension between Plant’s
24 theory for indemnity and J.T. Thorpe’s theory for coverage?? What is the profile of JTT’s
25 plaintiffs?” (*Id.*, at PICX00008939.)

26 NEGOTIATION OF THE PLANT MATRIX

27 Plant always understood that the \$35 million that CIGA committed under the policies
28 issued by the insolvent Mission Insurance Companies was insufficient to satisfy all of the

1 asbestos claims pending against Plant. (Gregory, Trial Tr. vol. 5, 626:5-11; Travis, Trial Tr. vol.
2 12, 1456:16-1457:6.) Similarly understood was that payment of defense costs would reduce the
3 amount of coverage available under the policies issued by the insolvent Mission. (Travis, Trial
4 Tr. vol. 10, 1353:2-16; Trial Exh. 5965 (Bradley Depo. at 53:18-20).)

5 Against that background, and given its precarious financial situation, Plant proposed to
6 CIGA that Plant cease conducting a traditional asbestos defense, asserting to CIGA that such a
7 defense would cause defense costs to consume a potentially large amount of the coverage
8 available under the policies issued by Mission. (Trial Exh. 3411; Travis, Trial Tr. vol. 10,
9 1354:2-19, 1360:27-1361:9; Trial Exh. 5965 (Bradley Depo. at 41:4-7, 41:10-24, 112:21-112:22,
10 112:25-113:13, 140:3-14).) Plant further proposed to CIGA that Gregory and Travis's law firm,
11 Travis & Pon, replace Jackson & Wallace as Plant's asbestos defense counsel pursuant to a flat
12 fee arrangement. (Trial Exh. 3411, at PICX00008082-8083; Trial Exh. 3418, at JGE0005974,
13 JGE0005975.) CIGA agreed, and Gregory and Travis & Pon became Plant's defense counsel
14 effective January 1, 2002. (Gregory, Trial tr. vol. 6, 700:4-5; Travis, Trial Tr. vol. 10, 1358:24-
15 26.) Under their fee agreement with CIGA, Gregory and Travis & Pon were paid \$60.00 for each
16 open asbestos case against Plant, up to a combined monthly cap of \$125,000.00 plus
17 reimbursement of certain expenses. (Travis, Trial Tr. vol. 10, 1360:20-26; Trial Exh. 3445, at
18 TP0283781.)

19 To date, Gregory and Travis & Pon have received more than \$8 million in legal fees from
20 CIGA, although they did not mount a traditional defense against the asbestos suits. (Travis, Trial
21 Tr. vol. 14, 1701:16-26.)⁴ Payment of those fees has reduced the amount of money available to
22 pay asbestos claimants from \$35 million to less than \$27 million. CIGA considered the \$35
23 million available under the Mission policies to be "Plant's money" that Plant could use as it saw
24 fit in the defense and settlement of the asbestos suits. (Trial Exh. 5965 (Bradley Depo. at 41:20-
25 42:6; 56:11-6).)

26 In this Court's view, the fees which Gregory and Travis negotiated for themselves, and

27 _____
28 ⁴ Travis testified that "the total payments I think were somewhere in the neighborhood of 8.5, 8.7, but I don't have that number right off the top of my head." (Travis, Trial Tr. vol. 14, 1701:16-26.)

1 thereafter received, were unreasonably excessive in the light of the level of services performed by
2 them purportedly to earn those fees. CIGA itself initially expressed concern regarding the
3 negotiated fees. Thus, CIGA stated that “[t]he rates were higher than CIGA traditionally pays for
4 defense counsel,” and as a result, CIGA required that Plant request that the retention of Gregory
5 and Travis & Pon be put into written form and further required that CIGA be released from any
6 liability pertaining to that retention. (Trial Exh. 4516B, Collins Depo. at 57:16-58:7; Trial Exh.
7 3434, at ¶¶ 2,3.)

8 Beginning in or about 2002, Gregory and Travis sought to negotiate a comprehensive
9 arrangement with prominent members of the asbestos plaintiffs’ bar. The goal announced by
10 Gregory and Travis was to facilitate an orderly distribution of the money provided by CIGA,
11 while minimizing the amount of defense costs incurred by Plant. (Travis, Trial Tr. vol. 10,
12 1352:18-1353:16.)

13 Beginning in January 2002, Gregory and Travis continued various “standstill”
14 arrangements that Wallace had negotiated with the plaintiffs’ asbestos bar beginning in 2000, at a
15 time when Plant began to deplete the last of its remaining, confirmed insurance assets. (Brayton,
16 Trial Tr. vol. 7, 913:12-20; McClain, Trial Tr. vol. 8, 1048:26-1049:12, 1128:8-14, 1131:17-
17 1133:8; Trial Exh. 5982 (Wallace Depo. at 104:1-105:5, 124:15-125:8, 129:1-130:7).) Plant’s
18 second-tier excess insurers, which were defending Plant in 2000, likely were aware of the
19 standstill arrangements that Wallace negotiated on Plant’s behalf (Trial Exh. 5982 (Wallace
20 Depo. at 270:11-271:4).), and there is no evidence that the second-tier excess insurers objected, at
21 least until many years later, to the “standstill” arrangements.

22 Under the “standstill” arrangements, Plant was not required to file answers, participate in
23 the defense of the asbestos cases, or attend trial. (McClain, Trial Tr. vol. 8, 1128:15-1129:17.) In
24 return, the plaintiffs’ asbestos bar would not enter defaults against Plant or attempt to enforce
25 default judgments. (McClain, Trial Tr. vol. 8, 1133:9-1134:12.) All of Plant’s defenses, and the
26 asbestos plaintiffs’ potential damages as they existed at the time, were nevertheless preserved
27 even though Plant was not participating actively in the asbestos litigation. (McClain, Trial Tr.
28 vol. 8, 1128:15-1129:17; Trial Exh. 5982 (Wallace Depo. at 107:14-108:19, 113:9-115:23,

1 116:14-23, 117:22-120:3, 122:16-25).)

2 Gregory and Travis & Pon had a contingent fee arrangement with Plant with respect to
3 their work on Plant's indemnity claims against Fibreboard. (Gregory, Trial Tr. vol. 5, 571:2-
4 572:4; Trial Exh. 4516, Tab 6 (Travis Depo. at 42:25-43:18).) They wanted to extend the payout
5 of the money made available by CIGA under the Mission policies as long as possible because
6 they believed, or at least hoped, that this would extend Plant's corporate life long enough for
7 Plant to recover on its indemnity claims against Fibreboard. (Gregory, Trial Tr. vol. 5, 590:13-
8 16; Brayton, Trial Tr. vol. 6, 803:12-22; Brayton, Trial Tr. vol. 7, 924:25-925:4.) Their primary
9 goal, if not the only one, was to obtain a contingent fee for themselves related to a recovery from
10 Fibreboard. (Gregory, Trial Tr. vol. 5, 572:12-23, 591:9-21.)

11 As previously mentioned, in 2004 Gregory and Travis formed a holding company for
12 Plant, known as PEACE. They capitalized PEACE with only \$1,000 each, for a total sum of
13 \$2,000. (Trial Exh. 3595; Gregory, Trial Tr. 5, 573:25-574:4.) Their purpose in forming PEACE
14 was to avoid a situation where Plant might otherwise resolve its indemnity claims against
15 Fibreboard for little or no money and thereby disadvantage them in their quest for a very
16 substantial contingent fee. (Gregory, Trial Tr. vol. 5, 569:27-571:12, 572:12-23, 574:24-575:7.)

17 Gregory and Travis did not reach agreement on a comprehensive arrangement with the
18 asbestos plaintiffs' bar to distribute the CIGA money equitably among the claimants in 2002,
19 2003 or 2004. (Gregory, Trial Tr. vol. 5, 586:15-18; Travis, Trial Tr. vol. 10, 1354:26-1356:5;
20 McClain, Trial Tr. vol. 8, 1125:11-16; Brayton, Trial Tr. vol. 6, 805:13-19, 805:28-806:2.)
21 However, the election results of November 2004 motivated the asbestos plaintiffs' bar to seek at
22 that time to reach a comprehensive arrangement with Plant to distribute the CIGA money in an
23 equitable manner. (Gregory, Trial Tr. vol. 5, 583:18-584:6, 616:7-617:25; Trial Exh. 3621.) The
24 asbestos plaintiffs' bar believed that national asbestos legislation might pass soon after the
25 November 2004 election, and thus eliminate asbestos litigation in the United States. (Gregory,
26 Trial Tr. vol. 5, 640:25-641:8; Brayton, Trial Tr. vol. 6, 815:7-15.) The plaintiffs' asbestos bar
27 therefore wanted to get a deal done with Plant as quickly as possible with respect to distributing
28 the CIGA money. (Travis, Trial Tr. vol. 10, 1381:21-1382:1; Brayton, Trial Tr. vol. 6, 838:10-

1 19.)

2 In pursuit of that goal, the plaintiffs' asbestos bar suggested the adoption of a "matrix"
3 arrangement, similar to those then in use in asbestos bankruptcies, under which similar claims
4 would be valued similarly and paid a percentage of a so-called "liquidated claim value" that was
5 derived mathematically based on a number of different factors used to value asbestos claims
6 outside of the tort system. (Trial Exhs. 3475, 3603; Brayton, Trial Tr. vol. 6, 802:26-803:1,
7 803:23-804:27, 806:3-808:27; Brayton, Trial Tr. vol. 7, 921:21-922:14; Travis, Trial Tr. vol. 10,
8 1358:10-18.) Alan Brayton, a leading member of the asbestos plaintiffs' bar in Northern
9 California, presented a draft Plant "matrix" agreement to Gregory and Travis in March 2004.
10 (Trial Exh. 3603.) This draft was based on a matrix arrangement used by another asbestos
11 installer and distributor, Western MacArthur, as part of its trust distribution procedures in
12 bankruptcy court. (Brayton, Trial Tr. vol. 6, 806:3-807:14.) Brayton provided another draft
13 matrix agreement to Gregory and Travis in late 2004. (Trial Exh. 4417.) This draft agreement
14 was derived from the "matrix" arrangement used in the E.J. Bartels asbestos bankruptcy in
15 Washington state, and from the Western MacArthur matrix arrangement. (Travis, Trial Tr. vol.
16 10, 1356:7-25; Brayton, Trial Tr. vol. 7, 954:25-955:17.) With respect to CIGA money, these
17 two versions of the agreement envisioned a 10 percent payout to each claimant of the value of his
18 or her claim determined under the matrix. (Trial Exh. 3603, at TPE00102660; Trial Exh. 4417, at
19 TPE00102985.)

20 Plant provided a revised draft "matrix" to Brayton in January 2005. (Trial Exh. 3643;
21 Travis, Trial Tr. vol. 10, 1356:7-1357:19.) This draft Matrix recited that it set forth "the terms
22 and conditions under which Asbestos Claims will henceforth be processed, resolved, and paid in
23 light of the insufficiency of the CIGA coverage and the contingent nature of the [Fibreboard]
24 indemnity recovery." (Trial Exh. 3643, at TPE00103038.) The stated "general principles"
25 behind this draft Matrix agreement were "(a) paying as much as possible to each holder of a
26 compensable Asbestos Claim (as defined herein) while at the same time (b) providing
27 substantially the same treatment to similarly situated holders of Asbestos Claims and (c) keeping
28 the administrative expense of processing and resolving Asbestos Claims, which erode Plant's

1 CIGA coverage, to a minimum.” (*Id.*, at TPE00103039.) The proposed Matrix thus provided that
2 “[a]ll asbestos-related claims against Plant for personal injury, wrongful death, and loss of
3 consortium shall be submitted to Plant in accordance with the Plant Matrix, which shall constitute
4 the sole and exclusive method by which the holder of an Asbestos Claim against Plant may
5 pursue such Asbestos Claim” (*Id.*) Also included in Plant’s proposal was a provision to the
6 effect that Plant would receive a complete release from liability from each asbestos claimant who
7 was paid money under the Matrix. (Trial Exh. 3643, at TPE00103059; Travis, Trial Tr. vol. 10,
8 1363:22-26.)

9 Brayton’s understanding was that the committee of Plaintiff Lawyers negotiating with
10 Plant replied that the demand for a full release was not acceptable. (Brayton, Trial Tr. Vol. 7,
11 908:18-28.) Brayton later told Gregory, the timing probably being in July of 2005, that the
12 plaintiffs wanted to preserve what he called their “Shapiro rights” and that therefore the proposed
13 full Plant release would have to be redone. Travis, Trial. Tr. Vol. 10, 1364:3-12; Brayton, Trial
14 Tr. vol. 7, 917:25-918:8; Trial Exh. 3682.) The reference to “Shapiro rights” is to the California
15 Supreme Court’s opinion in *Shapiro v. Republic Indemnity Co. of America*, 52 Cal. 2d 437 (1959)
16 (“*Shapiro*”).

17 On August 3, 2005, Plant responded to the stated desire to preserve the rights of claimants
18 under *Shapiro* by “revising the release to make it clear that such rights are not released.” (Trial
19 Exh. 3682, at p. 1.) The new proposed release language stated that the amount paid to the
20 claimant under the Matrix represented a “substantial discount” from the claimants’ “full
21 settlement value . . . in the tort system.” Plant proposed that the “release language” would not bar
22 the claimants’ alleged rights under *Shapiro* to recover from Plant’s allegedly exhausted insurers
23 the difference between the amount paid under the Matrix and the full settlement value of their
24 claims. (*Id.*, at pp. 1-2.) Plant also proposed that any “release” of Plant under the Matrix “shall
25 not operate to extinguish any such [*Shapiro*] claims against Plant’s allegedly exhausted primary
26 and excess insurers.” (*Id.*, at p. 2.) On August 17, 2005, “in keeping with [the plaintiffs’ bar’s]
27 desire to preserve plaintiffs’ ability to make a future claim under *Shapiro v. Republic Indemnity*,”
28

1 Plant modified the draft Matrix by replacing the release of Plant with “a covenant not to execute”
2 against Plant. (Trial Exh. 3702.)

3 Brayton reported in August 2005 that the plaintiffs’ bar was concerned that national
4 asbestos legislation, known as the Fairness in Asbestos Injury Resolution Act (“FAIR Act”),
5 would soon become law. (Trial Exh. 3712, at TPE00109653.) Brayton proposed that the Matrix
6 contain language to protect payments of the CIGA money to the claimants from being taken by a
7 national trust contemplated by the FAIR Act. (*Id.*, at TPE00109652.) Brayton wanted to “craft a
8 solution that commits all the money, to claims filed that qualify under the Matrix, for the amount
9 to be determined under the matrix . . . Consideration would be forbearance of proceeding in the
10 tort system in return for promise to pay qualified claims under the Matrix to the extent of funds
11 availability. . . . Thinking out loud, it might be a good idea to do that as soon as we have the
12 final deal, maybe even by next week, so people can formally start their forbearance, and we have
13 legal detriment.” (*Id.*)

14 On August 22, 2005, Plant sent a further revised version of the proposed Matrix to
15 Brayton. (Trial Exh. 3705.) This version of the Matrix attempted to address Brayton’s concerns
16 about the FAIR Act with the following language under the heading “Execution Of Matrix And
17 Offer To Claimants” (the “Execution Provision”):

18 Plant hereby agrees to the foregoing terms and conditions and
19 offers to resolve Asbestos Claims in accordance therewith.
20 Submission of a Claim Form executed by or on behalf of a claimant
21 to Plant shall constitute acceptance of this offer and agreement to
22 all of the terms and conditions set forth herein by claimant
23 submitting such claim, it being understood and agreed that upon
24 submission of a duly executed, completed, and complete Claim
25 Form an express contract will then exist between the claimant
26 involved and Plant under which Plant will be under an express
27 obligation to make a future direct monetary payment to the claimant
28 in the amount fixed by this Matrix. By submitting such written and
executed Claim Form, the claimant agrees to forbear from further
prosecution of any lawsuit the claimant may have previously filed
against Plant; if the claimant has not, as of the time of such
submission, filed such lawsuit against Plant, the claimant agrees to
forbear from filing such a lawsuit.

(Trial Exh. 3705, at BR0000875-876.) The draft contained the following “Certification By

1 Members Of The Plant Negotiating Committee” directly below the Execution Provision: “The
2 undersigned hereby certify that they participated in the negotiation of the foregoing Plant Matrix,
3 that they approve it and that they intend to recommend to their clients that they resolve their
4 claims against Plant in accordance with the Plant Matrix.” (Trial Exh. 3705, at BR0000876.)
5

6 The August 22, 2005 draft also contains the following language in “Section 1 -- Purpose
7 And Interpretation” (the “Submission of Claims Provision”):

8
9 1.2 Submission of Claims: All asbestos-related claims against
10 Plant for personal injury and wrongful death shall be submitted to
11 Plant in accordance with the Plant Matrix, which shall constitute the
12 sole and exclusive method by which the holder of an Asbestos
13 Claim against Plant may pursue such Asbestos Claim. Plant
14 intends not to pay or liquidate Asbestos Claims except in
15 accordance with the Plant Matrix. Nothing in this Matrix precludes
16 any person from suing Plant in the tort system, until that person’s
17 Asbestos Claims against Plant have been resolved under the Matrix.

18 (Trial Exh. 3705, at BR0000843.) Under this draft, claims would be submitted by “filling out the
19 online Plant Insulation Company Asbestos Matrix Claim Form (“Claim Form”), available at the
20 Claims Web Site, www.plantmatrix.org, and submitting the Claim Form to Plant via the Claims
21 Web Site, together with electronic copies of all required supporting documents and a scanned
22 copy of the claimant’s executed attestation page verifying under penalty of perjury the accuracy
23 of the fact stated in the Claims Form.” (Trial Exh. 3705, at BR0000867-868.) Language
24 proposing to release Plant from liability is not included in this draft. (Trial Exh. 3705.)

25 The next version of the Matrix, sent to the asbestos plaintiffs’ bar in September 2005,
26 contained proposed releases in favor of various “CIGA Releasees” and “each and all of Plant’s
27 present and former directors, shareholders, officers, employees, and attorneys” in exchange for
28 the claimants’ receipt of money under the matrix. (Trial Exh. 3681, at TPE00113327.) Plant
itself was not to be released. (*Id.*) This version of the Matrix also proposed that the Claimant
would “not under any circumstances attempt to collect money from Plant on account of his, her or
their claims against Plant arising out of the Injured Person’s exposure to asbestos allegedly sold

1 or installed by Plant.” (*Id.*, at 113328.)

2 The September 2005 version of the Matrix continued to recite various basic principles that
3 appeared in the January 2005 version. (Trial Exhs. 3643, 3681.) For example, it stated that it
4 “sets forth the terms and conditions under which Asbestos Claims will henceforth be processed,
5 resolved, and paid in light of the insufficiency of the CIGA coverage and the contingent nature of
6 the [Fibreboard] indemnity recovery.” (Trial Exh. 3643, at TPE00103038; Trial Exh. 3681, at
7 TPE00113287.) It continued to articulate a basic goal of minimizing the “administrative expense
8 of processing and resolving Asbestos Claims, which erode Plant’s CIGA coverage.” (Trial Exh.
9 3643, at TPE00103039; Trial Exh. 3681, at TPE00113288.)

10 The September 2005 version of the Matrix stated that it was “procedural only” and created
11 no “substantive” right in any claimant. (Trial Exh. 3681, at TPE00113288.) Included was a
12 section on time-based defenses. (Trial Exh. 3681, at TPE00113312.) Under that section, Plant
13 agreed that “the time within which any asbestos-related action pending against it on the date of its
14 execution of this Matrix in which it is specifically named as a defendant must be brought to trial
15 is extended indefinitely. Further, Plant waives all right to seek discretionary dismissal” either for
16 failure of the claimants to effect service of their complaints or for their failure to bring their cases
17 to trial within the time periods specified in the Code of Civil Procedure. (*Id.*)

18 The Execution Provision of the August draft, quoted above, remained unchanged in the
19 September version. (Trial Exh. 3681, at TPE 00113318.) Similarly left untouched was the
20 Submission of Claims Provision of the August draft, as also quoted above. (Exh. 3681, at TPE
21 00113288.)

22 The September version of the Matrix was signed by Plant’s President, Douglas Ralston,
23 and by various members of the asbestos plaintiffs’ bar, including Brayton, Steven Kazan, Joseph
24 Visse, Steven Patti, and representatives of Harowitz & Tigerman and The Wartnick Law Firm.
25 (Trial Exh. 3681, at TPE00113319-324.) There is no evidence in the record that any asbestos
26 claimant either read or signed this version of the Matrix.

27 Next, Brayton wrote to Plant on October 19, 2005, stating that he and another member of
28 the asbestos plaintiffs’ bar, David McClain, had problems with the recitations in the “release”

1 appearing in the signed September 2005 Matrix. (Trial Exh. 3744.) Travis sent a revised version
2 of the release to Brayton and McClain on October 21, 2005 (Trial Exh. 3751.), and McClain sent
3 a copy of that revised version to lawyers at Morgan Lewis & Bockius (“Morgan Lewis”) on
4 October 24, 2005. (Trial Exh. 3751.)

5 In late-October 2005, a shared goal of Plant and the asbestos plaintiffs’ bar was that
6 claims would be submitted to the Matrix during November 2005. (Travis, Trial Tr. vol. 10,
7 1381:3-4.) Thus, Brayton and McClain had several telephone conferences with Gregory and
8 Travis during the week of October 24, 2005, concerning various issues arising under the signed
9 September 2005 version of the Matrix. (Travis, Trial Tr. vol. 13, 1590:22-1592:23, 1595:23-
10 1596:4, 1597:28-1598:9.) McClain, in particular, was concerned that the recitations about the
11 “exhaustion” of Plant’s insurance in the September Matrix would negatively impact Plant’s rights
12 under its policies. (McClain, Trial Tr. vol. 7, 985:10-986:2.) The parties also discussed the form
13 of release that a claimant would sign in return for being paid under the Matrix. (Travis, Trial Tr.
14 vol. 10, 1380:19-1381:1; Travis, Trial Tr. vol. 13, 1589:25-1592:23.)

15 McClain told Travis on October 28, 2005 that Plant may have additional insurance
16 coverage available to pay asbestos claims, and that Travis therefore should contact a lawyer at
17 Morgan Lewis named Michel Horton to discuss such matters. (Trial Exh. 3755; Travis, Trial Tr.
18 vol. 10, 1342:13-1343:11.) Travis contacted Horton on October 28, 2005 (Travis, Trial Tr. vol.
19 10, 1343:12-16.), and an attorney-client relationship between Plant and Morgan Lewis began on
20 or about that date (Trial Exh. 4445, at p. 3, ¶ 6.).

21 Travis and Gregory communicated with Brayton and McClain several times on October
22 28, 2005, attempting to finalize the Matrix for posting on the Plant Matrix web site. (Trial Exhs.
23 3755, 3756, 3757; Travis, Trial Tr. vol. 13, 1595:27-1596:4, 1598:3-19.) The parties could not
24 agree on the substance of the release to be included in the Matrix. (Gregory, Trial Tr. vol. 5,
25 677:12-15; Gregory Trial Tr. vol. 6, 690:28-691:10; Travis, Trial Tr. vol. 10, 1380:24-1381:1;
26 Brayton, Trial Tr. vol. 7, 910:26-911:5.) However, they did agree that the Matrix would be
27 posted online on October 31, 2005 *without* containing any release language. (Travis, Trial Tr.
28 vol. 10, 1385:6-15; Brayton, Trial Tr. vol. 7, 911:6-15.) They also agreed to continue negotiating

1 the matter of the release for inclusion into actual settlement agreements entered into among Plant,
2 CIGA and claimants. (Travis, Trial Tr. vol. 10, 1381:2-15.) In Travis's words, "... we were
3 unable to reach agreement on the wording of the release at that time. So we decided we will just
4 shelve this. We will figure out what the release says later on. We want to open the Matrix on
5 October 31st. And so we will just work on the release in due course." (Travis, Trial Tr. vol. 10,
6 1380:27-1381:5.)

7 Various recitals were changed from how they appeared in the September version of the
8 Matrix. (Trial Exhs. 3681, 3758.) For example, the statement in the September version of the
9 Matrix that "Plant Insulation Company ('Plant') is a California corporation that for many years
10 sold and installed asbestos-containing high-temperature insulation products that contained
11 asbestos" was changed in the final October 28, 2005 version of the Matrix to "Plant Insulation
12 company ('Plant') is a California corporation that for many years sold, installed, repaired,
13 removed or displaced asbestos through distribution of and operations involving asbestos-
14 containing high temperature insulation products." (Trial Exh. 3681, at TPE00113287; Trial Exh.
15 3758, at TPE00114125.) This was done so as not to disadvantage Plant in a lawsuit against its
16 insurers seeking so-called "operations" coverage. (Travis, Trial Tr. vol. 13, 1596:23-1597:24.)

17 Another example of change between the September and October Matrix agreements was
18 this. The September version stated: "Plant's primary liability insurance resources were exhausted
19 in 1993, and its solvent excess liability insurance resources were exhausted in 2001." (Trial Exh.
20 3681 at Recital B, TPE 00113287.). In October, Plant, Brayton, and McClain agreed to change
21 that provision to read: "Plant's acknowledged primary liability insurance resources were allegedly
22 exhausted in 1993, and its acknowledged solvent excess liability insurance resources were
23 allegedly exhausted in 2001." (Trial Exh. 3758 at Recital B, TPE00114125; emphasis added.)
24 Similarly, Section 1.1 of the initial Matrix agreement was changed from, "Plant does not have
25 assets or insurance coverage" (Trial Exh. 3681 at TPE00113288) to "Plant does not have assets or
26 acknowledged, uncontested, or available insurance coverage." (Trial Exh. 3758 at TPE
27 00114126.) Once again, the purpose was to avoid disadvantaging Plant in its anticipated quest for
28 insurance coverage on an "operations" theory.

1 The final October version retained recitals that appeared in the document since January
2 2005. (Trial Exhs. 3643, 3758.) It recited that it “sets forth the terms and conditions under which
3 Asbestos Claims will henceforth be processed, resolved, and paid in light of the insufficiency of
4 the CIGA coverage and the contingent nature of the [Fibreboard] indemnity recovery.” (Trial
5 Exh. 3758, at TPE00114125.) It continued to articulate a basic goal of minimizing the
6 “administrative expense of processing and resolving Asbestos Claims, which erode Plant’s CIGA
7 coverage.” (Trial Exh. 3758, at TPE00114126.) Further, it stated that it was “procedural only”
8 and created no “substantive” right in any claimant. (Trial Exh. 3758, at TPE00114126.)

9 The Execution Provision of the August draft and the September signed version remained
10 the same in the October version (Trial Exh. 3758, at TPE 00114156.) Also remaining the same as
11 in the August and September versions was the Submission of Claims Provision (Trial Exh. 3758,
12 at TPE 00114126.)

13 The final October version was posted on the Plant Matrix web site on October 31, 2005.
14 (Trial Exh. 3758; Gregory, Trial Tr. vol. 6, 729:14-17; Travis, Trial Tr. vol. 13, 1603:11-15.)
15 That version was signed by Plant’s President, Douglas Ralston. (Trial Exh. 3758, at
16 TPE00114157.) Brayton and McClain signed on October 28, 2005. (Trial Exh. 3758, at
17 TPE00114158-159.) The signatures of members of the asbestos plaintiffs’ bar were received
18 during November 2005 and posted on the Matrix website. (Travis, Trial Tr. vol. 1378:6-1379:8.)
19 Signatures were received by Plant from the Clapper Patti firm, the Wartnick firm, the Harowitz &
20 Tigerman firm, the Ahnfeldt firm, the Rose Klein firm, the Simon Shingler firm, the Brent Coon
21 firm, and the Paul, Hanley & Harley firm. (Travis, Trial Tr. vol. 12, 1487:24-27, 1488:18-
22 1489:19, 1490:3-13.) No asbestos claimant signed this version of the Matrix.

23 This October agreement contained no release language. (Trial Exh. 3758; (Gregory, trial
24 Tr. vol. 5, 677:4-15.) Instead, it provided that “[f]ollowing Plant’s acceptance of the claimant’s
25 claim as submitted, or the claimant’s acceptance of Plant’s counteroffer, or agreement reached
26 after reconsideration by Plant or a decision by an independent reviewer resolving a dispute as to
27 the propriety of rejection or as to the correct adjusted claim value, and in order to be entitled to
28 payment under this Matrix, a claimant must execute a Settlement Agreement and Release in a

1 form satisfactory to Plant and CIGA (or to Plant if the CIGA coverage has previously exhausted)
2 and deliver the same to Plant's counsel. Claimants who receive payment for nonmalignancy will
3 not be releasing claims for any subsequently discovered malignancy." (Trial Ex. 3758, at
4 TPE00114151, Section 5.8.) It follows that a person submitting a claim to the Matrix would not
5 know at the time of submission what he or she might be releasing in exchange for receiving
6 possible payment under the Matrix. (Travis, Trial Tr. vol. 10, 1377:2-25, 1380:19-1381:15,
7 1385:6-25.)

8 SUBMISSION OF CLAIMS TO THE PLANT MATRIX

9 The initial claims submission period under the Matrix occurred between October 31,
10 2005, and November 30, 2005. (Travis, Trial Tr. vol. 10, 1379:19-21.)

11 Plant could obtain rough approximations of so-called "liquidated claim values" ("LCV")
12 generated electronically by the Matrix web site as claims were submitted during November 2005,
13 although a number of reporting errors were noted. (Trial Exh. 3768; Gregory, Trial Tr. vol. 6,
14 698:4-22; Travis, Trial Tr. vol. 14, 1659:23-26.) The LCV was the nominal value assigned to
15 each Matrix claim based upon the various adjustment factors in the Matrix. (Gregory, Trial Tr.
16 vol. 6, 697:22-698:3.) The LCV generated electronically by the Matrix was not the final LCV for
17 purposes of a claimant's receipt of money from CIGA. (Travis, Trial Tr. vol. 13, 1640:1-15.)
18 Each submitted claim would need to be reviewed following submission, at which time
19 adjustments in either direction could be made based on an analysis of the evidence presented in
20 support of the claim. (Travis, Trial Tr. vol. 12, 1459:26-1462:27.) CIGA ultimately would make
21 the final decision as to whether or not to approve payment of a claim under the Matrix. (Travis,
22 Trial Tr. vol. 10, 1355:18-1356:2, 1385:22-1386:11.)

23 Gregory and Travis discussed the LCVs at various times during November 2005. (Trial
24 Exhs. 3768, 3771.) They appeared to be excited by, and expressed enthusiasm over, the high
25 numbers -- in the hundreds of millions of dollars -- being generated during the month by the
26 Matrix. (Trial Exh. 3771.) Gregory, in particular, believed that it would be possible to structure a
27 contingent fee for himself and Travis based in some respect on the LCVs being generated by the
28 Matrix. (Gregory, Trial Tr. vol. 6, 707:6-23, 709:6-9.) Gregory also believed that the LCVs

1 would be the basis of a claim for damages that Plant would assert against its insurers in a lawsuit
2 that it planned to file in the near future. (*Id.*, at 707:24-7; Trial Exh. 3771.)

3 Plant's complaint in this action, however, only seeks declaratory relief from the Court.
4 (Trial Exh. 4443, at pp. 16-19.) It does not seek the recovery of damages. (*Id.*) Proposed
5 contingent fees for Gregory and Travis were rejected definitively in June 2006 by the asbestos
6 plaintiffs represented by McClain. (Gregory, Trial Tr. vol. 6, 778:26-780:2.) There is no
7 evidence in the record that anyone other than Gregory, and Travis, gave serious thought to the
8 possibility that either of these individuals would be paid based on the amount of money Plant
9 recovered from its insurers or the amount of money in a Plant bankruptcy estate.⁵

10 The number of claims that were submitted to the Matrix during November of 2005 was
11 3,691. (Travis, Trial Tr. vol. 10, 1385:16-20.) Some of those claims were submitted via a "data
12 dump" by two of the plaintiff asbestos firms, Brayton Purcell and Paul Hanley and Harley, under
13 which the two firms submitted over 1,500 claims, with some supporting documentation,
14 electronically all at once. (Gregory, Trial Tr. vol. 6, 698:4-12.) There is no evidence that any
15 "Claim Forms" contemplated by the Execution Provision in the Matrix to create contracts
16 between Plant and the individual claimants to "forbear from further prosecution of any lawsuit"
17 (Trial Exh. 3758, at TPE00114157) were submitted by the Brayton Purcell and Paul Hanley and
18 Harley firms as part of their "data dumps." The only evidence of a "Claim Form" in the record
19 concerning the 3,691 claims submitted to the Matrix in November 2005 is a document called
20 "Attestation Under Section 5.1 Of The Plant Insulation Company Asbestos Case Valuation
21 Matrix," submitted and signed by Harley on behalf of Polly Burns. (Trial. Exh. 3770.) In this
22 "Attestation" document, Harley states only that he had "reviewed the information submitted with
23 this Claim Form and contained in all documents submitted in support of this claim" and declared
24 under penalty of perjury that he was informed and believed that the information was "true and
25 correct." (*Id.*)

26 The aggregate LCV for the claims submitted to the Matrix was in the hundreds of millions

27 ⁵ As was true with respect to obtaining the \$8 million fee related to the creation and operation of the Matrix
28 agreement, Gregory and Travis consistently viewed unfolding events through the prism of opportunities to obtain
legal fees for themselves, and at levels that this Court would characterize as unreasonably high.

1 of dollars. (Travis, Trial Tr. vol. 14, 1659:18-1660:11.) That number was used to generate the
2 “CIGA payment percentage” by dividing the total amount of CIGA funds available (\$35 million
3 minus attorneys fees paid, or to be paid, to Gregory and Travis & Pon, and the amount of a single
4 settlement previously paid by CIGA), by the aggregate LCV for all claims. (Gregory, Trial Tr.
5 vol. 6, 717:2-11.) The “CIGA payment percentage” as of November 2005 was 6.41%. (Gregory,
6 Trial Tr. vol. 6, 715:27-716:2.) A claimant would be eligible to receive from CIGA a payment
7 corresponding to the final LCV for their claim multiplied by the “CIGA payment percentage.”
8 (*Id.*, at 716:15-21.)

9 **THE SO-CALLED FIRST AMENDMENT TO THE PLANT MATRIX AGREEMENT**

10 On December 2, 2005, McClain sent an electronic mail message to Gregory and Travis to
11 complain that the “CIGA payout” would be “in the range of 4%.” (Trial Exh. 3784.) McClain
12 stated that “[t]he plaintiffs’ bar had been led to believe that the CIGA payout was going to be
13 over 10%. This representation was a material part of our agreement to *temporarily hold off*
14 *litigation against Plant* and proceed with the claims program.” (*Id.*, (emphasis added).) McClain
15 therefore said that the plaintiffs’ bar:

16 will continue to abide by our agreement to CIGA and accept
17 payments on each case of the 4+% CIGA will pay on these
18 processed cases and will release CIGA from any further liability for
19 its Mission exposure. We will, of course, not release Plant and will
20 have to continue to litigate these cases against Plant. We will, in
21 good faith, continue to negotiate with Plant on resolving these cases
22 but will not be bound by the gross settlements arrived in the CIGA
23 program as we have all along felt those numbers underestimated
24 Plant’s true liability. We will work with Plant in retaining experts
25 to arrive at correct settlement averages. *In the meantime, and*
26 *unless and until we resolve cases with Plant, we will have to*
27 *proceed in the tort system.*

28 (*Id.*, (emphasis added).)

Although early Matrix drafts prepared by the Brayton office contained a reference
to a 10% CIGA payment (Trial Exh. 3603, at TPE00102660; Trial Exh. 4417, at TPE00102985.),
this Court finds that Plant did not represent to the plaintiffs’ bar that there would be a 10% or
greater CIGA payout. In this connection Gregory responded to McClain on December 6, 2005,

1 denying that Plant ever represented that “the CIGA payout was going to be over 10%.” (Trial
2 Exh. 3787.) Gregory, however, further stated that “we always understood that there was no
3 agreement to release Plant as part of the Matrix. In any event, Plant is willing to discuss possible
4 mutually agreeable amendments addressing your concerns with your firm and all other firms that
5 signed the Matrix.” (*Id.*)

6 McClain thereafter discussed matters related to his December 2, 2005 e-mail message
7 with a lawyer at Morgan Lewis named Paul Richler. (McClain, Trial Tr. vol. 7, 979:11-19,
8 997:6-998:5.) Among other things, McClain expressed the view to Richler that he thought the
9 claimants could assert that the LCV values of the Matrix agreement were binding on Plant’s
10 insurers. (McClain, Trial Tr. vol. 8, 1050:19-1052:27.) Richler responded that Plant would not
11 agree to anything that purported to bind its insurers to the values determined in the Matrix
12 agreement. (Trial Exh. 5978 (Richler Depo. at 65:22-66:8, 80:24-81:11).) Richler also suggested
13 that McClain agree with this analysis so as not to cause a potential forfeiture of coverage under
14 Plant’s policies that might be available to pay asbestos plaintiffs. (*Id.*, at 66:8-11.)

15 McClain wrote to Richler on January 9, 2006, stating that “it is clear that the Matrix we
16 have worked out with Plant Insulation was only intended to apply to funds that Plant will receive
17 from CIGA and the Fibreboard Corporation. Neither the Matrix nor any other agreement was
18 intended to release Plant for its liability that is in excess of what CIGA and Fibreboard pay. As I
19 have stated previously, this is an absolute requirement and we will not go forward with
20 settlements regarding the CIGA money unless you agree to those terms in writing.” (Trial Exh.
21 3798.)

22 Travis wrote to McClain by e-mail on January 12, 2006, as a response to McClain’s
23 December 2, 2005 e-mail and his January 9, 2006 letter to Richler. (Trial Exh. 3803.) Noting
24 that Plant had prepared and attached a “First Amendment to the Matrix,” (“First Amendment”)
25 which was attached to the e-mail (*Id.*), Travis stated that the First Amendment would “clarify any
26 ambiguity and . . . confirm what it was we all intended when we negotiated and drafted the Plant
27 Matrix.” (*Id.*) Travis stated that the “shared intention” of the parties “at all times” was that the
28 Plant Matrix “serve as a means of making payments to claimants using the CIGA coverage and, if

1 there is one, using the net recovery on Plant's indemnity claims against Fibreboard, and nothing
2 beyond that. This should allay the concerns raised in David's letter and in your e-mails last
3 month, and allow us to continue moving forward with claims processing under the Matrix without
4 delay." (*Id.*)

5 The First Amendment was signed by Ralston on Plant's behalf on February 1, 2006.
6 (Trial Exh. 3793, at CIGA 0492.) It was signed by McClain on January 23, 2006, and by Brayton
7 on February 1, 2006. (*Id.*, at CIGA 0493, CIGA 0494.) No other members of the plaintiffs' bar
8 signed the document. (Trial Exh. 3793.) No asbestos claimants signed the document. (*Id.*)
9 Included in this document was a recital stating that it:

10 confirms and clarifies that the intent of the parties in entering into
11 the Plant Matrix and in submitting and receiving claims as provided
12 therein was to set forth equitable and efficient terms, conditions and
13 procedures under which the backup liability coverage provided by
14 CIGA will be paid to holders of Covered claims in light of the
15 insufficiency of the CIGA coverage, to provide a framework for
16 making payments to holders of Asbestos Claims using the net
17 distribution, if any, that Plant may receive in the future on account
18 of its indemnity claims against Fibreboard Corporation, and for no
19 other purpose.

20 (Trial Exh. 3793, at CIGA 0490.)

21 The First Amendment added a section to the Matrix agreement providing that the
22 settlement values discussed in the Matrix documents may be adjusted to "reflect" reports prepared
23 by "expert analyses of Plant's tort system liability," should those become available in the future.
24 (Trial Exh. 3793, at CIGA 0491.) It was noted, however, that "such adjustments will only be
25 applicable to any distribution on account of Plant's indemnity claims against Fibreboard
26 Corporation and will not be applicable to the calculation of the amount payable on any claim
27 from Plant's CIGA coverage." (*Id.*)

28 The First Amendment contained a provision that "tolled" any applicable statute of
limitations from the date a claimant submits a Claim Form to the Matrix website "until six
months after Plant gives e-mail notification to the claimant's counsel that the tolling is being

1 terminated.” (Trial Exh. 3793, at CIGA 0491.) That was a new provision.

2 Also, the Execution Provision in the final Matrix agreement was changed so as to read as
3 follows:

4 Plant hereby agrees to the foregoing terms and conditions and
5 offers to make payments to the holders of Asbestos Claims in
6 accordance therewith using the backup liability coverage provided
7 by CIGA and the net recovery, if any, on Plant’s indemnity claims
8 against Fibreboard Corporation. Submission of a Claim Form
9 executed by or on behalf of a claimant to Plant shall constitute
acceptance of this offer and agreement to all of the terms and
conditions set forth herein by the claimant submitting such claims.

10 (Trial Exh. 3793, at CIGA 0491.) Among other changes, the “agrees to forbear from further
11 prosecution of any lawsuit the claimant may have previously filed against Plant” language was
12 omitted from the Execution Provision or any other provision of the First Amendment. The
13 Submission of Claims Provision also was changed so as to read as follows:

14 “1.2 Submission of Claims. Asbestos-related claims against Plant for personal
15 injury and wrongful death shall be submitted to Plant in accordance with the Plant
16 Matrix, which shall constitute the sole and exclusive method by which the holder
17 of an Asbestos Claim against Plant may obtain compensation for such Asbestos
18 Claim from Plant’s CIGA coverage or any net distribution on account of its
19 indemnity claims against Fibreboard Corporation. Nothing in this Matrix
precludes any person from suing Plant in the tort system or from prosecuting a
lawsuit already on file to judgment.”

20 Plant neither sought nor obtained the consent of the defendants before it entered into any
21 Matrix agreement, including the so-called First Amendment. (Gregory, Trial Tr. vol. 6, 748:15-
22 22.) Indeed, Plant did not advise the defendants that it was contemplating or executing such an
23 agreement.

24 Plant began to process 2005 claims under the Matrix in January 2006. (Travis, Trial Tr.
25 vol. 15, 1853:27-1854:5.) Plant and the plaintiffs’ bar agreed to a form of release in February or
26 March of 2006 as the first of the approved Matrix claims were close to being paid. (Travis, Trial
27 Tr. vol. 10, 1385:22-27, 1386:3-14.) The agreed form of release would become part of the
28 settlement agreements signed by the claimant and CIGA for claims accepted for payment under

1 the Matrix. (Trial Exh. 5949; Travis, Trial Tr. vol. 10, 1386:27-1387:17.) The executed
2 settlement agreements, as agreed, would release CIGA and Plant's former and present officers,
3 directors, shareholders, employees and attorneys. (Trial Exh. 5949; Travis, Trial Tr. vol. 10,
4 1388:14-1389:3.) Plant itself would not be released. (Trial Exh. 5949; Travis, Trial Tr. vol. 10,
5 1385:28-1386:2.)

6 **THE FILING OF THIS ACTION AND PLANT'S TENDER OF DEFENSE**

7 On January 1, 2006, Gregory and Travis & Pon entered a revised legal services agreement
8 with Plant under which they would continue to serve as Plant's counsel in defense of the asbestos
9 suits. (Trial Exh. 3794.) Shortly thereafter, on January 17, 2006, Plant filed this lawsuit.
10 (Gregory, Trial Tr. vol. 6, 747:16-17.)

11 It was on January 18, 2006, that Plant tendered defense and indemnification of more than
12 3,800 asbestos cases to its primary insurers, other than U.S. Fire.⁶ (Trial Exhs. 3949, 3949A;
13 Gregory, Trial Tr. vol. 6, 734:10-20, 734:26-735:1.) Of the 3,800 plus claims so tendered, 3,692
14 were either claims or lawsuits brought by Matrix claimants, and the balance were lawsuits that
15 had been filed against Plant since the close of the Matrix. (Gregory, Trial Tr. vol. 6, 738:2-23;
16 Trial Exhs. 3940, 3940A, 3949, 3949A, and 3783.)

17 Also on January 18, 2006, Plant notified its first- and second-level excess insurers of the
18 same approximately 3,800 cases against which it asked its primary insurers to defend and
19 indemnify it. (Trial Exhs. 3949, 3949A.) Plant did not, however, ask its excess insurers to either
20 defend or indemnify it against the cases. (*Id.*)

21 On March 30, 2006, OneBeacon agreed to defend Plant against the asbestos suits tendered
22 on January 18, 2006 under a reservation of rights, notwithstanding the assertion by Commercial
23 Union in 1992 that it owed Plant no further defense under the policies. (Trial Exh. 5477.) In its
24 reservation of rights letter, OneBeacon stated that it would normally refer the defense of the
25 asbestos suits to "qualified counsel of its choice in the San Francisco area." (*Id.*, at
26 JGE0007001.) Explaining an exception, it continued, "[d]ue to the coverage issues raised in this

27 ⁶ U.S. Fire is alleged by Plant to be responsible for the obligations under primary policies issued to Plant by Industrial
28 Indemnity. (Trial Exh. 4443, at p. 5, ¶ 25.) There is no evidence, however, of the legal theory upon which U.S. Fire
is alleged to be responsible for Industrial Indemnity's policy obligations.

1 reservation of rights, however, Civil Code section 2860 allows the insured to select its own
2 defense counsel at OneBeacon's expense." (*Id.*) OneBeacon noted that it would begin providing
3 a defense "as expeditiously as possible." (*Id.*, at JGE0007004.) However, it also stated that Plant
4 should "protect [its] own legal interests" during the course of OneBeacon's investigation, and
5 "should arrange for defense as needed unless and until OneBeacon tells you otherwise." (*Id.*)

6 In March 2006, the Clapper & Patti firm entered defaults against Plant in several asbestos
7 cases pending in San Francisco Superior Court. (Trial Exh. 5520; Travis, Trial, Tr. vol. 12,
8 1484:6-11.) In his capacity as Plant's defense counsel, Travis requested that the defaults be set
9 aside. (Trial Exh. 5520; Travis, Trial, Tr. vol. 12, 1484:3-5; 1484:12-1486:4, 1487:20-23.) An
10 agreement was reached with the Clapper & Patti firm that no further action would be taken on the
11 defaults, no further defaults would be taken against Plant, and if Plant ever brought a motion to
12 set aside the defaults, Clapper & Patti would not assert that such motion was made too late. (*Id.*)
13 There is no evidence that the Clapper & Patti firm ever attempted to reduce the defaults to
14 judgment or to collect on the defaults.

15 Plant and several of the primary insurers met at the end of April 2006 to discuss the
16 defense of the asbestos cases. (Travis, Trial Tr. vol. 12, 1490:14-1491:8.) Plant proposed that the
17 insurers forego a traditional asbestos defense and instead reach agreement with the plaintiffs' bar
18 on the handling of the asbestos claims while coverage issues concerning Plant's policies are
19 resolved in this case. (*Id.*, at 1492:13-1493:11.) Plant made different proposals at and after the
20 meeting. One proposal was that the asbestos claims would be valued, but not paid, during the
21 pendency of this lawsuit. (*Id.*, at 1493:12-19.) Another proposal was that the insurers would
22 partially pay some of the claims during the pendency of this lawsuit, subject to later adjustments
23 if additional funds became available. (Trial Exh. 4537.)

24 The primary insurers rejected the alternative claims handling proposals made by Plant at,
25 and in connection with, the April 2006 meeting. (Trial Exh. 4538.) The insurers replied that the
26 proposals would be too costly, and questioned the use of some of the money they would be
27 paying to resolve asbestos claims to compensate Plant's counsel. (*Id.*)

28

1 **THE INSURERS' DEFENSE OF PLANT IN RESPONSE TO THE TENDER**

2 On July 27, 2006, Fireman's Fund accepted defense of the asbestos suits against Plant
3 under a reservation of rights. (Trial Exh. 4513). Fireman's Fund, however, asserted that "Plant's
4 conduct and newly asserted coverage position have effectively forced Fireman's Fund to provide
5 funding for Plant's defense despite the proper exhaustion of coverage and satisfaction of other
6 contractual obligations under the policies it allegedly issued." (*Id.*, at p. 2.) Fireman's Fund
7 further asserted that "Plant's conduct had unfairly and improperly manipulated the events which
8 have resulted in the current situation that has already, and continues to, inflict harm on Fireman's
9 Fund. Having waited until exhaustion of all of its coverage before asserting that more coverage
10 was available, Plant has put Fireman's Fund and other insurers in the position of either paying for
11 a defense they do not owe or leaving Plant without a carrier-funded defense and the potential for
12 resulting default judgments against it." (*Id.*)

13 By mid-2006, all of Plant's primary insurers had agreed to defend Plant against the
14 asbestos suits, notwithstanding the assertions made by those insurers between 1991 and August 6,
15 1993, that no further defense was owed under the policies. (Gregory, Trial Tr. vol. 6, 760:11-14;
16 Travis, Trial Tr. vol. 12, 1483:28-1484:2; Travis, Trial Tr. vol. 16, 1927:25-1928:8.)

17 More than 1,700 asbestos lawsuits have been filed against Plant since November 2005.
18 (Trial Exh. 5960; Travis, Trial Tr. vol. 12, 1477:11-24.) There is no evidence that any of the
19 plaintiffs in those lawsuits have at any time submitted claims to the Matrix.

20 In July 2006, the primary insurers retained the Burnham Brown law firm to defend Plant
21 against asbestos suits filed in the Alameda County Superior Court. (Gregory, Trial Tr. vol. 6,
22 759:13-14; Travis, Trial Tr. vol. 16, 1927:10-18, 1927:25-1928:8.) The insurers retained the
23 Lewis Brisbois Bisgaard and Smith law firm to defend Plant against asbestos cases filed
24 everywhere else in California. (*Id.*) In January 2008, the primary insurers retained the McKenna
25 Long & Aldridge law firm also to defend Plant against asbestos cases not filed in the Alameda
26 County Superior Court. (Travis, Trial Tr. vol. 12, 1496:6-13; Travis, Trial Tr. vol. 16, 1927:19-
27 24, 1928:9-18; Trial Exh. 4515 (Gregory Phase I Trial Testimony at 1767:21-1768:3).) From
28 July 2006 through September 2008, the primary insurers paid Gregory and Travis by the hour to

1 assist the lawyers they hired in matters related to Plant's defense. (Travis, Trial Tr. vol. 12,
2 1498:11-22.)

3 With respect to the period of time commencing in the summer of 2006, when some of the
4 primary insurers began defending and settling the asbestos cases, there is no evidence from which
5 the Court could conclude that Gregory or Travis engaged in any conduct that adversely affected
6 the outcome or settlement value of any asbestos case so defended or settled. Whereas Gregory
7 provided some assistance to the defense of asbestos claims to the lawyers hired by the primary
8 insurers since July 2006 to defend Plant (Trial Exh. 5974 (Oberg Depo. at 209:23-208:9, 241:18-
9 242:13, 242:17-243:17, 294:12-20, 295:9-16); Trial Exh. 5972 (McNeil Depo at 229:5-12); Trial
10 Exh. 5973 (Musfelt Depo. at 86:1-4, 86:11-15)), there is no evidence that either defense counsel
11 or the primary insurers complained that either Gregory or Travis engaged in any conduct after the
12 2006 tender that hindered the defense of Plant.⁷ In this connection, neither Gregory nor Travis (a)
13 has appeared as counsel of record on behalf of Plant in asbestos cases defended by the primary
14 insurers since July 2006 (Travis, Trial Tr. vol. 16, 1928:19-28); (b) has had supervisory powers
15 over the defense lawyers hired by the primary insurers since July 2006 (Travis, Trial Tr. vol. 16,
16 1929:12-15); (c) has settled any of the asbestos cases defended by the primary insurers since July
17 2006. (Travis, Trial Tr. vol. 16, 1929:20-1930:4); or (d) has been consulted about the potential
18 settlement of Plant asbestos cases defended by the primary insurers since July 2006 (Travis, Trial
19 Tr. vol. 16, 1929:16-19, 1930:5-10, 1931:12-21.).

20 As to a large subset of the 3,800 cases tendered to the primary insurers in January 2006,
21 there was no evidence, at least no persuasive evidence, that the insurers have incurred any
22 significant expense to defend the cases. Many of the cases tendered in January 2006 remain
23 dormant and have not been prosecuted. (Trial Exh. 5968 (Haas Depo. at 77:14-23, 78:6-79:5,
24 131:2-6, 150:1-151:7, 174:21-175:11, 177:5-22), Trial Exh. 5972 (McNeil Depo at 107:5-108:22,
25 119:16-121:1, 135:4-137:16, 165:7-11); Trial Exh. 5973 (Musfelt Depo. at 43:2-12).) For
26 example, approximately 1,100 cases filed by the Brayton firm alone have remained dormant and

27 _____
28 ⁷ In making these findings, the Court expresses no view on the matter of whether the fees paid to Gregory or Travis
by the insurers were reasonable in amount.

1 have not been prosecuted since tender in January 2006. (Trial Exh. 5974 (Oberg Depo. at 181:11-
2 182:24.) It appears that large numbers of the cases were simply dismissed, with or without
3 prejudice. (Trial Exh. 5973 (Musfelt Depo. at 32:19-25, 33:7-9, 64:3-13); Trial Exh. 5974 (Oberg
4 Depo. at 86:22-87:6, 89:20-90:6).) There was no evidence, direct or circumstantial, that
5 significant defense costs were incurred in connection with such dismissals.

6 Practices of the plaintiffs' bar beginning in mid-2006 included (a) telling defense counsel
7 that plaintiffs' counsel were "re-activating" specified cases that they had previously filed against
8 Plant, and (b) bringing motions to set trial dates on those cases. (Trial Exh. 6015 (Harley Depo.
9 at 87:20-88:1, 89:20-91:7); Trial Exh. 5972 (McNeil Depo. at 33:4-17, 64:25-65:14, 65:22-66:2,
10 66:24-67:19, 68:11-69:10); Trial Exh. 5968 (Haas Depo. at 104:22-105:25).) In one instance, the
11 Brayton firm sought to reactivate a large number of cases by bringing a motion to set trial dates in
12 those cases, but the motion was denied. (Trial Exh. 5972 (McNeil Depo. at 64:25-65:14, 65:22-
13 66:2).) Sometimes, however, a plaintiff's firm would seek to reactivate dozens of cases against
14 Plant at one time, but then later withdraw the request that Plant appear in many of the cases
15 previously reactivated. (Trial Exh. 5972 (McNeil Depo. at 34:2-37:5, 37:25-38:13, 41:10-23;
16 68:18-69:6).) This occurred in particular with the Paul Hanley & Harley firm. (Trial Exh. 5972
17 (McNeil Depo. at 34:2-10).) After several indications that that firm wished to reactivate a large
18 number of cases, an arrangement was reached in which the firm would identify the specific cases
19 in which Plant actually was to participate. (*Id.*, at 34:11-21, 37:1-5, 38:25-40:8, 45:4-17, 46:7-
20 20).)

21 There was evidence that defense counsel hired by the primary insurers to defend Plant
22 cases reported occasionally that they faced various challenges defending Plant since July 2006.
23 (Trial Exh. 5972 (McNeil Depo. at 268:2-9, 270:23-271:17, 274:10-275:6); Trial Exh. 5968 (Haas
24 Depo. at 194:15-196:8, 196:24-197:18); Trial Exh. 5974 (Oberg Depo. at 246:5-15).) However,
25 there was no evidence, at least no persuasive evidence, that the number of cases tendered had a
26 significant adverse impact on the quality of the defense or that the settlement or trial outcome was
27 adversely affected by the volume of the tendered cases. Defense counsel were not overwhelmed
28 by the number or complexity of the cases against Plant that they defended, nor were they unable

1 to handle the defense of Plant in a competent manner. (Trial Exh. 5972 (McNeil Depo. at 317:25-
2 318:18); Trial Exh. 5968 (Haas Depo. at 24:9-24, 197:13-15); Trial Exh. 5974 (Oberg Depo. at
3 216:2-14, 264:8-265:14); Trial Exh. 5973 (Musfelt Depo. at 57:10-19, 58:4-17, 128:8-20).) The
4 persuasive evidence leads this Court to find and conclude that the quality of Plant's defense was
5 not compromised or impacted negatively by reason of the circumstance that Plant tendered more
6 than 3,800 cases at one time to the defendants in January of 2006.

7 More broadly, it is this Court's finding and conclusion that Plant's tender of about 3,800
8 cases at one time in January 2006 has not caused the insurers to incur significant, or even
9 reasonably measurable, additional costs of defense or indemnity that would not have been
10 incurred had tender occurred at any earlier time. Putting it differently, the Court finds and
11 concludes that Plant's failure to tender cases to the insurers between 2002 and 2006 has not
12 resulted in significant, or even reasonably measurable, increased costs of defense or indemnity to
13 the insurers. Insurer evidence to the contrary of the findings set forth in this paragraph was not
14 persuasive to this Court.

15 Lacking was any evidence, at least any persuasive evidence, from which the Court can
16 ascertain, in any particular case defended by the insurers since the summer of 2006, that any
17 conduct by Plant increased the defense costs attributable to that case over and above the defense
18 costs that would have been incurred if the Matrix had not been amended. It is speculative
19 whether defense costs incurred in those particular cases would have been less if the Matrix had
20 not been amended.

21 Similarly lacking was any evidence, at least any persuasive evidence, from which the
22 Court can ascertain, in any particular case settled by the insurers since March of 2007 (the date of
23 the first post-tender insurer settlement), that the settlement amount was greater than the amount
24 that would have been paid if the Matrix had not been amended. Once again, it is speculative
25 whether any settlement so paid was greater than it would have been without amendment to the
26 Matrix.

27 **POTENTIAL "AGREE TO VALUE" SETTLEMENTS**

28 By the fall of 2006, several of McClain's asbestos suits against Plant were approaching

1 trial. (McClain, Trial Tr. vol. 9, 1147:10-1148:9, 1149:15-1151:7.) Defense counsel perceived
2 McClain's office as one of the toughest firms in the country handling mesothelioma cases, with a
3 demonstrated track record of being aggressive and successful in their trials of asbestos cases.
4 (Trial Exh. 5968 (Haas Depo. at 24:9-15, 179:2-15, 186:1-3).)

5 McClain was unsure whether Plant's primary insurers would pay cash to resolve his
6 clients' cases against Plant in light of the disputed issues involved in this case. (McClain, Trial
7 Tr. vol. 9, 1154:4-9.) So, beginning in the fall of 2006, McClain proposed that Plant's primary
8 insurers resolve his clients' cases without the payment of cash. (Trial Exhs. 5657, 5658, 5659A;
9 McClain, Trial Tr. vol. 9, 1151:8-19, 1153:28-1154:9, 1160:6-15; Trial Exh. 5968 (Haas Depo. at
10 227:6-17).) McClain suggested, instead, that Plant's primary insurers agree to "value" his clients'
11 cases for settlement purposes. (Trial Exhs. 5657, 5658, 5659A; McClain, Trial Tr. vol. 8,
12 1107:23-1109:5; McClain, Trial Tr. vol. 9, 1153:28-1154:9; Trial Exh. 5968 (Haas Depo. at
13 227:6-17).) McClain had discussions with the primary insurers at the time about the possibility of
14 future payments on "agree to value" cases through a potential future Plant bankruptcy trust.
15 (McClain, Trial Tr. vol. 9, 1160:23-27, 1161:18-28.) He told the insurers that any insurer that
16 entered into a global insurance coverage settlement with Plant would not be obligated to pay the
17 individual asbestos settlements -- according to the claim values to which the insurers agreed when
18 settling these cases -- unless such global insurance settlement so provided or such payment was
19 made through a bankruptcy trust. (Trial Exhs. 5657, 5658.)

20 **INSURERS' SETTLEMENTS OF PLANT CASES**

21 In March of 2007, an asbestos case McClain was prosecuting against Plant and others,
22 sometimes referred to as the "Hogan Case," was approaching trial. (McClain, Trial Tr. vol. 9,
23 1198:15-19.) McClain told the insurers that his client was not looking to receive cash to resolve
24 her case, but instead wanted the case to be resolved on an "agree to value" basis, as discussed
25 above. (*Id.*, at 1162:12-17, 1197:28:1198:3; McClain, Trial Tr. vol. 8, 1109:6-16; Trial Exh.
26 5968 (Haas Depo. at 227:6-17).) All of McClain's discussions with the insurers up until right
27 before the Hogan Case settled were about settling the case based on an "agree to value"
28 settlement. (Trial Exhs. 5667, 5658, 5659A, 5667A; McClain, Trial Tr. vol. 9, 1196:19-25; Trial

1 Exh. 5968 (Haas Depo. at 227:6-17).)

2 OneBeacon was the “lead” insurer among those defending the Plant cases after the
3 summer of 2006. (Trial Exh. 5972 (McNeil Depo. at 74:23-75:1, 333:16-334:4).) Its claims
4 handler, Bruce Perkins, was highly experienced and was involved with Plant’s claims in the late
5 1980s. (Trial Exh. 5975 (Perkins Depo. at 16:3-7, 18:24-21:21, 69:3-7, 95:14-22, 96:3-17, 97:2-
6 17); Trial Exh. 5968 (Haas Depo. at 110:13-16).) Perkins requested that McClain make a cash
7 demand to settle the Hogan case. (McClain, Trial Tr. vol. 9, 1162:18-25.) McClain settled the
8 case with Perkins for a cash payment of \$1,000,000. (McClain, Trial Tr. vol. 8, 1109:6-1110:19.)
9 The settlement was paid by Plant’s primary insurers. (Travis, Trial Tr. vol. 16, 1923:21-27.)
10 This was the first cash settlement McClain reached with the primary insurers under the allegedly
11 exhausted policies since Plant’s tender in January of 2006. (McClain, Trial Tr. vol. 8, 1119:3-5.)

12 Following the settlement of the Hogan case, the primary insurers agreed to pay cash to
13 settle at least 62 other cases against Plant. (Trial Exh. 5962.) At least four of those settlements
14 were for \$1,000,000 or more. (*Id.*)

15 As of the time of the Phase II trial, the primary insurers have been billed approximately
16 \$55 million for Plant’s defense against the asbestos suits since July of 2006. (Travis, Trial Tr.
17 vol. 14, 1675:13-1676:11.) The primary insurers have paid at least \$21.5 million settling asbestos
18 suits against Plant since March of 2007. (Trial Exh. 5962.) There were also a number of cases
19 that were resolved on the “agree to value” basis discussed above. (Trial Exh. 5972 (McNeil
20 Depo. at 178:10-18).) None of Plant’s excess insurers has paid any money defending or settling
21 asbestos cases against Plant since receiving notice of the suits in January of 2006. (Travis, Trial
22 Tr. vol. 16, 1924:3-23.)

23 Approximately 38 of the asbestos cases settled by the primary insurers since March of
24 2007 involved claims also paid under the Matrix. (Trial Exh. 5961.) Ten of those cases settled
25 for more money than the LCV generated by the Matrix. (*Id.*) At least 25 of those cases settled
26 for less money than the LCV generated by the Matrix. (*Id.*)

27 The aggregate amount paid by the primary insurers settling asbestos cases where the
28 claimant also was paid under the Matrix is approximately \$13.8 million. (Trial Exh. 5961.) The

1 aggregate LCV for claims paid under the Matrix and also paid by the primary insurers is
2 approximately \$20.8 million. (*Id.*)

3 There is no persuasive evidence to support a conclusion that Matrix LCVs or payments
4 adversely affected the settlement value of cases generally. Ms. McNeil, a defense lawyer, when
5 asked if the LCVs were a factor in settlement negotiations, testified that a couple of plaintiffs'
6 counsel raised the issue but that she laughed at them and gave the LCVs no value. (Trial Exh.
7 5972 (McNeil Depo., at 234-35).) Ms. Oberg, another defense lawyer, testified that Matrix
8 values were raised as a factor in negotiations only "very rarely." (Trial Exh. 5974 (Oberg Depo.
9 at 249).) Similarly, there is no persuasive evidence that Matrix LCVs adversely affected the
10 settlement value of any particular case. It would be speculative to say that there were any such
11 adverse impacts.

12 **SUSPENSION OF CLAIMS PROCESSING UNDER THE MATRIX**

13 Beginning in about March of 2007, Plant's primary insurers started to pay cash to some
14 asbestos claimants in settlement of their claims against Plant. (Gregory, Trial Tr. vol. 6, 783:18-
15 27; Trial Exh. 5962.) Consequently, "insurance" other than funds that CIGA agreed to make
16 available under the policies issued by the insolvent Mission Insurance Company was "available"
17 to satisfy Plant's asbestos liabilities. (Travis, Trial Tr. vol. 12, 1503:14-1504:27.)

18 There was no evidence that any claimant was asked to consent to the suspension of the
19 processing of CIGA claims, nor was there any evidence that any claimant agreed to the
20 suspension. Nevertheless, in the late summer or early fall of 2007, Plant and CIGA agreed to
21 suspend the processing of claims under the Matrix pending the resolution of issues in this case.
22 (Trial Exh. 5151, at p. 3; Trial Exh. 3987, at p. 2; Travis, Trial Tr. vol. 12, 1460:16-25, 1503:14-
23 1506:7.)

24 As of the time of the Phase II trial, of the 3,692 claims submitted to the Matrix,
25 approximately 1,041 to 1,043 Matrix claimants had received money from CIGA. (Travis, Trial
26 Tr. vol. 12, 1459:26-1460:10.) Of the \$35 million in policy limits under the Mission policies,
27 about \$11-\$12 million was paid by CIGA to Matrix claimants. (Trial Exh. 4516, Travis Depo. at
28

1 682:24-683:8.)⁸ Approximately 2,650 Matrix claimants have not received any money from
2 CIGA. (*Id.*, at 1460:11-15.)

3 **THE INVOLVEMENT OF ASBESTOS PLAINTIFFS' LAWYERS IN THE**
4 **SETTLEMENT OF PLANT'S CLAIMS UNDER ITS INSURANCE POLICIES**

5 Members of the asbestos plaintiffs' bar, particularly Brayton and McClain, have
6 participated in discussions between Plant and the defendants with respect to the settlement of
7 Plant's claims under the defendants' policies. (Travis, Trial Tr. vol. 15, 1878:18-1879:10,
8 1893:28-1894:5; McClain, Trial Tr. vol. 8, 1120:12-22.) In this connection, Brayton and
9 McClain assert that the asbestos plaintiffs and Plant have a "common interest" in maximizing the
10 amount of insurance coverage available to satisfy Plant's asbestos liabilities. (Brayton, Trial Tr.
11 vol. 6, 798:15-22; McClain, Trial Tr. vol. 7, 967:8-13.)

12 As Plant is in bankruptcy proceedings (Trial Exh. 5700), its creditors include asbestos
13 claimants who currently have pending claims against Plant, and also those who might make
14 claims against Plant in the future. (Brayton, Trial Tr. vol. 6, 797:7-26; Brayton, Trial Tr. vol. 7,
15 865:1-7, 866:17-19, 870:2-8; Travis, Trial Tr. vol. 14, 1749:9-1750:2.) A Plant bankruptcy
16 reorganization likely would encompass Plant's settlements with its insurers. (Travis, Trial Tr.
17 vol. 14, 1686:14-24, 1691:9-13; Gregory, Trial Tr. vol. 6, 772:10-774:24.) A "super majority"
18 vote of creditors, i.e., the asbestos claimants, is required to affirm an asbestos plan of
19 reorganization under Chapter 11 of the bankruptcy code. (Brayton, Trial Tr. vol. 7, 943:8-
20 944:16.) It thus follows that the asbestos creditor claimants could vote to reject a plan of
21 reorganization if they object to the settlements that Plant enters into, or might enter into, with its
22 insurers.

23 It is common for insurers to involve counsel for asbestos plaintiffs in asbestos coverage
24 settlement negotiations. (Brayton, Trial Tr. vol. 7, 941:7-19.) At least one of Plant's primary
25 insurers sought and obtained the *written* support of Brayton and McClain for a settlement it
26 entered with Plant since the January 2006 tender. (*Id.*, at 941:20-942:1, 943:1-7.)

27 _____
28 ⁸ As previously noted, an additional \$8.5-\$8.7 million was paid by CIGA to Gregory and Travis. Thus, their fees, as collected, amount to well over 2/3 of the amount paid to claimants to date.

1 In 2006, Gregory explored transferring ownership in Plant to Douglas Ralston, who
2 previously had transferred ownership of Plant to PEACE and who had served as Plant's President
3 for many years. (Ralston, Trial Tr. vol. 4, 393:27-394:16, 464:20-465:14, 466:2-13.) Ralston
4 rejected this proposal in the summer of 2006. (*Id.*, at 466:14-16.)

5 On January 16, 2008, Plant entered a management agreement with Flintkote. (Trial Exh.
6 4019.) The result was to terminate Gregory's and Travis' daily management over Plant's affairs
7 at that time.

8 The contingent fee agreement between Plant on the one hand and Gregory/Travis and Pon
9 on the other hand, with respect to Plant's indemnity claims against Fibreboard was terminated on
10 March 1, 2009. (Trial Exh. 4122; Trial Exh. 4516, Tab 5 (Travis Depo. at 105:9-20).) There is
11 no evidence in the record that Plant at any time recovered any money on its Fibreboard claims.
12 No money has been recovered from the OCF bankruptcy on the Fibreboard claims. (Gregory,
13 Trial Tr. vol. 5, 619:20-620:6.) As of the time of the Phase II trial, the claim forms necessary to
14 the process of obtaining such a recovery were not on file. (*Id.*) There is no evidence in the record
15 that Gregory or Travis will be paid any additional money for the so-far unsuccessful work they
16 performed prosecuting Plant's claims against Fibreboard.

17 On March 1, 2009, Gregory and Travis purportedly entered into employment agreements
18 with Plant. (Trial Exhs. 4124, 4125.) Under these agreements, each of the attorneys is paid
19 \$25,000 a month, and each of them also stands to obtain a potential bonus of \$350,000. (Trial
20 Exh. 4124, at pp. 2-3; Trial Exh. 4125, at pp. 2-3.) These agreements have not been approved by
21 the court in Plant's bankruptcy case. (Travis, Trial Tr. vol. 12, 1501:12-26.) Former federal
22 district court judge Charles Renfrew, the Bankruptcy Court appointed representative of the
23 interests of future claimants against Plant (the "FCR"), has lodged an objection to these
24 arrangements. (Trial Exh. 6007.) McClain testified that the asbestos claimants also would not
25 agree to the fee arrangements sought by Gregory and Travis. (McClain, Trial Tr. vol. 9, 1187:12-
26 20.)

27 Plant settled with Sompo, a primary insurer, on or about September 7, 2007 (Trial Exh.
28 6019.) and with United National, another primary insurer, on or about January 15, 2009 (Trial

1 Exh. 5248.). Both agreements contemplate that Plant will file for bankruptcy. (Trial Exh. 5248,
2 at p. 1 (fifth “Whereas” clause); Trial Exh. 6019, at p. 2 (first complete “Whereas” clause).)
3 Although Somo and United National paid cash to Plant shortly after the settlement agreements
4 were reached, additional cash payments are contingent upon Plant confirming a plan of
5 reorganization under Chapter 11 of the bankruptcy code that contains a “channeling injunction” in
6 favor of Somo and United National. (Trial Exh. 5248, at pp. 3-4, ¶ 3; Trial Exh. 6019, at pp. 4-
7 5, ¶ 2.)

8 Plant has used the cash that it received from Somo and United National to pay Gregory
9 and Travis, as well as its outside lawyers and the bankruptcy lawyers for the asbestos creditors
10 and the FCR (Travis, Trial Tr. vol. 14, 1729:2-28, 1730:14-22, 1732:14-24, 1734:15-1735:11.)
11 The Somo and United National representatives were advised of the intended use of the
12 settlement funds. (Travis, Trial Tr. vol. 15, 1881:13-1882:25, 1888:8-15, 1888:27-1889:11,
13 1890:21-1891:19.) Nothing in Plant’s settlement agreements with Somo or United National is
14 claimed to prohibit the use of the funds in this manner. (Trial Exhs. 5248, 6019.)

15 Plant filed its petition under Chapter 11 on May 20, 2009. (Trial Exh. 5700; Travis, Trial
16 Tr. vol. 14, 1730:1-8.) Under the Order of the Bankruptcy Court, the filing of that petition
17 resulted in an automatic stay of the asbestos litigation against Plant, except that, as previously
18 mentioned, this Court has been authorized by the Bankruptcy Court to proceed to try the Phase II
19 issues.

20 II. CONCLUSIONS OF LAW

21 The Court considers the three affirmative defenses *seriatim*. However, to the extent that
22 conclusions reached under the heading of one defense are applicable to another defense, that
23 conclusion is reached with respect to the other defense as well.

24 A. Unclean Hands

25 The Court has weighed and balanced all of the facts and circumstances bearing on the
26 relative equities between the parties and concludes that Plant should not be foreclosed from
27 seeking declaratory relief on the basis of the unclean hands doctrine. It is against the background
28 of the following general legal principles that the Court reaches the conclusions set forth below as

1 respects the defense of unclean hands.

2 The application of the unclean hands doctrine is a question of fact. *CrossTalk Prods., Inc.*
3 *v. Jacobson* (1998) 65 Cal. App. 4th 631, 639. “The decision of whether to apply the defense
4 based on the facts is a matter within the trial court’s discretion.” *Dickson, Carlson & Campillo v.*
5 *Pole* (2000) 83 Cal. App. 4th 436, 447.

6 Whether alleged misconduct is a bar to an alleged claim for relief depends on (1)
7 analogous case law, (2) the nature of the alleged misconduct, and (3) the relationship of the
8 alleged misconduct to the claimed injuries. *Jay Bharat Developers, Inc. v. Minidis* (2008) 167
9 Cal. App. 4th 437, 445-46 (citing and quoting from *Kendall-Jackson Winery, Ltd. v. Superior*
10 *Court* (1999) 76 Cal. App. 4th 970, 979) (internal quotation marks omitted).

11 “As a general rule, the doctrine of unclean hands is applicable only when the party
12 seeking to invoke it was injured by the alleged wrongful conduct.” *Ins. Co. of North America v.*
13 *Liberty Mut. Ins. Co.* (1982) 128 Cal. App. 3d 297, 307.

14 “The misconduct that brings the unclean hands doctrine into play must relate directly to
15 the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the
16 problem before the court does not suffice. The determination of the unclean hands defense
17 cannot be distorted into a proceeding to try the general morals of the parties.” *Kendall-Jackson*
18 *Winery, Ltd. v. Superior Court* (2000) 76 Cal. App. 4th 970, 979.

19 “[T]here must be a direct relationship between the misconduct and the claimed injuries.
20 Equity will grant relief when a plaintiff’s conduct prejudicially affects the rights of the person
21 against whom the relief is sought so that it would be inequitable to grant such relief.” *Mattco*
22 *Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal. App. 4th 820, 846.

23 “Unclean hands . . . requires inequitable conduct by the plaintiff in connection with the
24 matter in controversy.” *Dickson, Carlson & Campillo v. Pole, supra*, 83 Cal. App. 4th at 446.

25 Unclean hands can apply only when “the party against whom the doctrine is sought to be
26 invoked directly ‘infected’ the actual cause of action before the court.” *Pond v. Ins. Co. of North*
27 *America* (1984) 151 Cal. App. 3d 280, 290.

28 The unclean hands doctrine has broader application as a defense to less favored actions

1 than it does as a defense to more favored actions. *Kendall-Jackson, supra*, 76 Cal. App. 4th at
2 986.

3 Declaratory relief is a highly favored proceeding in California. *See, e.g.,* Witkin, Cal.
4 Proc. 5th (2008) Plead, § 850, p. 265 (“The beneficial effects and remarkable scope of the
5 [declaratory judgment] action have been the subject of voluminous comment by many
6 authorities”).

7 The defense of unclean hands “applies only where it would be inequitable to grant the
8 plaintiff *any* relief.” *Dickson Carlson, supra*, 83 Cal. App. 4th at 447 (emphasis in original).

9 **1. General Conclusions**

10 By way of broad summary, several substantial considerations of a general nature lead this
11 Court to its various conclusions as respects the unclean hands defense. These considerations are
12 as follows:

- 13 • There are thousands of existing asbestos lawsuits against Plant that have been
14 unaffected by Plant’s conduct that the defendants assert to constitute unclean
15 hands.
- 16 • Declaratory relief is a favored claim. Proceeding to the merits will provide policy
17 interpretation rules to be applied by the parties and future courts in the event
18 coverage disputes arise as to particular asbestos cases.
- 19 • The insurers have failed to prove prejudice to their ability to defend on the merits
20 with respect to the declarations Plant seeks in this action.
- 21 • The insurers have failed to prove that any conduct by Plant, including the failure to
22 tender claims over the course of years and also including the amendment of the
23 Matrix, has caused the insurers to incur additional defense costs, either generally
24 or in specific cases;
- 25 • The insurers have failed to prove that any conduct by Plant, including the matters
26 set forth in the immediately preceding bullet point, had an adverse impact on trial
27 results in any case.

- 1 • The insurers have failed to prove that any conduct by Plant, once again including
2 the matters referenced in the preceding two bullet points, had an adverse impact on
3 settlements made by the insurers, either generally or in any particular case.
- 4 • There was no persuasive evidence that any insurer relied to its detriment on
5 anything Plant at any time did or said or failed to do or say. Plant's various
6 statements about "exhaustion" and lack of insurance coverage were repetitions of
7 statements made to it by the insurers in the first instance.
- 8 • Each of the insurers is fairly chargeable in equity with constructive knowledge of
9 the coverage afforded to Plant by its policies, including at least the possibility that
10 coverage in addition to the aggregate limits of liability is applicable to at least
11 some of Plant's asbestos suits.
- 12 • At the heart of the insurers' unclean hands defense are their assertions that Plant
13 intentionally delayed giving them notice of thousands of claims as those claims
14 were received, and that Plant gratuitously abandoned defenses to the asbestos tort
15 claims based on a January 2006 amendment to the Matrix agreement. These
16 matters, if proven in the context of specific cases, may amount to breaches of the
17 "notice" and "cooperation" clauses of the insurance policies with respect to those
18 cases and, if proven, may excuse the insurers from any coverage obligations for
19 those cases. Those are legal contract defenses, not tried in this equitable
20 proceeding. The insurers retain all of their rights to establish those defenses to
21 coverage if they are able to do so. This conclusion counsels against allowing
22 unclean hands as a complete bar to proceeding to the merits of the declarations
23 sought.

24 **2. More Specific Conclusions and Discussion**

25 The conduct of Messrs. Gregory and Travis related to their repeated quests for fees does
26 not substantially relate directly to, or substantially impact, the claims for declaratory relief that
27 are at issue here. In other words, the challenged conduct of Messrs. Gregory and Travis, to the
28 extent found to exist, lacks a sufficient nexus to the declaratory relief sought by Plant in this

1 action such as to warrant depriving Plant of its right to declaratory relief. In short, that conduct
2 did not “infect” Plant’s causes of action for declaratory relief, and it would not be inequitable to
3 grant Plant at least some of the relief it seeks in this action, if it should otherwise prove
4 entitlement thereto.⁹ Indeed, it would not be inequitable to grant Plant all of the relief it seeks in
5 this action, again if it should otherwise prove entitlement thereto.

6 (a) **Matters Relating to the Matrix Agreement and Amendment**

7 Defendants have failed in their efforts to prove that they suffered injury because the
8 Matrix was amended in January of 2006 to remove language stating that a claimant submitting a
9 Claim Form “agrees to forbear from further prosecution of any lawsuit the claimant may have
10 previously filed against Plant.” “Forbearance” is not necessarily permanent. It can be temporary.
11 To the extent a contract to “forbear” came into being between Plant and individual asbestos
12 claimants, the duration of the required forbearance is disputable. When a contract requires
13 “forbearance” of an uncertain or unspecified amount of time, as the Matrix did, a “reasonable”
14 time of “forbearance” is inferred by the law. Civ. Code § 1657 (“If no time is specified for the
15 performance of an act required to be performed, a reasonable time is allowed.”); *Pierce v.*
16 *Avakian* (1914) 167 Cal. 330, 332. The trial record does not contain evidence sufficiently
17 persuasive to cause this Court to hold that insurers have proven that any or all Matrix claimants
18 were contractually bound to the complete forbearance which the insurers read into the Matrix.

19 At the outset of the Phase II trial, the insurers characterized the Matrix forbearance
20 language as a “covenant not to sue” (Defendants’ Phase II Trial Brief, at 18:3-9; Defendants’
21 Opening Statement, Trial Tr. vol. 1, 53:17-54:12, 68:13-28), but they failed to prove that the
22 Matrix process gave rise to such a “covenant” enforceable against the Matrix claimants. At the
23 end of the trial, the insurers characterized the “forbearance” language in the unamended Matrix as
24 providing Plant with a “potentially viable defense” to further litigation by claimants that Plant
25 subsequently waived by agreeing to the First Amendment. (Defendants’ Responses to the Court’s

26 ⁹ There is substantial case law support for the proposition that the unclean hands defense may be properly rejected, at
27 least in the trial court’s discretion, where the challenged conduct does not substantially relate directly to, or
28 substantially impact, the claims at issue. *E.g., Tinney v. Tinney* (1964) 211 Cal. App. 2d 548; *Jay Bharat Developers,*
Inc. v. Minidis, *supra*, 167 Cal. App. 4th 437; *Stockwell v. McAlvay* (1937) 10 Cal. 2d 368; *Bradley Co. v. Bradley*
(1913) 165 Cal. 237.

1 Questions of November 5, 2009, at 2:3.) In any event, the insurers failed to prove that the First
2 Amendment to the Matrix amounted to abandonment by Plant of a defense that could otherwise
3 have been interposed to any or all of the asbestos cases.

4 To be clear, this Court *is not ruling* that the “forbearance” language of the unamended
5 Matrix agreement was something other than an agreement to permanently forbear. What this
6 Court *is ruling* is that the insurers failed to prove that the agreement was one of permanent
7 forbearance. In this Court’s view, the persuasive evidence admitted at trial was simply
8 insufficient to cause this Court to conclude that the October Matrix agreement included a
9 provision that bound any or all Matrix claimants to “forbear” permanently from further litigation
10 against Plant. This Court’s conclusion as to insufficiency of proof on this point is supported by
11 the following observations, findings, and legal authority.

12 The mutual intention of the parties at the time of contract formation governs contract
13 interpretation. Civ. Code § 1636. Mutual intent is ascertained from the written contract if
14 possible, but courts also consider the circumstances under which the contract was made and the
15 matter to which it relates when interpreting contract provisions. Civ. Code §§ 1639, 1647.

16 Against the background of these fundamental legal principles, it is noteworthy that no
17 evidence was offered at trial as to the contractual intent of any individual asbestos claimant.
18 There was no evidence as to what any claimant knew, thought or believed about the Matrix.
19 More specifically, there was no evidence that any claimant consented to the settlement that the
20 insurers assert was embodied in the Matrix. For example, there was no evidence that any
21 asbestos claimant consented to a settlement of his or her claims against Plant effective upon the
22 mere submission of a claim to the Matrix. While there was evidence as to what some lawyers
23 representing some asbestos claimants said, did and thought (Trial Exh. 6015 (Harley Depo. at
24 74:15-74:4).), lawyers lack authority to settle lawsuits without explicit client consent. *Levy v.*
25 *Superior Court* (1995) 10 Cal. 4th 578, 583 (a lawyer has no actual or ostensible authority to
26 settle a client’s lawsuit based solely on employment as a lawyer).

27 The only evidence in the record as to what actually was submitted on behalf of a claimant
28 to the Matrix was the “Attestation” accompanying the Polly Burns Claim Form. (Trial. Exh.

1 3770.) This document was signed by her lawyer, Philip Harley, and it states only that Harley
2 attested that he believed that the information submitted in support of the Burns claim was true and
3 correct. (*Id.*) There is no evidence as to whether Ms. Burns consented to the filing of a Matrix
4 claim on her behalf, whether she ever read the Matrix, or whether she understood that the
5 Execution Provision purported to bind her to perpetual “forbearance” from litigation following
6 the submission of her claim to the Matrix.

7 There similarly was no evidence as to what was understood, intended, or actually done
8 by the other approximately 3,690 persons whose claims were submitted to the Matrix. A large
9 subset of these claimants (numbering approximately 1,500) had their claims submitted to the
10 Matrix in a mass “data dump” by employees of the law firms handling their asbestos cases.
11 (Gregory, Trial Tr. vol. 6, 698:4-12.) There was no evidence in the record that those claimants
12 submitted a signed “Claim Form” that would have triggered the Execution Provision and thus
13 could have created an alleged contract of perpetual “forbearance” upon receipt of the claim by
14 Plant. In fact, there was no evidence in the record that *any* particular Matrix claimant, other than
15 Ms. Burns, submitted, or had submitted on his or her behalf, a “Claim Form” that supposedly
16 created a contract of “forbearance” under the Execution Provision of the unamended Matrix.

17 This lack of evidence, and the uncertainty of outcomes in the hypothetical contract
18 lawsuits necessary to vindicate the insurers’ view of the operation of the Matrix, counsels against
19 imposing a bar against proceeding with the declaratory relief sought here. In the absence of a
20 proven contract bar to maintaining an action by at least some discernible number of Matrix
21 claimants, an essential predicate of the insurers’ defense fails, even on its own terms.

22 There is more to be said about the failure to prove a permanent forbearance or absolute
23 bar. Other contract provisions are relevant to that matter, and their relevance is shown by a brief
24 prior review of certain legal principles pertinent to contract interpretation. It is to those legal
25 principles that this Court first turns, followed by their application, or at least potential application,
26 to the issue at hand.

27 The rules of contract interpretation that would bear on an analysis of whether individual
28 claimants entered into a contract that could be enforced so as to obtain dismissal of their tort

1 lawsuits against Plant are well established under California law. They include the following:

- 2 • “The whole of a contract is to be taken together, so as to give effect to every part, if
3 reasonably practicable, each clause helping to interpret the other.” Civ. Code § 1641.
- 4 • A contract provision is ambiguous if it is capable of two or more reasonable constructions.
5 *Waller v. Truck Ins. Exch., Inc.* (1996) 11 Cal. 4th 1, 18. To determine whether a
6 particular provision of a contract is ambiguous, the language must be considered in the
7 context of the entire contract, along with any extrinsic evidence that supports a reasonable
8 interpretation. *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage Co.* (1968) 69 Cal. 2d 33,
9 37, 39-40.
- 10 • A conclusion that the meaning of a contract provision is “clear and unambiguous” cannot
11 be made based only on the content *within* the four corners of the document. The court
12 also is *required* to consider relevant extrinsic evidence that supports a reasonable
13 interpretation. *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal. App. 4th 97,
14 114-15.
- 15 • Even apparently clear contract language may be found “ambiguous” when read in the
16 context of the contract as a whole, and under the circumstances of a particular case.
17 *MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal. 4th 635, 652. “Latent” ambiguities can
18 arise from an analysis of the contract language in light of a particular set of facts at issue.
19 *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal. 4th 384, 391.
- 20 • Extrinsic evidence is admissible provisionally to determine whether apparently clear
21 language in the contract is, in fact, “susceptible to more than one reasonable
22 interpretation.” *Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal. App. 4th
23 1107, 1126. “If, in light of the extrinsic evidence, the language is reasonably susceptible
24 to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its
25 role in interpreting the contract.” *Id.*
- 26 • As summarized by the California Supreme Court over four decades ago, a trial court’s
27 task in interpreting a contract is as follows:

28

1 Accordingly, rational interpretation requires at least a
2 preliminary consideration of all credible evidence offered to
3 prove the intention of the parties. Such evidence includes
4 testimony as to the circumstances surrounding the making of the
5 agreement . . . including the object, nature and subject matter of
6 the writing . . . so that the court can place itself in the same
7 situation in which the parties found themselves at the time of
8 contracting. If the court decides, after considering this
9 evidence, that the language of a contract, in the light of all the
10 circumstances, is fairly susceptible of either one of the two
11 interpretations contended for . . . extrinsic evidence relevant to
12 prove either of such meanings is admissible.

13 *Pac. Gas & Elec. Co., supra*, 69 Cal. 2d at 39.

14 As applied to the record of this case, these principles support this Court's view that the
15 evidence is unpersuasive in the direction of proving that the unamended Matrix agreement
16 constituted a permanent bar to proceedings in the tort system initiated or prosecuted, or to be
17 initiated or prosecuted, by some or all of the Matrix claimants. For example, the unamended
18 Matrix provides that "the time within which any asbestos-related action pending against [Plant]
19 on the date of its execution of this Matrix in which it is specifically named as a defendant must be
20 brought to trial is extended indefinitely." (Trial Exh. 3758, at TPE00114150.) It also provides
21 that "[n]othing in this Matrix precludes any person from suing Plant in the tort system, until that
22 person's Asbestos Claims against Plant have been resolved under the Matrix." (*Id.*, at
23 TPE00114126.) It says that it is "procedural only" and creates no "substantive" rights. (*Id.*) It
24 says that one of its goals is to minimize the "administrative expense of processing and resolving
25 Asbestos Claims, which erode Plant's CIGA coverage." (*Id.*) It recites that its basic purpose is to
26 "set forth the terms and conditions under which Asbestos Claims will henceforth be processed,
27 resolved, and paid in light of the insufficiency of the CIGA coverage and the contingent nature of
28 the [Fibreboard] indemnity recovery." (*Id.*, at TPE00114125.)

The unamended Matrix also sets forth a procedure for the review of claims, including
provisions for rejection, disagreement, adjustment and later dispute as to "covered claim" status
of any submitted claim. (*Id.*, at TPE00114151.) It provides that Plant's adjustment of a claim
value would constitute a "counteroffer to resolve the claim." (*Id.*) The claimant could then

1 request further “reconsideration by Plant or resolution of the dispute by an independent
2 reviewer.” (*Id.*)

3 The unamended Matrix makes it clear that, in order to be entitled to payment under the
4 Matrix, a claimant would be required to execute a “Settlement Agreement and Release” only *after*
5 Plant, or an independent reviewer, agreed that a claimant was entitled “to payment under this
6 Matrix.” (*Id.*) It also says that “[c]laimants who receive payment for nonmalignancy will not be
7 releasing claims for any subsequently discovered malignancy.” (*Id.*)

8 The unamended Matrix did not require Plant to resolve submitted claims in any particular
9 amount of time. Instead, it says that “[i]n light of the fact that Plant will likely be receiving
10 thousands of claims within a short period, it is not practicable for Plant to agree to resolve a claim
11 within a particular period after its submission is completed.” (*Id.*, at TPE00114150.) Plant thus
12 agreed to use “best efforts to resolve all claims asserted under this Matrix as promptly and
13 reasonably possible under all the circumstances.” (*Id.*)

14 These provisions are at the least arguably inconsistent with the insurers’ position that the
15 unamended Matrix required, as it was intended to require, permanent “forbearance” of tort
16 litigation against Plant immediately upon submission of a Claim Form to the Matrix. Claims
17 needed to be reviewed. Claimants could dispute Plant’s initial determinations. Claims could then
18 be reviewed by an independent third-party reviewer. Plant expected to receive “thousands of
19 claims within a short period” and thus could not commit to conclude its review of any particular
20 claim at any particular time. A claimant would only be providing a release after his or her claim
21 was accepted for payment. Claimants with non-malignant injuries would not be releasing claims
22 related to malignancies discovered subsequent to the submission of their claims. Submission of a
23 claim did not guarantee payment to the claimant under the Matrix. It did not even guarantee
24 timely review of the claim by Plant. It is, at best, unclear that the insurers would have been able
25 to obtain dismissal of any tort case filed by a Matrix claimant based on the “forbearance”
26 language in the Execution Provision, at least until the claimant’s claim was resolved entirely
27 under the Matrix. That process could have taken many months, or even several years.

28 The “indefinite” extension of a claimant’s time to bring a lawsuit against Plant to trial to

1 which Plant agreed also is at least arguably inconsistent with a requirement that a claimant
2 otherwise forbear permanently (i.e., dismiss) his or her lawsuit upon submission of a claim to the
3 Matrix. This provision would support a construction of the word “forbear” in the Execution
4 Provision as involving only a *temporary* refrain from prosecution for some uncertain amount of
5 time. A claimant who was required permanently to “forbear” from litigating a case against Plant
6 would not have needed an “indefinite” extension of the time to bring Plant to trial. Such person
7 would not have needed any extension of time at all because he or she would not have been able to
8 bring Plant to trial.

9 It follows from the foregoing analysis that the pertinent provisions of the Matrix that bear
10 on questions of “forbearance” are susceptible to more than one reasonable interpretation. The
11 parties might have contemplated that “forbearance” would be permanent, and that claimants
12 would dismiss their complaints against Plant following submission of their claims to the Matrix.
13 Conversely, the parties might also have contemplated that “forbearance” would be temporary,
14 thus permitting the claimants to maintain their lawsuits on file. To repeat, the evidence presented
15 at trial was insufficiently persuasive in the direction of causing this Court to hold that any or all of
16 the Matrix claimants were permanently barred, by reason of the unamended Matrix, from
17 proceeding against Plant in the tort system.

18 The interpretation of the term “forbear” in the Execution Provision of the Matrix is aided
19 further by an analysis of what, if any, consideration was given to the claimants in exchange for
20 their “forbearance.” As a general rule, to be enforceable, every contract requires consideration.
21 Cal. Civ. Code § 1550; *Huong Que, Inc. v. Luu* (2007) 150 Cal. App. 4th 400, 415. One
22 interpretation to which the pertinent Matrix provisions are reasonably susceptible is that the
23 claimants agreed to forbear prosecuting or filing suit for some period of time in exchange for
24 Plant’s agreement to process their claims under the Matrix in a timely manner. In Section 5.6,
25 Plant agreed simply “to use its best efforts to resolve all claims asserted under this Matrix as
26 promptly as reasonably possible under all the circumstances.” (Trial Exh. 3758, at
27 TPE00114150.) It is settled that even temporary “forbearance” is sufficient consideration to form
28 a contract. *Krobitzsch v. Middleton* (1946) 72 Cal. App. 2d 804, 809 (“Any suspension or

1 forbearance of a legal right constitutes a sufficient consideration Even though the
2 forbearance is for one day only, there is a sufficient consideration as the law does not weigh the
3 quantum.” (citation omitted)). Plant’s promise to process claims, however, is sufficiently
4 curtailed by the obligation to “use its best efforts” and to act “as promptly as reasonably
5 possible,” such that the promise is not illusory, and is therefore adequate consideration for the
6 agreement to forbear. *Storek & Storek, Inc. v. Citicorp Real Estate* (2002) 100 Cal. App. 4th 44,
7 61.

8 Thus, under this possible interpretation of the Matrix, the consideration for the claimants’
9 “forbearance” was Plant’s agreement to process claims within a reasonable period of time. It is a
10 reasonable interpretation of the Execution Provision that a claimant’s forbearance obligation
11 lasted only for the reasonable period of time it took to process a claim under the Matrix. If and to
12 the extent that CIGA decided to cease processing claims because of the prospect of other
13 available insurance,¹⁰ it is very well possible that the purportedly binding contract between Plant
14 and asbestos plaintiffs or their counsel was nullified, at least prospectively, under the doctrine of
15 frustration of contract purpose or the doctrine of impossibility of performance.

16 The unamended Matrix did not guarantee payment of a claimant’s claim. If, at the end of
17 the claims process, Plant and CIGA agreed to pay a claimant’s claim, it is arguable that the
18 subsequent execution of a release by the claimant represented additional consideration given by
19 the claimant in exchange for that payment. (Trial Exh. 3758, at TPE00114151.) Also arguable is
20 the proposition that the payment, funded by CIGA, would be given in exchange for a release by
21 the claimant of “CIGA Releasees” and “Plant Releasees,” but not Plant itself. (Trial Exh. 5949.)
22 While this is not the only possible interpretation of the Matrix, it is an interpretation a court
23 presented with the necessary evidence could well adopt and, under this interpretation, the
24 claimant would still have the right to pursue Plant in the tort system as he or she no longer would
25 be obligated to “forbear” from further litigation. If it were true, as the insurers assert, that the

26 ¹⁰ The Insurance Code (§§ 1063.1(c) and 1063.2(a)) provides that CIGA shall not pay claims in the face of other
27 available insurance. The discussions between Plant and CIGA leading to their agreement to suspend the processing
28 of claims under the Matrix were initiated by Collins, CIGA’s counsel, in approximately April of 2007, when he
contacted Plant for a meeting “to discuss the status of the Matrix and CIGA’s obligations, in light of the fact that the
insurance carriers had begun to defend Plant...” (Travis, Trial Tr. vol. 12, 1503:28-1505:20.)

1 claimant's obligation to "forbear" was permanent, the requirement in the Matrix of an executed
2 release in exchange for payment by CIGA would be rendered superfluous, and there would be no
3 consideration by the claimant in exchange for receipt of payment from CIGA. Under such an
4 analysis, the Execution Provision is less susceptible to the insurers' interpretation that
5 "forbearance" was meant to be permanent than it is to an interpretation that "forbearance" was
6 required only for as long as it reasonably takes to process a claim under the Matrix. Indeed, as
7 noted previously, the law only infers a "reasonable" time of "forbearance" when a contract
8 requiring "forbearance" does not specify the amount of time to which the party agreed to
9 "forbear." *Pierce, supra*, 167 Cal. at 332 (in an action on a promissory note, the court held that
10 "it appeared that action was not commenced upon this note until one year and one month after it
11 became due. Here was a forbearance for 13 months. The time of forbearance was not specified,
12 and a reasonable time is inferred").

13 The insurers also suggest that the consideration for the claimants' forbearance might be
14 found in Plant's waiver of delayed prosecution defenses under Section 5.5 of the Matrix.
15 (Defendants' Closing Argument, Trial Tr. vol. 24, 3147:16-25; Trial Exh. 3758, at
16 TPE00114150.) Such consideration, however, would be illusory, unless the claimants'
17 forbearance was intended to be less than permanent. If a claimant was required permanently to
18 forbear from prosecuting his or her claim against Plant upon submission of a Claim Form to the
19 Matrix, the waiver of delayed prosecution defenses would have no value to that claimant. *Grant*
20 *v. Aerodraulics Co.* (1949) 91 Cal. App. 2d 68, 76 ("It is well settled that something which is
21 completely worthless cannot constitute a valid consideration."). This would not be a reasonable
22 interpretation of the Matrix.

23 Plant also proposed initially to obtain a *complete* release in exchange for the claimants
24 receiving money from CIGA. (Trial Exh. 3643, at TPE00103059.) That proposal was rejected by
25 the asbestos plaintiffs' bar. (Brayton, Trial Tr. vol. 7, 908:18-28.) There was evidence that the
26 asbestos plaintiffs, through negotiator Brayton, contemplated that claimants would retain so-
27 called "*Shapiro*" rights to proceed against Plant's insurers to recover the remaining portion of
28 their damages. (Trial Exh. 3682, at p.1-2; Travis, Trial Tr. vol. 10, 1363:27-1365:2; Brayton,

1 Trial Tr. vol. 7, 917:25-918:8.). The retention of “*Shapiro*” rights would be inconsistent with an
2 agreement that claimants may not proceed with their lawsuits against Plant following submission
3 of their claims to the Matrix. An injured person may *only* sue a tortfeasor’s liability insurer (to
4 vindicate what the negotiators called “Shapiro rights”) after obtaining a *judgment* against the
5 tortfeasor. Ins. Code. § 11580(b) (2). A claimant could not obtain a judgment against Plant
6 without proceeding with his or her lawsuit against Plant. This raises question as to whether those
7 who negotiated the Matrix intended permanent forbearance from litigation. The negotiation they
8 conducted includes evidence to the contrary.

9 Questions also exist as to whether Matrix claimants knowingly consented to the effective
10 dismissal of their lawsuits. It was their lawyers who submitted claims to the Matrix. The Matrix
11 documents were signed by some, but not all, of the members of the asbestos plaintiffs’ bar in
12 California. (Trial Exhs. 3681, 3758; Travis, Trial Tr. vol. 12, 1487:24-27, 1488:18-1490:20.) No
13 claimants signed these documents. (Trial Exhs. 3681, 3758.) The Execution Provision says that
14 “[s]ubmission of a Claim Form executed *by or on behalf of a claimant* to Plant shall constitute
15 acceptance of this offer and agreement to all of the terms and conditions.” (Trial Exh. 3758, at
16 TPE00114156 (emphasis added).) It provides that “upon submission of a duly executed,
17 completed, and complete Claim Form an express contract will then exist between the claimant
18 involved and Plant.” (*Id.*) The Execution Provision concludes by saying that “[b]y submitting
19 such written and executed Claim Form, the claimant agrees to forbear from further prosecution of
20 any lawsuit the claimant may have previously filed against Plant.” (*Id.*) As noted above, many
21 “claims” were submitted by “data dump” and there was no evidence that any Claim Form or any
22 execution accompanied the “data dump.”

23 In *Levy, supra*, 10 Cal. 4th at 583, the Supreme Court held that a lawyer must procure the
24 consent of the client to settle a lawsuit. Employment as a lawyer carries no inherent ostensible or
25 actual authority to compromise a claim:

26 Unlike the steps an attorney may take on behalf of the client that are
27 incidental to the management of a lawsuit, such as making or
28 opposing motions, seeking continuances, or conducting discovery,
the settlement of a lawsuit is not incidental to the management of

1 the lawsuit; it ends the lawsuit. Accordingly, settlement is such a
2 serious step that it requires the client's knowledge and express
3 consent. (1 Witkin, *Cal. Procedure* (3d ed. 1985) *Attorneys*, § 194,
4 pp. 221-222.) As we stated in *Blanton v. Womancare, Inc.* (1985)
5 38 Cal.3d 396, 212 Cal.Rptr. 151, 696 P.2d 645: '[T]he law is well
6 settled that an attorney must be specifically authorized to settle and
7 compromise a claim, that merely on the basis of his employment he
8 has no implied or ostensible authority to bind his client to a
9 compromise settlement of pending litigation' (*Id.* at p. 404,
10 212 Cal.Rptr. 151, 696 P.2d 645, quoting *Whittier Union High Sch.*
11 *Dist. v. Superior Court* (1977) 66 Cal.App.3d 504, 508, 136
12 Cal.Rptr. 86.).

13 Other cases also stand for the proposition that a client must consent to a lawyer's
14 settlement of his or her claim. For example, in *Blanton v. Womancare, Inc.* (1985) 38 Cal. 3d
15 396, 403-04, the court held that an attorney has no right to dispose of a client's cause of action,
16 even though the attorney is authorized ostensibly to make various binding agreements on behalf
17 of the client during the course of litigation:

18 An attorney retained to represent a client in litigation is clothed
19 with certain authority by reason of that relationship. "The attorney
20 is authorized by virtue of his employment to bind the client in
21 procedural matters arising during the course of the action . . . 'In
22 retaining counsel for the prosecution or defense of a suit, the right
23 to do many acts in respect to the cause is embraced as ancillary, or
24 incidental to the general authority conferred, and among these is
25 included the authority to enter into stipulations and agreements in
26 all matters of procedure during the progress of the trial. Stipulations
27 thus made, so far as they are simply necessary or incidental to the
28 management of the suit, and which affect only the procedure or
remedy as distinguished from the cause of action itself, and the
essential rights of the client, are binding on the client.' [Citation.]
(quoting *Linsk v. Linsk* (1969) 70 Cal.2d 272, 276-277).

Still other cases have held that settlement agreements not signed by the client itself are not
binding on the client. *See, e.g., Gauss v. GAF Corp.* (2002) 103 Cal. App. 4th 1110, 1119
(settlement agreement signed on behalf of GAF by its authorized agent was not enforceable
against GAF, because a GAF corporate officer did not execute the settlement); *Williams v.*
Saunders (1997) 55 Cal. App. 4th 1158, 1163 (settlement agreement signed by husband and
attorney for wife, who had authority to act on wife's behalf, was not enforceable against wife
because she did not personally sign the agreement).

1 The circumstances under which claims were submitted to the Matrix in November 2005 --
2 whether by a Claim Form originating with a lawyer or by “data dumps” by a law firm -- raise
3 questions not addressed in the evidence as to whether any claimant gave effective consent to the
4 termination of his or her tort claims against Plant. There was simply no evidence of authority
5 from the clients to terminate litigation, whether by virtue of the submission of a “duly executed,
6 completed, and complete Claim Form” to the Matrix website or otherwise.

7 Submission of a Claim Form to the Matrix did not guarantee payment to the claimant.
8 Plant could have rejected a submitted claim. In fact, about 2,650 of the 3,691 or so claims
9 submitted to the Matrix *were not paid* for one reason or another. (Travis, Trial Tr. vol. 12,
10 1459:26-1460:15.) That also raises fundamental issues of intent. Did the claimants whose claims
11 were submitted but rejected by Plant consent to “forbear” permanently from further litigation
12 against Plant simply by submitting claims to the Matrix that ultimately were not paid? What if
13 neither Plant nor CIGA even reviewed their submitted claims? No Matrix claimants testified at
14 the Phase II trial on these issues, or at all. No lawyer representing asbestos claimants who
15 testified at trial was questioned on whether their clients had consented to “forbear” permanently
16 from further litigation and have their claim against Plant resolved completely merely by
17 submitting a claim to the Matrix. Most of the lawyers representing asbestos claimants who
18 signed the Matrix did not testify at all during the Phase II trial. There is no evidence of their
19 intent with regard to “forbearance” or otherwise. Under *Levy*, it is dubious that this Court may
20 infer or assume that the claimants consented to terminate their lawsuits or compromise their
21 claims against Plant *in toto* simply because their lawyers, or employees of their lawyers,
22 submitted Claim Forms to the Matrix website. In any event, this Court, on this record, draws no
23 such inference and makes no such assumption.

24 The lack of an agreed-upon release form in the October 2005 Matrix also raises a question
25 as to whether a binding contract existed between Plant and the asbestos claimants to dismiss
26 lawsuits against Plant following the submission of claims to the Matrix. A proposal must be
27 sufficiently “definite” to result in the formation of an enforceable contract:
28

1 In order for acceptance of a proposal to result in the formation of a
2 contract, the proposal “must be sufficiently definite, or must call for
3 such definite terms in the acceptance, that the performance
4 promised is reasonably certain.” (1 Witkin, *Summary of Cal. Law*
5 (9th ed., 1987) *Contracts*, § 145, p. 169.) A proposal ‘cannot be
6 accepted so as to form a contract unless the terms of the contract are
7 reasonably certain. [¶] . . . The terms of a contract are reasonably
8 certain if they provide a basis for determining the existence of a
9 breach and for giving an appropriate remedy.’ (*Ibid.*, quoting from
10 Rest.2d *Contracts*, § 33.) . . . “In particular . . . a provision that
11 some matter shall be settled by future agreement, has often caused a
12 promise to be too indefinite for enforcement.’ (1 Williston, *supra*, §
13 4:18, p. 418-420.) ‘[I]f an essential element is reserved for the
14 future agreement of both parties, as a general rule the promise can
15 give rise to no legal obligation until such future agreement. Since
16 either party in such a case may, by the very terms of the promise,
17 refuse to agree to anything to which the other party will agree, it is
18 impossible for the law to affix any obligation to such a promise.’”
19 (*Id.*, § 4:26, p. 585-587.)

20 *Weddington Productions, Inc. v. Flick* (1998) 60 Cal. App. 4th 793, 811-13.

21 Gregory, Travis, Brayton and McClain had agreed on October 28, 2005 to start the claims
22 submission process on October 31, 2005, even though there was no agreement on an acceptable
23 form of release. (Travis, Trial Tr. vol. 10, 1385:6-15; Brayton, Trial Tr. vol. 7, 911:6-15.) A
24 person submitting a claim to the Matrix website thus would not have known what he or she might
25 have been releasing whether upon submission of a claim or when his or her claim was accepted
26 for payment. There was no promise of payment simply because a claim had been submitted to
27 the Matrix, and most claims have not been paid either in full or in any part.

28 A definitive “release” might be viewed as something more than a “minor matter” that
could have been left for future agreement in an otherwise “binding” Matrix that gave Plant a
complete defense to further litigation by the claimants:

There are occasions in which “minor matters” in elaborate contracts
are left for future agreement. When this occurs, it does not
necessarily mean that the entire contract is unenforceable. “The
Restatement suggests as an illustration of this a building contract
which is definite in all particulars except for a provision that the
form of window fastening shall be afterwards be [sic] agreed
upon . . . This would not make the entire building contract
unenforceable; by contrast, if the nature of the window fastenings

1 was fixed by the agreement while the dimensions of the building
2 were left to future agreement, there would be no enforceable
3 obligation. Obviously, the question is one of degree; the question is
4 whether the indefinite promise is so essential to the bargain that
5 inability to enforce that promise strictly... makes it also unfair to
6 enforce the remainder of the agreement. The more important the
7 subject matter to be agreed upon, the more likely it is that the
uncertainty will prevent or hinder enforcement. If the contract
cannot be performed without settlement of the undetermined
point . . . the entire contract may fail.” (1 Williston, supra, § 4:28,
p. 602-605.).

8 *Weddington Productions, supra*, 60 Cal. App. 4th at 813. It is at least arguable that the lack of an
9 agreed-upon release, or even the terms of such a release, when claims were submitted to the
10 Matrix in November 2005, is inconsistent with interpreting the Matrix process as giving rise to an
11 agreement to resolve and terminate litigation entirely.

12 It follows that the insurers have failed to prove that Plant relinquished a viable defense to
13 any or all of the lawsuits filed by Matrix claimants when Plant amended the Matrix in February of
14 2006. The primary insurers thus have failed to prove that they have defended, or will be
15 defending, suits against Plant that otherwise would have been dismissed had Plant not agreed to
16 the amendment. The first- and second-level excess insurers have not paid any money defending
17 Plant since January 2006. (Travis, Trial Tr. vol. 16, 1924:3-23.)

18 Issue was raised at the trial as to whether the Matrix was amended in February of 2006 in
19 order to conform to the original intent of the parties, in order to pressure Plant’s insurers so that
20 Gregory and Travis could obtain further fees, or for some other reason. The Court is satisfied that
21 Brayton and McClain believed, as they contemporaneously stated, that amendment was proper
22 because their original intent was not to settle claims for pennies on the dollar in the face of
23 potentially available insurance money. From the perspective of Gregory and Travis, they saw the
24 demand of the plaintiffs’ bar for revision as an opportunity to maximize their prospects of
25 obtaining even more legal fees in the future, with those fees to come from the defendant insurers.
26 The significance of the intent of Gregory and Travis is diminished by reason of the failure of the
27 insurers’ to prove that Plant relinquished an actual defense to the asbestos suits filed by Matrix
28 claimants.

1 The insurers assert that the desire of Gregory, in particular, to earn money from Plant's
2 insurance policies increased the amount of money they have paid defending and settling cases
3 against Plant since mid-2006. (Defendants' Closing Argument, Trial Tr. vol. 24, 3096:25-
4 3097:16.) The primary insurers, however, have controlled the defense and settlement of asbestos
5 cases against Plant since reassuming the duty to defend, consistent with their rights and duties
6 under the policies. *Long v. Century Indem. Co.* (2008) 163 Cal. App. 4th 1460, 1468 ("Generally,
7 an insurer owing a duty to defend an insured, arising because there exists a potential for liability
8 under the policy, 'has the right to control defense and settlement of the third party action against
9 its insured, and is . . . a direct participant in the litigation"). Defendants failed to prove any
10 connection, for example, between the desire of Gregory and Travis to be paid a contingent fee
11 based, in part, on the extent of Plant's liability and the money spent by the insurers defending and
12 settling asbestos cases against Plant. There was no evidence that the insurers assumed the
13 defense or settled cases because Gregory or Travis wanted a contingent fee. The insurers did not
14 prove that Gregory's or Travis' interest in a contingent fee, which never came to pass, injured the
15 insurers in any way.

16 The insurers also argue that Gregory and Travis amended the Matrix to obtain leverage
17 against the insurers in a future bankruptcy case by releasing approximately 3,700 cases otherwise
18 subject to dismissal into the tort system to be defended and settled by the insurers. (Defendants'
19 Response to the Court's Questions of November 5, 2009, at 5:15-17; Defendants' Closing
20 Argument, Trial Tr. vol. 24, 3083:14-3084:4, 3088:18-3089:11.)¹¹ In this respect, the insurers
21 claim that Gregory and Travis wanted to "build a record" of high-value claims for several years to
22 create an "aura" that Plant's asbestos liability was substantial and expensive. (*Id.*; Defendants'
23 Closing Argument, Trial Tr. vol. 23, 2991:26-2992:2; Trial Tr. vol. 23, 3104:5-14.) In the
24 insurers' view, this would lead to the preparation of a bankruptcy plan that inflated the value of
25 the asbestos cases processed and paid by a bankruptcy trust over many years. (Defendants'
26 Response to the Court's Questions of November 5, 2009, at 6:3-4; Defendants' Closing

27 _____
28 ¹¹ This Court has already noted its conclusion that the insurers have failed to prove that any or all of the
approximately 3,700 cases were subject to dismissal by reason of the unamended Matrix.

1 Argument, Trial Tr. vol. 24, 3094:6-13, 3104:21-3105:25.) The insurers argue that Plant would
2 assert that these values were binding on the insurers because asbestos insureds and the asbestos
3 plaintiffs' bar typically seek to do this in bankruptcy cases. (Defendants' Closing Argument,
4 Trial Tr. vol. 24, 3094:6-13.) According to the insurers, this would, in turn, coerce them into
5 paying substantial money to settle with Plant, to the enormous financial benefit of Gregory and
6 Travis. (Defendants' Response to the Court's Questions of November 5, 2009, at 6:5-7.) The
7 essence of the insurers' arguments is that this is what has happened, and will happen, in the Plant
8 bankruptcy, because "this is how it is always done" in asbestos bankruptcies.

9 The insurers, however, did not prove that any of this actually happened in the
10 circumstances here at issue. Gregory and Travis did not defend or settle any asbestos cases after
11 the primary insurers assumed the defense of Plant in mid-2006. The primary insurers controlled
12 the defense and settlement of the cases until Plant filed bankruptcy in May of 2009. Gregory and
13 Travis did not "build a record" of claims. Further, the insurers' argument about what they
14 contend is "always" done in asbestos bankruptcies is not supported by any persuasive evidence,
15 let alone persuasive evidence that Plant has attempted, or will attempt, in its own bankruptcy to
16 assert that "inflated" settlement values under a plan of reorganization are binding on the insurers.
17 There is insufficient persuasive evidence for the Court to conclude that the hypothetical
18 bankruptcy-related conduct of which the insurers complain is supportive of an unclean hands
19 defense -- either generally or as a bar to Plant obtaining the declaratory relief it seeks in this case.
20 The insurers are not required to settle this case, or Plant's bankruptcy case. They are not required
21 to "buy out" their policies. Moreover, there is nothing in Plant's complaint in this case that could
22 or would cause the Court to require any insurer to "buy out" its policies.

23 (b) **Matters Relating to the 2006 Tender**

24 The insurers failed to prove to the Court's satisfaction that Plant's tender of some 3,800
25 suits to the primary insurers, all at one time in January 2006, resulted in significant, or even
26 reasonably quantifiable, injury, damage or prejudice to the insurers. For example, the insurers
27 failed to prove that they incurred any additional expenses because Plant tendered the 3,800 cases
28 all at once, instead of gradually over time as the cases were served. Any such additional expenses

1 are speculative at best. Although defense counsel in the underlying asbestos cases identified
2 some logistical difficulties getting their arms around all of the Plant cases in 2006, the difficulties
3 were not pervasive and did not result in an inadequate defense to Plant. (Trial Exh. 5972 (McNeil
4 Depo. at 268:2-9, 270:23-271:17, 274:10-275:6, 317:25-318:18); Trial Exh. 5968 (Haas Depo. at
5 24:9-24, 194:15-196:8, 196:24-197:18); Trial Exh. 5974 (Oberg Depo. at 216:2-14, 246:5-15,
6 264:8-265:14); Trial Exh. 5973 (Musfelt Depo. at 57:10-19, 58:4-17, 128:8-20).) Indeed, large
7 numbers of the 3,800 cases either were dismissed by the plaintiffs or have remained inactive since
8 tender.

9 In reaching the conclusion that Plant's failure to tender cases to the insurers between 2002
10 and January 2006 has not been persuasively shown to have prejudiced the insurers' defense of the
11 cases, this Court is mindful of the evidence that settlement costs have generally increased over
12 time. (McClain, Trial Tr. vol. 8, 1043:21-1048:24; Travis, Trial Tr. vol. 16, 1944:7-15.) The
13 amount of that escalation, however, was not quantified, nor was it linked to particular cases or to
14 specific causes. The insurers proffered no evidence of the amount of money they would have
15 paid to defend and settle Plant cases between 2002 and 2006, had the cases been tendered by
16 Plant during that time. The Court is not prepared to assume, or to find on the evidence presented,
17 that the primary insurers could have settled the cases against Plant that they did settle between
18 2007 and 2009 for less money had those cases been tendered earlier. There was no statistical or
19 other expert evaluation of the issue at trial. There was no satisfactory evidence to show the
20 "value" of asbestos cases against Plant in the 2002 to 2006 period. In short, delayed tender is not
21 a basis for barring Plant from all relief.

22 The conclusion that delayed tender is an inadequate basis upon which to recognize the
23 unclean hands defense is supported by the observation that the insurers retain contract defenses to
24 coverage in individual asbestos cases where they can prove that their rights were, in fact,
25 prejudiced by Plant's conduct. *See, e.g., Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.
26 App. 4th 715, 763 ("To establish actual prejudice, the insurer must show a substantial likelihood
27 that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it
28 would have settled the claim for less or taken steps that would have reduced or eliminated the

1 insured's liability."). "The well-settled rule is that one must exhaust all his legal remedies before
2 he is entitled to redress in a court of equity." *Doran v. Sherman* (1937) 18 Cal. App.2d 479, 480.
3 The defendant insurers in the case at bar remain free to dispute coverage for some, or even all, of
4 the underlying asbestos claims based on legal, contract "late notice" or "lack of cooperation"
5 defenses, including such defenses based on Plant's failure to tender asbestos cases between 2002
6 and January 2006 (E.g., *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal. App. 4th 715,
7 761; *Campbell v. Allstate Ins. Co.* (1963) 60 Cal. 2d 303, 306). That opportunity is another factor
8 tending to defeat a potential equitable bar to Plant's maintenance of this lawsuit.

9 The evidence does not persuade the Court that Plant's agreement to the Matrix, which
10 generated LCVs for the submitted claims, caused the primary insurers to pay more money settling
11 asbestos cases than they otherwise would have paid. The primary insurers settled some cases for
12 *more* than the LCV generated by the Matrix for those claims. (Trial Exh. 5961.) They settled
13 other cases for *less* than the LCVs generated by the Matrix for those claims. (*Id.*) The aggregate
14 amount paid by the primary insurers settling asbestos cases where the claimant also was paid
15 under the Plant Matrix is approximately \$13.8 million. (*Id.*) The aggregate LCVs for claims paid
16 under the Matrix and also paid by the primary insurers is approximately \$20.8 million. (*Id.*) If
17 anything, the primary insurers have settled asbestos cases for *less money*, overall, than the LCVs
18 generated by the Matrix.

19 Stated more generally, the Court is not persuaded that Plant's conduct has led to an
20 increase in the value of settlements paid by the primary insurers. Insurers have failed to carry
21 their burden of so proving.

22 (c) **Other Matters**

23 There was no persuasive evidence presented showing that the insurers were injured,
24 damaged or prejudiced because members of the asbestos plaintiffs' bar have been involved in
25 discussions to settle claims under Plant's policies. In this connection, it is worthy of repetition
26 that United National, one of Plant's primary insurers, *required* Brayton and McClain to sign an
27 "assurances agreement" expressing support for Plant's settlement of its claim against United
28 National. (Travis, Trial Tr. vol. 15, 1876:27-1877:19.)

1 While members of the asbestos plaintiffs' bar were adverse to Plant in the asbestos
2 litigation, it does not follow, without more, that it was improper for them to participate, on Plant's
3 side, in settlement discussions with the insurers. As adverse parties in one context, the asbestos
4 plaintiffs and Plant may properly share a so-called "common interest" in Plant's insurance
5 policies, as Brayton and McClain asserted at trial. Put simply, adversity in one case does not
6 necessarily translate into adversity in all cases. *Oxy Resources California LLC v. Superior Court*
7 (2004) 115 Cal. App. 4th 874, 888 (common interest doctrine has been applied to "parties who
8 oppose one another in a case but are able to join forces on a particular issue of common interest").
9 Plant and the insurers are adverse in this case, yet they share a "common interest" in the defense
10 and settlement of asbestos cases against Plant. *Am. Mut. Liab. Ins. Co. v. Superior Court* (1974)
11 38 Cal. App. 3d 579, 591-92 ("The insured and the insurer have certain obligations each to the
12 other, as previously noted, arising from the insurance contract. Both the insured and the carrier
13 have a common interest in defeating or settling the third party's claim."). The adversity between
14 Plant and the asbestos plaintiffs in asbestos cases thus does not preclude them from having a
15 "common interest" in the settlement of Plant's insurance claims, or in the outcome of issues in
16 this case. The purpose of this case is not to assess and quantify Plant's present and future
17 asbestos liability. It is to interpret Plant's insurance policies.

18 Certain legal principles elucidate the propriety of the involvement of members of the
19 plaintiffs' asbestos bar in discussions related to policy settlement. For example, under California
20 law, the rights of injured third parties cannot be compromised by an agreement between the
21 insured and insurer entered without their consent. *Malmgren v. Southwestern Auto Ins. Co.*
22 (1927) 201 Cal. 29, 33-34 (insurance code statute, now codified at Section 11580, is "founded
23 upon principles of public policy and an anomalous situation would be created if the rights of third
24 parties, for whose protection the law was adopted, could be hindered, delayed, or defeated by the
25 private agreements of two of the parties"); *Hynding v. Home Acc. Ins. Co.* (1932) 214 Cal. 743,
26 747 (statute "creates a contractual relation in every indemnity insurance policy, which inures to
27 the benefit of any person who might be negligently injured by the assured"); *Shapiro v. Republic*
28 *Indemnity Co.* (1959) 52 Cal. 2d 437, 440 (persons injured by a tortfeasor are "third-party

1 beneficiaries of the policy” and “had an interest that could not be altered or conditioned by
2 independent action of the insurer and the insured. Nor can these rights be conclusively
3 determined against the injured persons in an action to which they were not made parties.”); *see*
4 *also* Croskey, *et al.*, California Practice Guide: Insurance Litigation (The Rutter Group 2009)
5 ¶ 5:338 (“[i]nsurers sometimes wish to ‘buy back’ or ‘buy out’ issued liability policies in the face
6 of potential liabilities (e.g., for environmental cleanup). However, the parties cannot rescind if
7 the rights of third parties would be prejudiced”). It follows that the asbestos plaintiffs would not
8 be bound by a settlement between Plant and an insurer to which the plaintiffs did not consent.

9 The involvement of members of the asbestos plaintiffs bar in settlement discussions,
10 operating on Plant’s side of the equation, was not shown to have been wrongful for other reasons
11 as well. Plant is in bankruptcy proceedings, long anticipated. So far as appears from the
12 evidence presented in this case, Plant’s discussions and negotiation of a possible plan of
13 reorganization with its asbestos creditors and representatives of holders of future asbestos
14 demands, as well as discussions of possible insurance settlements to fund such a plan, were lawful
15 activities in contemplation of meeting the requirements of the bankruptcy code. *See* 11 U.S.C. §
16 524(g)(2)(B)(ii)(IV)(bb) (requiring that a plan seeking to implement Bankruptcy Code § 524(g)
17 obtain the approval of at least 75% of creditors voting on a plan of reorganization); 11 U.S.C. §
18 524(g)(4)(B)(i) (requiring the appointment of a legal representative for those asbestos claimants
19 that might assert claims against the debtor in the future); 11 U.S.C. §§ 1129(a)(8)(A) and 1126(c)
20 (together requiring that an impaired class of creditors accept a plan by a vote of two-thirds in
21 amount and one-half in number of those voting on a plan of reorganization). These provisions
22 counsel against a finding that it is unclean hands for Plant to have discussed possible insurance
23 settlements with the asbestos plaintiffs’ bar in the latter’s capacity as representatives of the
24 interests of Plant’s asbestos creditors.

25 There is no evidence in the record that Gregory, Travis, Gordon or Plant’s insurance
26 coverage lawyers have disclosed confidential defense information or otherwise breached Plant’s
27 duty of cooperation with the insurers in their discussion of settlement issues with members of the
28 asbestos plaintiffs’ bar relating to Plant’s insurance policies and its insurance claims. The

1 involvement of members of the asbestos plaintiffs' bar in settlement discussions in this case thus
2 is not wrongful and does not support the insurers' unclean hands defense.

3 The insurers assert that Plant's agreement to the Matrix was, itself, a "collusive" act by
4 which Plant and the asbestos plaintiffs' bar agreed to inflated claim values that they intended to
5 impose upon the insurers through the August 2005 agreement to preserve the so-called "*Shapiro*"
6 rights of Matrix claimants. Even assuming members of the asbestos plaintiffs' bar hoped to
7 impose Matrix-generated LCVs on Plant's insurers, Plant rebuffed any such desires
8 unequivocally when its lawyer, Paul Richler, told David McClain that Plant would not agree to
9 *anything* that purported to bind its insurers to the Matrix. (Trial Exh. 5978 (Richler Depo. at
10 65:22-66:8, 80:24-81:11).) There is no persuasive evidence that Plant *ever* sought to bind the
11 insurers to the Matrix.

12 This Court's conclusion that Plant's entry into the Matrix was not a pernicious collusive
13 act supportive of a finding of unclean hands is further bolstered by the following circumstances
14 and considerations. All of Plant's insurers had stopped defending and indemnifying Plant by the
15 end of 2001. (Gregory, Trial Tr. vol. 3, 270:28-272:10.) Many had done so up to a decade
16 earlier. (See, e.g., Trial Exhs. 3091, 3093, 3098, 3101.) By the end of 2001, the insurers had left
17 Plant "on its own" to manage its asbestos liabilities. It follows that, at least *vis-à-vis* the insurers,
18 Plant was "free" to enter the Matrix on its terms, especially where, as here, Plant has not asserted
19 that the Matrix is binding on the insurers or that the insurers are required to fund Matrix
20 "settlements." Plant is not here seeking coverage measured by Matrix settlements. In this
21 connection, Plant has made clear its position that the Matrix is irrelevant to the insurers' coverage
22 obligations. (Plant's Closing Argument, Trial Tr. vol. 22, 2841:17-2842:14.)

23 It may well be true, as the insurers contend, that the amount of money that Gregory and
24 Travis have received as respects their work on Plant matters over the years, amounting to over
25 \$10 million since Plant went out of business, is unreasonable, particularly given the level of
26 services provided by them, and that they have focused rather myopically on obtaining fees for
27 themselves.¹² However, those fees, even if unreasonable, have not prejudiced the primary

28 ¹² In an e-mail to Travis dated November 28, 2005, Gregory said by way of candid self-assessment, "[a]s you know,

1 insurers' defense of Plant or otherwise prejudiced the insurers in any sense relevant to the Phase
2 II issues. Moreover, even if there had been some relevant prejudice to them, it would not warrant
3 the consequences that they seek to attach to it.

4 There is further answer to the insurers' contention that fees charged by Gregory and
5 Travis were excessive or disproportionate to the work performed. It is found in the law which
6 vests in the Plant Bankruptcy Court the authority to deal with billing improprieties, if any should
7 be found by that Court to exist. *See, e.g.*, Bankruptcy Code Sections 541, 544, and 548 (11
8 U.S.C. §§ 541, 544, 548). In short, the availability of restitutionary remedies in Plant's
9 bankruptcy, which affords a forum in which claims of unreasonable fees can be heard, weighs
10 against the application of the unclean hands doctrine to bar Plant from proceeding to the merits of
11 its declaratory relief claims.

12 The insurers also point to the existence of a current contractual arrangement between Plant
13 and Messrs. Gregory and Travis (Trial Exhs. 4124, 4125), and urge that the existence of that
14 arrangement should be weighed in the determination of the unclean hands defense. (Defendants'
15 Closing Argument, Trial Tr. vol. 24, 3188:25-28). However, the existence of the arrangement
16 does not weigh in favor of an unclean hands finding because its propriety is also a matter that
17 may be addressed by the Bankruptcy Court (*see, e.g.*, Bankruptcy Code Section 365(a) (11 U.S.C.
18 § 365(a)), and indeed objection to the arrangement has already been lodged in that Court (Trial
19 Exh. 6007.))

20 The insurers also assert that witnesses have died, and documents were destroyed, between
21 2002 and 2006, when Plant did not tender asbestos cases to the insurers. (Defendants' Closing
22 Argument, Trial Tr. vol. 17, 2092:7-2093:1, 2106:16-2107:2.) Even assuming that this is true,
23 the insurers did not prove that they suffered any significant disadvantage in defending against
24 either asbestos cases generally or this case in particular as a result of the death of witnesses with
25 knowledge or the unavailability of documentary evidence. In short, the insurers failed to prove

26
27 my venality knows no bounds." (Trial Exh. 3771.) Travis testified, incredibly in this Court's opinion, that he was
28 able to "do a very good job" of recreating his time records for a two-year period in 6-minute increments with the aid
only of e-mail and phone card records, pursuant to a fee agreement with new Plant management. (Travis, Trial Tr.
vol. 16, 1936:28-1938:11.)

1 that any loss of any witnesses or document negatively impacted them, or threatens to negatively
2 impact them, such as to support their unclean hands defense.

3 Another of the insurers' contentions is that the "waiver" of the delayed prosecution
4 defenses in the Matrix permitted the asbestos plaintiffs to re-position their cases for trial, and
5 insurers argue that the plaintiffs in fact reordered the trial calendar to put their best cases forward.
6 (Defendants' Closing Argument, Trial Tr. vol. 24, 3085:23-3086:25.) According to the insurers,
7 this process drove up claim values. (*Id.*, at 3087:15-3089:28.) There is no evidence, however,
8 that even a single asbestos case against Plant has been saved from dismissal because Plant waived
9 the five-year statute in the Matrix. Nor have insurers proved that they paid more money
10 defending or settling even a single asbestos case against Plant because Plant waived the five-year
11 statute in the Matrix. The insurers' assertion that the plaintiffs successfully "re-positioned" their
12 cases to permit their "best" or "most valuable" cases against Plant to be tried first is contradicted
13 by the evidence. The only evidence of a trial result against Plant concerned the "Johnson" case,
14 which went to verdict in June 2009. (Trial Exh. 5921.) Judgment was entered against Plant in the
15 "Johnson" case in an amount less than \$45,000. (Trial Exh. 4559, at Tab 10.) The "Johnson"
16 case does not appear to have been a particularly high value case, and the insurers have failed to
17 establish that the waiver and alleged reordering of cases on the trial calendar resulted in high
18 value cases proceeding to verdict against Plant. In short, the evidence was not persuasive to the
19 effect either (a) that Plant acted with the motives ascribed to it in connection with the supposed
20 buildup of claim values for use in a bankruptcy, or (b) that a plan like that described by the
21 insurers was carried out.

22 The insurers further assert that the agreement by Plant in the Matrix to a "site list" (where
23 the asbestos plaintiffs' bar apparently has evidence of Plant's involvement at several thousand
24 work sites in California) caused the insurers to pay more money trying and settling asbestos cases
25 since January of 2006 than would otherwise have been the case. (Defendants' Closing Argument,
26 Trial Tr. vol. 23, 2999:4-17.) The evidence shows that the site list was not a meaningful factor in
27 settlement negotiations. Ms. McNeil, one of the assigned defense counsel handling asbestos
28 cases after 2006, could not recall the site list "ever being discussed during any settlement

1 negotiations.” (Trial Exh. 5972 (McNeil Depo. at 233:1-8).) Ms. Oberg, another defense lawyer,
2 testified that the site list has never been the centerpiece of negotiations. (Trial Exh. 5972 (Oberg
3 Depo. at 97:16-25). In short, there is no persuasive evidence that the “site list” caused the
4 insurers to pay more money on any particular asbestos case against Plant, or on the asbestos cases
5 generally, than they would have paid had Plant not agreed to the list.

6 According to the insurers, testimony by Gregory and Travis “can’t be trusted.” *See, e.g.*,
7 Demonstratives P and R in Trial Exhibit 4563 for identification. The Court declines the invitation
8 to make that or a similar finding.¹³ Moreover, at least so far as is apparent to the Court at this
9 stage, none of the Phase II trial testimony of Gregory or Travis related to the merits of the
10 declarations that Plant seeks in this case. In any event, the insurers have failed to identify how
11 any rulings by the Court on ultimate questions of coverage for the asbestos suits could be
12 impacted adversely to the insurers by the allegedly misleading evidence about which insurers
13 complain.

14
15 Overall, defendants have failed to prove that any conduct of Plant or any of its
16 representatives has made it inequitable for Plant to obtain “any” (at least some) of the declaratory
17 relief being sought in this case. It is apparent that there are many asbestos cases, present and
18 future, against Plant that will be unaffected by any of the conduct relied on by the insurers to
19 establish unclean hands. It is also apparent that there are likely to be disagreements between
20 Plant and the insurers concerning the application of insurance policies to those claims. This
21 militates in favor of proceeding to the merits of the declarations Plant seeks, especially since
22 doing so may be of aid to courts called upon at some future date to adjudicate those potential
23 disputes. Because Plant is entitled to at least “some” relief -- at a minimum, relief that may aid
24 resolution of future disputes concerning cases that were unaffected by the Matrix -- it is arguably
25 unnecessary for the Court to decide whether Plant’s conduct might have sustained an unclean
26 hands defense if the only cases potentially subject to declaratory relief were cases touched by

27
28 ¹³ As is not uncommon with witnesses, the Court found some of the testimony of Gregory and Travis to be reliable
and even persuasive and other testimony by them not so.

1 Plant's Matrix-related conduct. In short, the insurers have failed to prove that Plant is barred by
2 unclean hands from obtaining *at least some* relief by way of obtaining interpretative declarations.

3 The Court's conclusions in this area extend further. Based on the findings and
4 conclusions set forth herein, this Court also holds that Plant's conduct does not sustain an unclean
5 hands defense even as to cases potentially touched by Plant's Matrix-related conduct. In short,
6 the insurers have failed to prove that Plant is barred by unclean hands from seeking *any* of the
7 interpretative declarations that are the subject of its complaint.

8 In reaching this decision concerning the unclean hands defense, the Court has considered
9 the three-pronged test set forth in the case of *Jay Bharat Developers* (167 Cal. App. 4th at 445-
10 46). Thus, the Court (a) has considered the nature of the alleged misconduct, concluding that
11 there was no misconduct in any sense relevant to the relief here sought by the insurers; (b) has
12 considered the relationship of the alleged misconduct to the claimed injuries, concluding that the
13 insurers have not been prejudiced in any sense relevant to the relief here sought by them; and (c)
14 has determined that there is no analogous case law that counsels against rejection of the unclean
15 hands defense.

16 One additional matter merits discussion. While the parties agree, and correctly so, that the
17 burden of proof for unclean hands is preponderance of the evidence, they appear to differ over
18 who bears the burden of proof on the unclean hands defense. Citing *DeGarmo v. Goldman*
19 (1942) 19 Cal. 2d 755, 762, and *Belling v. Croter* (1943) 57 Cal. App. 2d 296, 304, the insurers
20 claim that Plant has the burden of proving clean hands.¹⁴ The appellate court in the case of
21 *Mattco Forge, Inc, supra*, 52 Cal. App. 4th at 846-847, in approving jury instructions requiring
22 the defendant to prove unclean hands by a preponderance of the evidence, appears to hold
23 otherwise. Other California authorities likewise support the view that the burden of proof is on
24 the defendant. *E.g., Ghirardo v. Antonioli* (1996) 14 Cal. 4th 39, 54; *Peregrine Funding, Inc. v.*
25 *Sheppard Mullin Richter & Hampton* (2000) 133 Cal. App. 4th 658, 676.¹⁵ Professor Witkin

26 ¹⁴ The insurers' position is somewhat ambiguous on this point. At page 47 of their initial Proposed Statement of
27 Decision dated January 12, 2010, they say: "In general, Plant, as the party bringing the instant action, bears the
burden of proving its *clean* hands." [italics in original.] However, at page 2 of the same document, they say: "As set
28 forth below, Defendants have met their burden of proof in establishing . . . unclean hands."

¹⁵ That the burden of proving unclean hands is on the defendant asserting it also finds support in authorities from

1 characterizes unclean hands as a “defense” which is “not likely to appear on the face of the
2 complaint,” and is “essentially a plea in confession and avoidance,” the result being that, although
3 not required, “it will ordinarily be raised affirmatively in the answer.” 5 Witkin, California
4 Procedure *Pleading* § 1126 (5th ed. 2008).

5 In this Court’s opinion, the burden of proof is upon the party claiming unclean hands, here
6 the insurers. However, this Court’s view of the burden of proof as resting upon the insurers does
7 not affect the Court’s conclusion rejecting the unclean hands defense in this case. The reason is
8 this: If the insurers have the burden of proving unclean hands, they have failed to meet that
9 burden. If Plant has the burden of proving clean hands, it has met that burden. Any connection
10 between the facts found by the Court to exist in the areas of challenged conduct and Plant’s
11 request for a declaration of rights is at best tenuous and more likely nonexistent. In any event,
12 such conduct was not sufficiently pernicious such that Plant should thereby be deprived of the
13 benefits of the assumed further insurance coverage to which it otherwise would be entitled.

14 To be clear, the holding is not that Plant’s requested insurance policy language
15 interpretations are meritorious, but merely that Plant’s right to any and all interpretative rulings,
16 as sought, is not foreclosed by the unclean hands defense. That defense is rejected.

17 **B. Waiver**

18 Before applying them to the facts at hand, this Court reviews some of the basis principles
19 of the waiver doctrine. It is noteworthy that the burden of proof on the party claiming waiver is
20 higher than the “preponderance of the evidence” standard generally applicable in civil cases.

21 Defendants carry the burden of showing waiver by clear and convincing evidence. *Utility*
22 *Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal. App. 4th 950, 959; *Kacha v. Allstate Ins.*
23 *Co.* (2006) 140 Cal. App. 4th 1023, 1033-34. Waiver requires knowledge of the right’s existence,
24 “and either an actual intention to relinquish it or conduct so inconsistent with any intent to
25 enforce the right as to induce a reasonable belief that it has been relinquished.” *Utility Audit Co.,*

26 other states (e.g., *Fade v. Pugliani/Fade* (2004) 779 N.Y.S. 2d 568, 570; *Beitner v. Marzahl* (2004) 354 Ill. App. 3d
27 142, 149; *Paciwest, Inc. v. Warner Alan Props., LLC* (2008) 266 S.W. 3d 559, 571) and from federal courts (e.g.,
28 *Demarest v. Quick Loan Funding, Inc.* (C.D. Cal. 2009) 2009 U.S. Dist. LEXIS 120251, at *29; *Intamin, Ltd. v.*
Magnetar Techs. Corp. (C.D. Cal. 2009) 623 F.Supp. 2d 1055, 1065; *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*
(S.D.N.Y. 1999) 82 F. Supp. 2d 126, 130).

1 *Inc., supra*, 112 Cal. App. 4th at 959.

2 “[W]aiver is the intentional relinquishment of a known right after knowledge of the facts.
3 The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing
4 evidence that does not leave the matter to speculation, and doubtful cases will be decided against
5 a waiver. The waiver may be either express, based on the words of the waiving party, or implied,
6 based on conduct indicating an intent to relinquish the right.” *Waller v. Truck Ins. Exch., supra*,
7 11 Cal. 4th at 31 (citations omitted). “California courts will find waiver when a party
8 intentionally relinquishes a right or when that party’s acts are so inconsistent with an intent to
9 enforce the right as to induce a reasonable belief that such right has been relinquished.” *Waller*,
10 *supra*, 11 Cal. 4th at 33-34.

11 Equitable estoppel applies “where the conduct of one side has induced the other to take
12 such a position that it would be injured if the first should be permitted to repudiate its acts. This
13 form of estoppel is, for practical purposes, indistinguishable from the doctrine of implied waiver
14 through conduct.” *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.
15 App. 4th 1175, 1190 (*citing Waller*). “The estoppel underpinnings of the implied waiver rule
16 may be traced back” to the 1897 decision in *Schmidt v. Mesmer* (1897) 116 Cal. 267. *Oakland*
17 *Raiders, supra*, 144 Cal. App. 4th at 1189.

18 “Absent an express waiver of the contractual provision, the application of the waiver and
19 judicial estoppel doctrines require a showing of prejudice. Thus, waiver ‘is a voluntary act and
20 implies an abandonment of a right or privilege -- an election to dispense with something of value
21 or to forego some advantage which one might, at his option, have demanded or insisted upon. In
22 no case will a waiver be presumed or implied contrary to the intention of the party whose rights
23 would be injuriously affected thereby, unless by his conduct the opposite party has been misled,
24 to his prejudice, into the honest belief that such waiver was intended or consented to.’ (*McDanels*
25 *v. General Ins. Co.* (1934) 1 Cal.App.2d 454, 460, 36 P.2d 829.) . . .” *Applera Corp. v. MP*
26 *Biomedicals, LLC* (2009) 173 Cal. App. 4th 769, 792. “And we do not infer a waiver unless it
27 has ripened into an estoppel by reason of prejudice to the adverse party. Likewise, the dual goals
28 of judicial estoppel ‘are to maintain the integrity of the judicial system and to protect parties from

1 opponents' unfair strategies.' (*Aguilar v. Lerner, supra*, 32 Cal.4th at p. 986, 12 Cal.Rptr.3d 287,
2 88 P.3d 24.) Thus, the common theme of these legal doctrines is the prevention of unfairness."

3 *Id.*

4 Plant did not *expressly* waive the here assumed "right" to coverage under the policies in
5 addition to the aggregate limits of liability defendants paid previously. Defendants have asserted
6 that Gregory's letters to CIGA's counsel in early-2001 (Trial Exhs. 3319, 3322), contained
7 express waivers of "rights" under the defendants' policies. However, nothing in those letters
8 stated that Plant was waiving, releasing, or relinquishing *any* rights under the policies. Plant did
9 not *expressly* waive rights under the OneBeacon policies, for example, by virtue of Gregory
10 telling CIGA's counsel that Gregory was "dubious" that Plant's primary insurers continued to
11 owe Plant a duty to defend notwithstanding their prior assertions of exhaustion. Nor did Plant
12 *expressly* waive rights under the insurers' policies by virtue of filing a lawsuit against CIGA
13 asserting that all of its coverage soon would be "exhausted." (Trial Exh. 3325, at p. 2.) Examples
14 of *express* waivers of coverage rights appear in the record in, for example, the Westport Complete
15 Release where Plant released Westport explicitly from its obligations under a \$10,000,000 policy,
16 as well as from all present and future claims and causes of action under the policy. (Trial Exh.
17 4528, at ¶¶ 7, 24-30.) No equivalent or similar release or waiver language appears in Gregory's
18 letters to CIGA's counsel, or in Plant's lawsuit against CIGA, or anywhere else in the evidence
19 received at trial.

20 Defendants failed to prove by "clear and convincing" evidence that Plant's conduct
21 reflected an intent to waive coverage under the policies or that Plant's conduct induced the
22 defendants or anyone else into reasonably believing that Plant had relinquished the right to seek
23 coverage in addition to the aggregate limits of liability. In other words, the defendants failed to
24 prove by "clear and convincing" evidence that Plant intended to relinquish the rights here at issue
25 or that Plant engaged in conduct so inconsistent with any intent to enforce those rights as to
26 induce a reasonable belief that they had been relinquished. Thus, the insurers failed to meet their
27 burden of proof not only with respect to their claim of express waiver but also with respect to
28 their claim of implied waiver.

1 In short, defendants failed to prove by “clear and convincing” evidence that Gregory,
2 Travis, or Plant (a) intended to waive the here-assumed “rights” to so-called “operations”
3 coverage or coverage in addition to the aggregate limits of liability, or (b) engaged in conduct so
4 inconsistent with any intent to enforce those “rights” as to induce a reasonable belief that they
5 have been so relinquished. It has not been proven under the requisite “clear and convincing”
6 evidence standard that there was intentional relinquishment of a known right after knowledge of
7 the facts.

8 The policies contain a provision that precludes waiver of their terms “except by
9 endorsement.” (*E.g.*, Trial Exh. 2037, at CMB-R0000004.) There was no pertinent endorsement.
10 Therefore, assuming that the policies provide non-exhausted coverage to Plant, the present effort
11 of the insurers can be reasonably viewed as an attempt to “change” the terms of the policies
12 through application of the waiver defense, and to do so without the endorsement expressly
13 contemplated by the policies. The parties differ over whether an entire grant of coverage for
14 which the insured paid a premium can be eliminated by inferred waiver without the issuance of an
15 endorsement memorializing the parties’ agreement that such coverage would not be available.
16 However, it is not necessary for this Court to address that difference of opinion because the Court
17 has found that, irrespective of the no-waiver-except-by-endorsement provision, there was no
18 intent to waive under the pertinent evidentiary burden.

19 Plant and the insurers, except Industrial Indemnity and Safety National, entered four
20 different claims handling agreements between 1987 and 2000 governing the defense and
21 settlement of asbestos suits against Plant. (Trial Exhs. 57, 62, 3303, 6008.) It is established in
22 the insurance context that “[t]he specific purpose of a reservation of rights is to preclude the
23 application of estoppel and waiver.” *Truck Ins. Exch. v. Superior Court* (1996) 51 Cal. App. 4th
24 985, 998. Here, the 1987 Defense Agreement and the 1989 Interim Defense and Indemnity
25 Agreement contain the following provision: “[e]ach Party to this Agreement expressly reserves
26 any rights and defenses which it may have against any person or entity, including Parties to this
27 Agreement, *to assert any theory of coverage and to interpret any policy of insurance in any*
28 *manner deemed proper by the interpreting party, even if inconsistent with this Agreement.*” (Trial

1 Exh. 57, at p. 5; Trial Exh. 62, at pp. 4-5 (emphasis added.) In the 1997 and 2000 Claims
2 Handling Agreements, the parties, including Plant, simply reserved “all of their rights.” (Trial
3 Exh. 6008, at ¶ 12; Trial Exh. 3303, at ¶ 11.) The insurers failed to prove by “clear and
4 convincing” evidence that Plant waived the rights that it had reserved in the claims handling
5 agreements, including its right to assert a “theory of coverage” that was inconsistent with the
6 insurers’ prior indemnification of Plant against the asbestos suits subject to the aggregate limits of
7 liability in the policies.

8 Gregory’s correspondence with CIGA’s counsel in early 2001 does not reflect a knowing
9 and intentional waiver by Plant of the right to so-called “operations” coverage in the policies.
10 Gregory’s dismissal of the availability of “operations” coverage for Plant’s asbestos suits because
11 “the gravamen of the cases against Plant is and always has been that of strict products liability,
12 not negligence” (Trial Exh. 3319), was based on an incorrect construction of Plant’s policies:

13 Coverage under a CGL insurance policy is not based upon the
14 fortuity of the form of action chosen by the injured party. Thus, as
15 the Court of Appeal stated, determination of coverage must be
16 made individually by considering “the nature of [the] property, the
injury, and the risk that caused the injury, in light of the particular
provisions of each applicable insurance policy.”

17 *Vandenberg v. Superior Court* (1999) 21 Cal. 4th 815, 838. Or, in other words, “[p]redicting
18 coverage upon an injured party’s choice of remedy or the form of action sought is not the law of
19 this state.” *Id.*, at 840. Consequently, whether an asbestos suit is or is not subject to the
20 aggregate limits of liability depends upon whether it is within either the “products hazard” or the
21 “completed operations hazard” coverage provisions of the policies. At least generally speaking,
22 and very possibly without exception, the theory of liability pursued by the plaintiff -- “strict
23 products liability” or “negligence” in Gregory’s words -- is immaterial.

24 Not only did Gregory fail to understand the “right” here at issue but also he perceived that
25 Plant lacked the financial ability to pursue litigation against its insurers in 2001 over a disputed
26 theory of coverage. Thus, in one of his 2001 letters to CIGA’s counsel, he states that he expected
27 “furious resistance” from the insurers in the event of such litigation and notes that Plant lacked
28 the resources to finance the “bitter litigation” that would ensue if Plant filed a declaratory relief

1 lawsuit against its insurers. (Trial Exh. 3319.) In short, Plant saw itself as being financially
2 foreclosed from litigating the issue, something quite different from intending to give up whatever
3 rights it had with respect to that issue.

4 The insurers assert that Plant waived rights because it knew of the “reasonably possible
5 efficacy” of the “operations theory of coverage” in 2001, but chose not to pursue litigation at the
6 time. (Defendants’ Closing Argument, Trial Tr. vol. 23, 2939:8-17.) This Court is unaware of
7 any California case holding that a party waives rights because it chooses not to litigate a claim
8 with “reasonably possible efficacy.” The insurers rely exclusively on out-of-state authority --
9 *Jenkins v. Indem. Ins. Co.*, 152 Conn. 249, 257-58 (1964); *Hamilton v. Williams*, 214 Ill. App. 3d
10 230 (1991); *A&E Supply Co., Inc. v. Nationwide Mut. Fire Ins. Co.*, 589 F.Supp. 428, 431 (W.V.
11 1984) -- in support of this proposition. These cases, however, do not state the California standard
12 on waiver.

13 Even if the “reasonably possible efficacy” standard embraced by the insurers *were* the law
14 of California, Gregory’s 2001 letters do not constitute proof by “clear and convincing” evidence
15 that Plant believed that litigation against the insurers over the “operations theory of coverage”
16 possessed “reasonably possible efficacy.” To the contrary, Gregory stated in his letters that he
17 thought the theory was “dubious.” (Trial Exh. 3319.) He stated that he did not think that the
18 New York and Maryland case law that he read at the suggestion of CIGA’s counsel supported
19 “the proposition that Plant’s pre-1980 CGL primary insurers are now obliged under California
20 law and the terms of their policies to defend and/or indemnify Plant against asbestos-related
21 actions for personal injury, wrongful death and/or loss of consortium.” (Trial Exh. 3322.) He
22 further stated that a lawsuit by Plant against the insurers at that time would be barred by the
23 statute of limitations. (*Id.*)

24 Gregory’s skepticism of the “operations” theory of coverage was confirmed, at least
25 reasonably so in his mind, when CIGA, in June of 2001, agreed to make available to Plant \$35
26 million under the policies issued by the insolvent Mission companies following Gregory’s
27 communications with CIGA’s counsel and Plant’s filing of suit against CIGA. For all purposes
28 here relevant, CIGA is permitted by statute to make funding available only in situations where

1 there is no other insurance “available” to the policyholder to satisfy its liability. Cal. Ins. Code §
2 1063.1(c)(9) (“Covered claims does not include (A) any claim to the extent that it is covered by
3 any other insurance of a class covered by the article *available* to the claimant or insured”)
4 (emphasis added). Gregory always understood this to be the case. (Gregory, Trial Tr. vol. 2,
5 219:20-23.) CIGA’s agreement to pay under the Mission policies seemed to Gregory to confirm
6 in mid-2001 that there was no other insurance “available” to Plant to pay the asbestos suits,
7 including so-called “operations” coverage under Plant’s primary or excess insurance policies.
8 That conclusion follows from recognition of the statutory law which prohibits CIGA from making
9 payment to an insured who has other available insurance. Cal. Ins. Code §§ 1063.1(c)(9) and
10 1063.2(a).

11 The writings of Travis after 2001 also serve as support for this Court’s conclusion that the
12 insurers have failed to show by clear and convincing evidence that Plant believed in 2001 that the
13 “operations theory of coverage” possessed “reasonably possible efficacy,” but chose not to
14 proceed consistent with its intent to relinquish rights under the policies. Thus, in late 2002, Travis
15 wrote to Gregory concerning an article on “operations” coverage and told him that “[w]e really do
16 need to nail down the situation” as to whether Plant might have “a shot at additional insurance
17 coverage if developing case law goes that direction.” (Trial Exh. 4439.) In monitoring case law
18 developments to see if it might have “a shot” at pursuing a claim in the future, Plant did not view
19 the claim as having “reasonably possible efficacy.”

20 There is more. Thus, several months later, in early 2003, Travis annotated a brief that he
21 had received on “operations” coverage with a number of questions, including whether policy
22 language controlled the coverage analysis or whether the pertinent question concerned the theory
23 of liability asserted against the insured, i.e., “negligence” or “strict liability for product defect.”
24 (Trial Exh. 4220.) Travis’ annotations thus appeared, at least implicitly, to be revisiting the issues
25 discussed in Gregory’s letters with CIGA counsel from early 2001 in which Gregory dismissed
26 the idea that Plant should seek “operations” coverage from its insurers because “the gravamen of
27 the cases against Plant is and always has been that of strict products liability, not negligence.”
28 (Trial Exh. 3319; Trial Exh. 4220, at PICX00008939.) Travis’ writings thus serve as further

1 support for the Court's conclusion that the clear and convincing evidence did not establish that
2 Plant intended to relinquish rights under the policies to so-called "operations" coverage.

3 It is true that, even after CIGA, in mid-2001, made \$35 million available to Plant under
4 the Mission policies based on the premise that no other insurance was then "available" to Plant,
5 Plant was still considering whether to seek additional rights under the policies. However, it was
6 not established by "clear and convincing evidence" that Plant was acting inconsistently with its
7 intent to enforce "rights" under the policies for coverage in addition to the aggregate limits of
8 liability that the insurers had previously paid.

9 Another of the insurers' contentions is that Plant relinquished any rights to "operations"
10 coverage under the policies because nearly five years elapsed between Gregory's rejection of
11 litigation against the insurers in early 2001 and Plant's filing of this lawsuit in January 2006.
12 Plant's supposed "delay" in filing this lawsuit does not constitute a waiver of the "right" to
13 coverage under the policies, or even a waiver of the right to dispute the insurers' assertions of
14 "exhaustion" as the insurers contend. A party who "delays" in initiating litigation might see its
15 lawsuit dismissed for violating the statute of limitations or based on the equitable defense of
16 laches. This Court, however, previously dismissed, on summary adjudication, the insurers'
17 affirmative defense of the running of the statute of limitations for claims that were first tendered
18 on or after January 18, 2006. The equitable defense of laches was not tried in Phase II.

19 The insurers have also asserted that they would have defended Plant under the
20 "operations" coverage afforded by their policies had Plant tendered cases to them between 2002
21 and 2006. (Defendants' Closing Argument, Trial Tr. vol. 23, 2910:14-2911:3.) While that may
22 be true, it is irrelevant because, as previously held, there was failure of proof, even on the basis of
23 a preponderance-of-the-evidence standard, to establish that the delayed tender resulted in
24 significant, or even reasonably quantifiable, injury, damage or prejudice to the insurers.

25 Plant did not say or do anything that induced the insurers to change their position to their
26 detriment following their assertions of "exhaustion" between 1991 and 2002. None of Plant's
27 statements concerning the supposed "exhaustion" of the defendants' policies was made to any
28 defendant. There was no evidence presented at trial that any insurance company representative

1 heard or read any of those statements, took any action based on any of the statements, or declined
2 to take any action based on any of the statements.¹⁶ In short, the insurers did not detrimentally
3 rely on anything said or done by Plant following the insurers' assertions of "exhaustion."

4 Even if the record contained evidence of insurer knowledge of Plant's statements or
5 conduct after the insurers declared "exhaustion," the Court still would not conclude that the
6 insurers were misled by Plant or have changed their positions in reliance on anything Plant said or
7 did, or anything that Plant failed to say or do. Insurers are required to conduct a "reasonable
8 investigation" into the insured's claim for coverage that "is not narrowly confined to the facts or
9 theories of coverage relied on by its insured." *Safeco Ins. Co. of America v. Parks* (2009) 170
10 Cal. App. 4th 992, 1007. Consequently, if coverage is not available under the policy for the
11 theory of coverage known and pursued by the insured, the insurer is required to investigate
12 whether different or "additional coverage" is available under the policy. *Jordan v. Allstate Ins.*
13 *Co.* (2007) 148 Cal. App. 4th 1062, 1066-67. Insurers are required to investigate "all of the
14 possible bases" of a claim made by their insureds. *Id.* at 1073. Thus, the insurers in this case are
15 fairly chargeable with knowledge of the terms of the policies they wrote, and with some
16 understanding of the application of those terms to the facts and circumstances of the asbestos
17 liabilities faced by Plant. The insurers, in fact, did understand the nature of the underlying claims
18 against Plant when they paid the "aggregate" limits of liability under their policies between the
19 late 1980s and 2001. (E.g., Defendants' Closing Argument, Trial Tr. vol. 24, 3177:4-17.)

20 Although the insurers assert that Plant knew at various times in 1994, 1999 and 2001
21 about the "operations theory of coverage," they also candidly conceded in closing argument, and
22 correctly so, that it is a reasonable inference that, at the time that they told Plant that their policies
23 were "exhausted," they knew "at least as much" as Plant did about the relevant policy language,
24 the law about "operations" coverage, and the nature of the underlying claims against Plant.
25 (Defendants' Closing Argument, Trial Tr. vol. 24, 3177:18-25.) The Court draws that reasonable
26 inference as part of its findings.¹⁷ It follows that, even if the insurers had known of Plant's

27 ¹⁶ None of the letters written by insurer representatives to Plant between 1991 and 2002 asserting "exhaustion" was
admitted into evidence to prove the "state of mind" of the author.

28 ¹⁷ The evidence showed that Fireman's Fund actively investigated and discussed the "theory of coverage" internally

1 various repetitions of the insurers' advice about exhaustion of the Plant policies, there could not
2 have been reasonable reliance by the insurers on any views that Plant may have held about the
3 existence *vel non* of "operations coverage." See *Martinez v. Scott Specialty Gases, Inc.* (2000) 83
4 Cal. App. 4th 1236, 1248 ("Estoppel requires, among other things, *reasonable* reliance on the
5 other party's actions." (emphasis in original)).

6 The defendants presented no evidence from which the Court could even infer that
7 anything Plant did or said following the insurers' assertions of "exhaustion" induced the insurers
8 to believe reasonably that Plant relinquished rights to coverage in addition to the aggregate limit
9 of liability the insurers had previously paid. Insurers' failure to present "clear and convincing"
10 evidence that they were "prejudiced" by Plant's conduct subsequent to their assertions of
11 "exhaustion" is fatal to their affirmative defense of waiver (*Applera Corp, supra*, 173 Cal. App.
12 4th at 792 ("And we do not infer a waiver unless it has ripened into an estoppel by reason of
13 prejudice to the adverse party.")), as is their failure to have proved, by "clear and convincing"
14 evidence either the requisite intent to waive or the requisite conduct inconsistent with an intent to
15 waive, all as previously discussed.

16 For the foregoing reasons, the defense of waiver is rejected.

17 **C. Judicial Estoppel**

18 Judicial estoppel is an "extraordinary remed[y]" and "not meant to be a technical defense
19 for litigants seeking to derail potentially meritorious claims." *Cloud v. Northrop Grumman Corp.*
20 (1998) 67 Cal. App. 4th 995, 1017 (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber*
21 *Co.* (3d Cir. 1996) 81 F.3d 355, 362-363 (internal citations omitted)). In general, each of the
22 following elements must be established by the party asserting that defense:

23 "(1) the same party has taken two positions; (2) the positions were
24 taken in a judicial or quasi-judicial administrative proceeding;
25 (3) the party was successful in asserting the first position (i.e., the
26 tribunal adopted the position or accepted it as true); (4) the two
positions are totally inconsistent; and (5) the first position was not
taken as a result of ignorance, fraud, or mistake."

27 *Levin v. Ligon* (2006) 140 Cal. App.4th 1456, 1469, and *Swahn Group, Inc. v. Segal* (April 7,

28 in the early 1980's, long before telling Plant in 1992 that its coverage was "exhausted.")

1 2010, No. C056970) __ Cal.Rptr.3d __ [2010 WL 1347700] [p. *6] (both cases *quoting Jackson*
2 *v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 183. Judicial estoppel is concerned with
3 the *deliberate* and *intentional* misleading of the courts. “Wrongdoing for the purposes of judicial
4 estoppel results when the party deliberately takes inconsistent positions.” *Levin v. Ligon* (2006)
5 140 Cal. App. 4th 1456, 1483. Thus, it has been said that even the taking of deliberately
6 inconsistent positions, alone, does not trigger the doctrine of judicial estoppel, unless the
7 “deliberate inconsistencies” are “tantamount to a knowing misrepresentation or even fraud on the
8 court.” *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal. App. 4th 995, 1017 (*quoting Ryan*
9 *Operations, supra*, 81 F.3d at 362-63).

10 The parties agree that the burden of proving judicial estoppel is upon the defendants and
11 that the standard of proof is preponderance of the evidence. The Court too so agrees.

12 The parties differ over whether the defense requires proof of prejudice to the party
13 asserting it. In this Court’s view, since the doctrine of judicial estoppel seeks to protect parties
14 from their opponents’ “unfair strategies” and is aimed at avoiding “unfairness,” it follows that
15 prejudice is a necessary element, as said by the court in *Applera Corp, supra*, 173 Cal. App. 4th at
16 792. As applied here, the defendants must prove that they relied detrimentally on the supposedly
17 “inconsistent” statements upon which Plant is said to have succeeded in other court proceedings
18 to prevail on the defense of judicial estoppel. *See also Oakland Raiders, supra*, 144 Cal. App. 4th
19 at 1189-90; *Waller, supra*, 11 Cal. 4th at 35.

20 Even if defendants are correct in asserting that prejudice is not required, judicial estoppel
21 nevertheless “is an equitable doctrine and its application by the court is discretionary.” *Levin,*
22 *supra*, 140 Cal. App. 4th at 1468. “Windfall and prejudice are factors the trial court *may* consider
23 when exercising its discretion to apply the doctrine of judicial estoppel.” *Id.* at 1483 (emphasis in
24 original). “Consistent with these purposes [maintaining the integrity of the judicial system and
25 protecting parties from their opponents’ unfair strategies], numerous decisions have made clear
26 that judicial estoppel *is an equitable doctrine*, and its application, even where all necessary
27 elements are present, is discretionary.” *MW Erectors, Inc. v Niederhauser Ornamental & Metal*
28 *Works Co, Inc.* (2005) 36 Cal. 4th 412, 422-23, citing numerous California cases (italics in

1 original).

2 The statements that Plant made in other judicial proceedings concerning the alleged
3 “exhaustion” of the defendants’ policies constituted mere repetition of what the defendants
4 themselves had previously said to Plant (Trial Exhs. 3085, 3091, 3093, 3098, 3101, 3106, 3108,
5 3112, 3116, 3175, 3268, 3338, 3420, 5431), and in a context where defendants knew at least as
6 much about the matter of “exhaustion” as did Plant. Moreover, as previously discussed, the
7 defendants did not rely on Plant’s statements about exhaustion. Indeed, the defendants did not
8 even know about those statements at any relevant time.

9 It follows that this case presents the unique situation where a party (Plant) is alleged to be
10 estopped judicially from proceeding in litigation because it repeated in court filings the statements
11 made previously to it by the very parties (defendants) seeking to use the repetition of their own
12 statements as a basis for judicial estoppel. And the context is a situation where (a) the party
13 sought to be estopped had no pertinent information not possessed by the party seeking to impose
14 the estoppel, and (b) the parties seeking to impose the estoppel did not rely upon, or even know
15 about, the matters upon which they rest their defense. If prejudice is a required element, it is
16 absent. Even if “prejudice” is not strictly required, the Court treats the absence of “prejudice” by
17 the defendants as an especially important factor in the exercise of its equitable discretion.

18 Defendants also assert that statements that Plant made in the “proof of claim” forms it
19 filed in the Fibreboard and OCF bankruptcy case concerning the nature of its asbestos liabilities
20 are “totally inconsistent” with positions it is taking in this case. In particular, defendants point to
21 statements in the proof of claim forms where Plant asserted that it was “entirely dependent upon
22 Fibreboard to advise it as to any medical hazards associated with Fibreboard’s asbestos-
23 containing products,” that it “never altered, abused, or misused any of the Fibreboard-
24 manufactured asbestos-containing products it sold or installed,” and that it was entitled to
25 indemnity from Fibreboard because it was in the “chain of distribution of a defective asbestos-
26 containing product manufactured by Fibreboard, and not because of any negligence of its own.”
27 (*See, e.g.*, Trial Exh. 3460, at p. 2.)

28 The defendants did not rely upon, or even know about, these “proof of claim” forms, or

1 statements made in them, at any relevant time. Moreover, Plant's statements in the forms have
2 nothing at all to do with insurance or whether an asbestos suit is within the "products hazard" or
3 "completed operations hazard" coverage provisions of policies and thus subject to an aggregate
4 limit of liability. Plant does not seek rulings in this case that are contrary to what it said in the
5 Fibreboard proofs of claim forms concerning whether it was, or was not, negligent with respect to
6 the asbestos claimants. As discussed above, the legal basis of an insured's liability and the legal
7 theory of recovery employed by a plaintiff are generally, if not always, immaterial to coverage
8 purposes. *Vandenberg v. Superior Court* (1999) 21 Cal. 4th 815, 841. Plant's policies do not
9 cover "negligence." They do not cover "strict liability." They do not cover "products liability."
10 While potentially subject to other provisions, many of Plant's policies, and possibly all of them,
11 cover "bodily injury" or "property damage" that happens during the policy period resulting from
12 an "occurrence" or "accident." (*See, e.g.*, Trial Exh. 2037, at CMB-R0000031 (Insuring
13 Agreements Section 1).) While the parties differ over what is required to bring an asbestos claim
14 within the "products hazard" (as defined in the policy) or "completed operations hazard" (as
15 defined in the policy), it suffices for present purposes to observe that the answer depends upon
16 factors other than the legal basis of an insured's liability or the legal theory of recovery employed
17 by the plaintiff.

18 Nor have defendants proven that Plant achieved "success" in the Fibreboard and OCF
19 bankruptcy case. It is true that Plant obtained a \$20 million valuation of its indemnity claim for
20 "voting purposes" in that bankruptcy case. (Gregory, Trial Tr. vol. 5, 622:26-623:18.) However,
21 there was no persuasive evidence that Plant's obtaining the valuation has had, or is likely to have,
22 significance with respect to its indemnity litigation goals against Fibreboard. Thus, the valuation
23 was not proven to be worth anything to Plant. To date, Plant has not recovered any money from
24 the Fibreboard and OCF bankruptcy trust on its indemnity claim. (Gregory, Trial Tr. vol. 5,
25 620:7-24, 622:18-24.) There is no evidence that Plant recovered any money from any of its
26 litigation against Fibreboard, or from any claims it has asserted against Fibreboard in any forum,
27 or that the court in the Fibreboard and OCF bankruptcy case has "relied upon" any statements
28 made by Plant in that litigation.

1 As previously noted, one of the elements of judicial estoppel is that the first position taken
2 by the party sought to be estopped was not taken as a result of ignorance, fraud, or mistake. The
3 insurers have failed to prove that element. Thus, the insurers have failed to prove that Plant's
4 assertions in judicial proceedings were not taken as a result of ignorance and/or mistake.

5 By way of conclusion, the judicial estoppel defense is rejected for three independently
6 sufficient reasons. First, it is rejected for insurers' failure to prove detrimental reliance. Second, it
7 is rejected for insurers' failure to prove that Plant's judicial pronouncements at issue were not
8 taken as a result of ignorance or mistake. Third, having in mind the teaching of the California
9 Supreme Court in the *MW Erectors* case, cited above, that the application of judicial estoppel,
10 being an equitable doctrine, is discretionary even where all necessary elements are present (36
11 Cal. 4th at 422-23), and having considered all the facts and circumstances, as shown by the
12 entirety of the evidence admitted at trial, the Court exercises its discretion to reject the defense in
13 large part because (a) Plant's judicial pronouncements at issue were largely repetitions of what
14 the insurers had told Plant in circumstances where the insurers knew at least as much as did Plant,
15 and (b) any connection between the Plant's conduct claimed to support judicial estoppel on the
16 one hand and Plant's request for a declaration of rights on the other hand is at best tenuous and
17 more likely nonexistent.

18 **OVERALL CONCLUSIONS**

19 The equitable defenses of unclean hands, waiver and judicial estoppel tried in Phase II
20 lack merit. Accordingly, each is rejected.

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1 **FUTURE PROCEEDINGS**

2 To this Court's understanding, now that it has resolved the Phase II issues, the stay
3 following Plant's voluntary petition for reorganization under Chapter 11 of the United States
4 Code applies to this action. As stated by the Bankruptcy Court in its Order of July 24, 2009 (Trial
5 Exhibit 6010), except as modified by that Order to permit this Phase II to proceed to the present
6 stage, "the automatic stay shall remain in full force and effect." If that Order should be modified
7 or other events should occur which result in the lifting of the stay, the parties are directed to
8 contact the Clerk of this Department to arrange for a Case Management Conference. Unless and
9 until this Court orders otherwise, this action is stayed.

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12 Dated: May 5, 2010

JOHN E. MUNTER

Judge John E. Munter
Judge of the Superior Court

CGC-06-448618

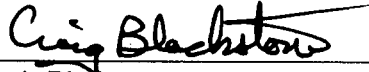
PLANT INSULATION VS. FIREMAN'S FUND INSURANCE, et al

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on May 5, 2010, I served the foregoing FINAL STATEMENT OF DECISION ON PHASE II ISSUES on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: May 5, 2010

By: CRAIG BLACKSTONE

SEE ATTACHED LIST



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San Francisco Superior Court

Plant Insulation vs. Fireman's Fund

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